



REPUBLIC OF KENYA



KENYA LAW
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**Gichuhi v Shamiah & another (Cause E009 of 2024)
[2024] KEELRC 1919 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1919 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E009 OF 2024**

JK GAKERI, J

JULY 25, 2024

BETWEEN

JOSEPH MAINA GICHUHI CLAIMANT

AND

WYCLIFFE SHAMIAH 1ST RESPONDENT

NAIROBI SECURITIES EXCHANGE 2ND RESPONDENT

RULING

1. Before the court for determination is the 1st Respondent's Notice of Preliminary Objection dated 29th January, 2024 asserting that the Claimant's suit dated 19th December, 2023 was filed contrary to the provisions of Section 90 of the *Employment Act*, 2007 as it is time barred and the court lacks jurisdiction to hear and determine the claim.
2. The 1st Respondent prays for dismissal of the suit with costs.
3. In his grounds of objection dated 11th April, 2024, the Claimant argues that the Preliminary Objection is devoid of merit as it is not purely on points of law required in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA.
4. That the objection is based on facts as opposed to law and Section 90 of the *Employment Act* does not apply.
5. It is the Claimant's case that accrual of a cause of action in a claim emanating from an employment contract takes effect from the date of termination as communicated to the employee not before.
6. The Claimant prays for dismissal of the Preliminary Objection with costs.
7. The objection was canvassed by way of written submissions.
8. However, only the 1st Respondent and the Claimant filed submissions.



9. Counsel for the 1st Respondent submits that based on the test in the Mukisa Biscuits Case, the Claimant's suit is statute barred as it relates to a continuing injury which must be filed within 12 months after the act, neglect or default under Section 90 of the *Employment Act*, 2007.
10. Reliance is made on the decision in *Okere v County Government of Kakamega & another* (2023) eKLR on the definition of continuing injury.
11. Counsel urges that since the underpayment, non-payment of leave days and leave allowances are continuing wrongs and the suit was not filed within 12 months of cessation, the claim is statute barred.
12. Reliance is also made on the sentiments of the court in *Serah Wairimu Kihara v Nokia Solutions Branch Operations* (2021) eKLR which cited *George Hiram Ndirangu v Equity Bank Ltd* (2015) eKLR.
13. Counsel urges that the court has no jurisdiction to hear and determine the suit.
14. Counsel for the Claimant on the other hand urges that objection is based on facts as opposed to pure points of law and the cause of action accrued on the date of termination.
15. Reliance is made on the sentiments of the court in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (2015) KESC where the court endorsed the Mukisa Biscuits case on the threshold of a Preliminary Objection.
16. Counsel urges that since the letter of termination of employment is dated 29th September, 2022, time started running on 31st October, 2022 and the suit was filed on 9th January, 2024 within the 3 years.
17. According to counsel, since the 1st Respondent acknowledges the dues they constitute a continuing injury which can only stop on payment.
18. Reliance was made on the sentiments of the court in *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* (2018) eKLR on the limitation period where the Court of Appeal held that the unpaid terminal dues were not a continuing injury.
19. That the delay in filing the suit was occasioned by out of court negotiations and it would be unfair and unjust for the 1st Respondent to argue that the suit is stale.
20. Reliance was made on the sentiments of the Supreme Court in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (*Supra*) that it was improper for a party to pursue of a Preliminary Objection as a sword for winning a case.
21. The issues for determination are;
 - i. Whether the 1st Respondent's Notice of Preliminary Objection meets a threshold of a Preliminary Objection.
 - ii. Whether the Preliminary Objection is merited.

On the 1st issue, it is common ground the threshold of a Preliminary Objection was enunciated in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (*Supra*), where Law JA stated as follows;

“... a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court a plea of limitation or



a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. . .”

22. Sir Charles Newbold V.P. stated as follows;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . .”

23. It requires no gainsaying that a Preliminary Objection is a threshold issue and when raised must be disposed of at the earliest possible instance as it has the potential to dispose of the suit before a hearing and determination.

24. The pith and substance of the Claimant’s objection to the notice of preliminary objection that there is no preliminary objection before the court as the notice raises factual issues.

25. However, the court holds a different view in that the 1st Respondent’s Notice of Preliminary Objection urges that the action is stale by virtue of Section 90 of the *Employment Act*, 2007 and thus the court lacks jurisdiction to hear and determine it.

26. Since the notice of Preliminary Objection raises the issue of limitation of time which implicates the court’s jurisdiction to hear and determine the suit and guided by the sentiments of Law JA in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (Supra)*, the court is satisfied that the Notice of Preliminary Objection before the court meets the threshold as enunciated in the Mukisa Biscuits case (Supra).

27. Concerning the second issue, counsel for the parties have adopted opposing positions with the 1st Respondent’s counsel maintaining that since the instant suit was filed after 12 months of termination of employment.

28. It is common ground that by Gazette Notice No. 1734 dated 5th March, 2008, the Capital Markets Authority (CMA) placed Nyaga Stockbrokers Ltd under statutory management for six (6) months and appointed the Respondents as joint statutory manager and by Gazette Notice No. 1735 of even date revoked the powers of the board of directors of Nyaga Stock Brokers Ltd.

29. The foregoing notices constituted the Respondents, the decision making organ of Nyaga Stockbrokers Ltd for the duration it would remain under statutory management.

30. In furtherance of their statutory mandate by letter dated 14th March, 2008, the 1st Respondent notified the Claimant that as his services were still needed, he would be retained on the same terms and conditions as previously and a job description would be provided from time to time.

31. It is common ground that by letter dated 29th September, 2022, the joint Statutory Manager notified the Claimant that his employment had been terminated owing the CMAs inability to support the Statutory Management of the company.

32. Evidently, the Claimant’s cause of action against the Respondents accrued on 29th September, 2022 and according to the 1st Respondent, the suit herein ought to have been filed within 12 months as ordained by Section 90 of the *Employment Act*, 2007.

33. The Claimant on the other hand contends that he had 3 years to pursue his case under Section 90 of the Act.



34. Section 90 of the *Employment Act*, 2007 provides;
- “Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act* (Cap 22), no civil action or proceedings based or arising out of this Act, or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of a continuing injury or damage within twelve months next after cessation thereof.”
35. The gravamen of the 1st Respondent’s case is that since the claim involves continuing injuries or wrongs and it was filed after 12 months, the claim is unsustainable and cites the holding of Keli J. in *Ismael Angi Okere v County Government of Kakamega & another* (*Supra*), where the Judge dismissed the claim for unpaid leave and house allowance.
36. The question as to what constitutes continuing injury or wrong has been addressed in various decisions of this Court and Court of Appeal.
37. In the *German School Society & another v Helga Ohany & another* (2023) KECA) the Court of Appeal stated;
- “ . . . One of the exceptions in the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrongs, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced. If such a continuing wrong creates a continuing source of injury. Borrowing from excerpts reproduced above and considering that the Respondent continued to work under the same circumstances we find and hold that the breach complained of was of a continuing nature capable of giving rise to a legal injury which assumes the nature of a continuing wrong . . . So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to the rules. It is no doubt true that if the appellant’s claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant’s claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with the rules and to cessation of a continuing wrong if on merits his claim is justified”.
38. Similarly, in *Charles George Ogola & 2 others v Mansion Hart Kenya Ltd* (2019) eKLR, Onyango J. stated as follows;
- “Overtime is a continuing wrong while underpayment is a right. It is therefore only overtime that would be statute barred after 12 months as provided under Section 90 of the *Employment Act*. Underpayments would however accrue like all other terminal benefits so long as the claim is filed within 3 years from the date of accrual of cause of action”.
39. Applying the foregoing authorities, since the Claimant’s last day of employment by the Respondents was 31st October, 2022, the earliest date he could have approached the court for relief, his cause of action accrued on that date and will lapse in October 2025.
40. However, as the suit was filed on 9th January, 2024, it is not statute barred as the three year limitation period had not lapsed by then.



41. In the upshot, the 1st Respondent's Notice of Preliminary Objection is unmerited and it is accordingly dismissed.

42. Parties to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

