IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MUSINGA (P), KIAGE, & GATEMBU, JJ.A.)

CIVIL APPEAL NO 459 0F 2019

BETWEEN

BAKERY CONFECTIONERY FOOD MANUFACTURING & ALLIED WORKERS UNION (K).....APPELLANT

AND

WRIGLEY COMPANY (EAST AFRICA) LIMITED …1ST RESPONDENT SHEER LOGIC MANAGEMENT CONSULTANTS LIMITED.....2ND RESPONDENT

*(Being an appeal from the Ruling and Order of the Employment and Labour Relations Court at Nairobi (**Wasilwa, J.**) dated 11th June 2018*

in

ELRC NO. 806 of 2017)

****

JUDGMENT OF THE COURT

1. In the ruling that gave rise to this appeal, the Employment and Labour Relations Court (**ELC**) sitting at Nairobi, (**Wasilwa, J**.) allowed the 1st respondent's **Notice of Preliminary**

Objection dated **24th January 2017** on the grounds that the suit by the appellant herein, *to wit*, **ELRC Cause No. 806 of 2017** was

statute barred.

2. The brief background is that the appellant, a registered trade union mandated under the Labour Relations Act to represent unionisable workers in the food manufacturing sector, entered into a recognition agreement with the 1st respondent in 1981 after recruiting a simple majority of its employees into its membership. That agreement, which arose from orders issued in **Industrial Cause No. 3 of 1981,** established a binding framework for collective bargaining and set out the rights and obligations of the parties. It required the 1st respondent to recognize the appellant as the exclusive representative of its unionisable workforce in all matters relating to wages, job grading, working hours, terms of employment and other negotiated conditions.

3. The appellant and the 1st respondent thereafter negotiated Collective Bargaining Agreements (**CBAs**), including those covering 2007–2008, 2009–2010 and 2011–2012, which clearly defined grades, job descriptions, basic wages, house allowance and the requirement under clause 25 for each unionisable employee to receive a formal letter of appointment incorporating the terms of the applicable CBA. These agreements formed the

legal baseline against which the employer's conduct would be assessed.

4. The grievants in the suit were originally employed directly by the 1st respondent on various dates and in various positions, and they received employment letters that reflected the grading and wage structures prescribed in the CBAs. In 2007 they exercised their statutory right to join the union by signing check-off forms. The appellant forwarded these forms to the employer and called for the deduction of union dues. It is against this backdrop that the appellant contended that the respondents devised a method to deliberately undermine the collective bargaining framework.

5. According to the appellant, shortly after the employees joined the union, the 1st respondent, acting in concert with the 2nd respondent, entered into outsourced labour arrangements through agreements executed in April 2008 and May 2009. These agreements allowed the 2nd respondent to supply labour to the 1st respondent and the workers who had been performing unionisable work within the meaning of the CBAs were gradually shifted onto fixed-term contracts under the 2nd respondent. The appellant contended that these contracts

were a disguised device

intended to strip the grievants of union protection, negotiated pay structures, leave entitlements, transport allowances and job security, while keeping them in the same roles, performing the same duties and working within the same enterprise.

6. As per the appellant's Memorandum of Claim dated 27th April 2017, the dispute between the parties was first ventilated in **Cause No. 76 of 2008**, where the court found that the 1st respondent had breached the recognition and collective agreements by failing to engage with the appellant when introducing the outsourcing arrangement. That conclusion was later upheld by a three-judge bench in **ELRC Petition No. 22 of 2012**, which affirmed the substance of the court's findings in Cause No. 76 of 2008 save for a limited correction regarding the rewriting of employment contracts. At the time of those proceedings, however, the grievants were still in employment, and the relief sought was forward-looking rather than compensatory.

7. During the pendency of ELRC Petition No. 22 of 2012, the situation changed dramatically. On or about 29th May 2012, all employees were locked out of employment, and their services were deemed terminated following the respondents'

termination of the

outsourcing agreement. According to the appellant, the grievants lost their employment without any observance of the CBA, due process, consultation obligations or statutory safeguards. The appellant contended that because the earlier proceedings, viz, ELRC Petition No. 22 of 2012, were premised on ongoing employment, the grievants were unable to quantify or seek terminal dues at that stage. With the termination complete and the earlier cause having been concluded, the appellant filed ELRC Cause No. 806 of 2017 seeking to address the new cause of action which arose precisely when the grievants were locked out and terminated during the pendency of ELRC Petition No. 22 of 2012.

8. In its Memorandum of Claim, the appellant asserted, *inter alia,* that the respondents acted jointly and in collusion to deprive the grievants of their negotiated rights and protections, that the fixed- term contracts were a deliberate evasion of the CBA, and that the termination was abrupt, unlawful and destructive of their livelihoods. It contended that the respondents' conduct constituted an unfair labour practice, violated explicit contractual and statutory provisions, and caused the grievants significant financial loss and social disruption.

9. The appellant sought a range of remedies, including declarations that the outsourcing arrangement was unlawful and violated the CBA; that the arrangement amounted to an unlawful deprivation of the grievants' entitlements; and that the termination of employment through the disguised arrangement was unlawful, null and void. It also sought payment of all terminal dues and statutory benefits, including underpayments under the 2007– 2008, 2009–2010 and 2011–2012 CBAs, leave travelling allowance, daily transport allowance, notice pay and compensation equivalent to twelve months' salary for wrongful termination.

10. In response to the Memorandum of Claim, the 1st respondent filed a **Memorandum of Appearance** dated 25th May 2017 and a **Notice of Preliminary Objection** dated 24th July 2017. The said Notice of Preliminary Objection was premised on grounds that the suit was an abuse of court process; that it was *res judicata* because the same dispute had been litigated in Cause No. 76 of 2008; and that the suit was, in any event time barred by dint of section 90 of the Employment Act, Cap 226 (**the Act**). The 1st respondent pointed out that the appellant itself stated in the

Memorandum of Claim that the alleged breaches related to the 2007/2008, 2009/2010 and 2011/2012 CBAs and that the grievants' employment was terminated on or about 29th May 2012, yet the suit was not filed until 2017, more than five years later.

11. In its **ruling** which was delivered on **11th June 2018**, the trial court held that since the claim was premised on events that occurred in 2012, it was time-barred under section 90 of the Act which requires employment-based claims to be filed within three years. The trial court therefore lacked jurisdiction to entertain an out-of-time claim and proceeded to dismiss the suit with no orders as to costs.

12. Being aggrieved and dissatisfied with the ruling, the appellant preferred this appeal. In the memorandum of appeal dated 18th September 2019, the appellant contends that the learned judge erred in law and in fact by dismissing its suit on the basis of a preliminary objection that did not raise a pure point of law, but instead required interrogation of contested factual issues which could only be resolved at a full hearing rather than at a preliminary stage; by wrongly finding that the grievants' employment was terminated on or about 29th May 2012,

even

though the record shows only that the triangular labour-supply contract between the respondents came to an end, and whether this amounted to termination of employment was a disputed factual question requiring evidence; by failing to appreciate the unique intervening circumstances including the pendency of ELRC Petition No. 22 of 2012 which involved the same parties and subject matter and which effectively barred the institution of parallel proceedings thereby making the time-bar argument inapplicable; by failing to appreciate that determining whether termination of a triangular outsourcing arrangement amounted to termination under the Employment Act required factual examination outside the scope of a preliminary objection.

13. The appellant further contended that the trial court erred in law by improperly dismissing the suit thereby denying the grievants access to justice because the respondents' objection was not grounded in proper pleadings; by failing to consider that some of the reliefs sought concerned continuing injuries which under section 90 of the Act are not subject to the three-year limitation period; by failing to consider the totality of the appellant's submissions before reaching its decision; and by

failing to

appreciate that the cause of action flowed from express findings in ELRC Petition No. 22 of 2012 during which it would not have been proper or possible to institute a separate suit before conclusion of those proceedings thereby rendering the time-bar finding erroneous.

14. At the hearing of this appeal, learned counsel **Mr. Obura** was present for the 1st respondent while the 2nd respondent was represented by learned counsel **Mr. Kibanya**. There was no appearance for the appellant, despite service of a hearing notice. The appellant had, however, filed its written submissions. Both counsel elected to rely entirely on their respective client's written submissions without making any oral highlights.

15. The appellant in its **written submissions** dated **7th March 2025** indicates that it no longer wishes to pursue ground 6 of the memorandum of appeal, noting that this Court has since clarified the law on limitation of time for continuing injuries under section 90 of the Employment Act.

16. In the said written submissions, the appellant begins by setting out the procedural history culminating to this appeal. It asserts that it had a recognition agreement and several collective

bargaining agreements with the 1st respondent governing terms and conditions of employment. The grievants, who were employees of the 1st respondent, joined the appellant union after which the 1st respondent entered into an outsourcing arrangement with the 2nd respondent, transferring their services and placing them on fixed-term contracts. The appellant states that it challenged the legality of that arrangement in Industrial Cause No. 76 of 2012, where **Rika J**. held that the outsourcing arrangement was unlawful. The 1st respondent then filed ELRC Petition No. 22 of 2012 seeking to overturn that finding, but a three-judge bench largely upheld the decision and observed that the respondents were responsible for the unfortunate predicament befalling the appellant's members. The bench further noted that the employees would have been entitled to appropriate relief had they quantified their claims, which they could not do because they were still in employment during those proceedings. The appellant therefore contends that it should not be barred by limitation, since the cause of action could only properly crystallize after the termination of the triangular outsourcing arrangement.

17. As regards the competence of the preliminary objection raised by the 1st respondent, the appellant submits that it was fatally defective because it was not anchored on any pleadings. To support that argument, it relies on the decision of this Court in

Stephen Onyango Achola & Another v Edward Hongo Sule & Another [2004] eKLR, wherein it was held that a party who intends to rely on limitation must specifically plead it and cannot raise it through a preliminary objection, unless it is evident from the pleadings. In arriving at the said decision, this Court quoted **Halsbury's Laws of England, 4th ed., Vol. 36, para. 48** which emphasizes that a defendant who relies on limitation must plead it in the defence. In this regard, the appellant maintains that after being served with the Memorandum of Claim, none of the respondents filed a statement of response addressing the issues later raised in the preliminary objection. The only document filed was the 1st respondent's Notice of Preliminary Objection dated 24th July 2017. It is submitted that since the objection was not anchored on any pleadings, it ought to have failed at the outset.

18. The appellant also relies on the decision of **Kenya Plant Health**

Inspectorate Services & Another v Ngumu & another (Suing

as the Personal Representative of the Estate of Benson Mutua Wambua) (2024) KEHC 14140 (KLR), where the High Court reaffirmed that a preliminary objection can only be raised on a point of law arising from pleadings, which position is said to align with the decision of this Court in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**. According to the appellant, the respondents filed only a notice of preliminary objection and no response at all, and the learned judge therefore erred in entertaining an objection on unpleaded matters.

19. The appellant also maintains that the question of when termination occurred was not a pure point of law but a disputed factual issue requiring evidence. It contends that while the outsourcing agreement ended on 29th May 2012, it remained a factual question whether that event constituted termination of employment under the Act. The appellant submits that the learned judge therefore erred when he incorrectly assumed that termination occurred on 29th May 2012 without hearing evidence. The appellant maintains that the preliminary objection therefore called for factual

examination and could not succeed under the

test in **Mukisa Biscuit** which restricts preliminary objections to pure points of law.

20. The appellant therefore urges us to allow the appeal, set aside the impugned ruling and remit the matter for a full hearing and determination on its merits.

21. On its part, the 1st respondent through its **written submissions** dated **6th March 2025** submits that the appeal is without merit because the trial court properly struck out the suit as being statute-barred under section 90 (now section 89) of the Act. It maintains that the appellant's own pleadings show that the grievants' employment ended on or about 29th May 2012, yet the claim was filed on 2nd May 2017, almost five years later, contrary to the strict three-year limitation period. The respondent asserts that section 90 is mandatory and deprives a court of jurisdiction once time has lapsed. It contends that the trial court correctly treated limitation as a pure point of law consistent with the definition of a preliminary objection affirmed in **Mukisa Biscuit** (supra).

22. To emphasize the overriding effect of limitation, the 1st respondent cites the decision of **Kenya Electrical Trades & Allied Workers**

Union v Kenya Power & Lighting Company Ltd [2015] eKLR for the proposition that limitation period in employment claims is absolute and cannot be extended, and that limitation is not merely procedural but a substantive right available to a defendant. The respondent also relies on the decision of this Court in **Divercon Ltd v Samson S. Samani [1995–1998] 1 EA 48** to affirm that courts have no jurisdiction to enlarge time where the limitation statute does not provide such discretion.

23. As to when the cause of action arose, the 1st respondent contends that the memorandum of claim itself states that the employees' services were terminated on 29th May 2012 and that date therefore marks the accrual of the cause of action. It relies on the decision in **Michira & 41 Others v Aegis Kenya Ltd t/a Leopard Beach Hotel [2023] KEELRC 2551 (KLR))**, in which the Court held that time begins to run from the date an employee exits employment, and that where a party alleges a continuing injury, such a claim must be specifically pleaded and filed within twelve months of cessation, which the appellant in this matter did not do.

24. On whether there were any mitigating factors preventing the claim from being time-barred, the 1st respondent submits that the

appellant did not plead facts capable of supporting a claim of continuing injury, the existence of a triangular employment arrangement, or an alternative date of termination, and that parties are bound by their pleadings. It relies on **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR**, where this Court, citing the Malawi Supreme Court of Appeal decision in **Malawi Railways Ltd v Nyasulu [1998] MWSC 3**, emphasized that litigation must be confined to the issues pleaded and that a party cannot introduce a new case without first amending its pleadings. The respondent also cites **Mahamud Muhumed Sirat v Ali Abdirahman & 2 others [2010] eKLR** and **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR**, which affirm the principle that evidence or submissions that fall outside the pleadings should not be considered.

25. On the issues related to the existence of ELRC Petition No. 22 of 2012, it is contended that the pendency of the said suit did

not prevent the appellant from filing its claim within the limitation period and that if the matters were substantially similar, the

appellant could have filed suit and sought a stay under section 6 of the Civil Procedure Act.

26. Lastly on the issue whether this appeal has any merit, the 1st respondent contends that once limitation applies, the merits of the underlying dispute are irrelevant. It relies on **Kenya Orient Insurance Ltd v Senenerro Ole Kurraro & 7 Others [2016] eKLR**, where the court held that limitation operates strictly and that a defendant is entitled to rely on it even if the claim might otherwise have merit.

27. In its **Supplementary Written Submissions** dated **24th March 2025** and which were filed pursuant to orders made by this Court on 7th March 2025, the 1st respondent contends that the appellant's reliance on **Stephen Onyango Achola & Another v Edward Hongo Sule & Another** (supra), which held that a party who does not plead limitation cannot later rely on it without amending its pleadings, and on **Kenya Plant Health Inspectorate Service & Another v Amos Munyoli Ngumu** (supra) where the High Court held that failure to plead

limitation is not a mere procedural defect curable under Article 159(2)(d), is misplaced. It maintains that those decisions are distinguishable

because, in this case, it filed a notice of preliminary objection at the outset expressly stating that it would challenge the suit as being statute barred and that the objection was fully argued without any element of ambush.

28. The respondent further submits that that a notice of preliminary objection constitutes a pleading within the meaning of Order 2 rule 4 of the Civil Procedure Rules and the definition of "pleading" under the Civil Procedure Act and relies on **Maheshkumar Manibhai Patel v Rift Valley Agricultural Contractors Ltd & Another [2005] KEHC 2325 (KLR),** where the court treated such a notice as a pleading, and on **Osman v Abdalla & 2 Others [2023] KEELC 1894 (KLR)**, which affirmed that that a party need not file a defence before raising a preliminary objection provided that the notice identifies a pure point of law.

29. The respondent further submits that jurisdictional objections may be taken at any stage and relies on **Owners of the Motor Vessel Lillian S v Caltex Oil Kenya Ltd [1989] KLR** where this

Court held that jurisdiction is everything and must be determined the moment it is questioned. It also cites **Isaac Aluoch Polo Aluochier v Independent Electoral and Boundaries**

Commission & Others Petition No. E023 of 2022 and **Ushago**

Diani Investment Ltd v Abdulwahab [2023] KEELC 20213 (KLR) both of which confirm that jurisdictional objections may be raised at any point before final judgment. In addition, the 1st respondent cites **Uniglobe Northline Travel Ltd v Maverick**

Picture Works Ltd [2022] KEHC 13531 (KLR), where the court observed that a notice of intention to raise a preliminary objection that proceedings are statute time barred can even be inferred from witness statements and not necessarily from the Statement of Defence.

30. In sum, the 1st respondent posits that the trial court correctly upheld the objection because the appellant's own pleadings showed that the cause of action arose on 29th May 2012 thus rendering the claim filed in May 2017 time barred under section

90 of the Act. It submits that the judge properly applied the principles in **Mukisa Biscuit** and did not need additional evidence to determine limitation because the decisive dates were pleaded. It relies on **National Coal Board v WM Neill &**

Son (St. Helens)

Ltd [1984] 1 All ER, where Piers Ashworth QC observed that where a legal point may dispose of a case irrespective of factual

proof, it should be determined as a preliminary issue. The 1st respondent therefore prays that this appeal be dismissed with costs.

31. The 2nd respondent through **written submissions** dated **27th May 2024** contends that the appellant's own pleadings indicated that the grievants' employment was terminated on or about 29th May 2012 and that the claim filed on 2nd May 2017 sought compensation for alleged breach of CBAs covering 2007/2008, 2009/2010 and 2011/2012, which placed the claim more than three years outside the statutory limitation under section 90 of the Act. The trial court is therefore said to have been correct when it considered the appellant's own averments that the cause of action arose from alleged unlawful termination and outsourcing arrangements culminating on 29th May 2012.

32. The 2nd respondent reiterates that the facts relied on and/or applied by the trial court came entirely from the appellant's pleadings and were not disputed through a Memorandum of Reply meaning the issue was purely one of law and fell squarely within the permissible scope of a preliminary objection. The 2nd respondent relies on the principle that

parties are bound by their

pleadings as affirmed by this Court in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others** (supra) and in **Diakanga Distributors (K) Ltd v Kenya Seed Company Ltd [2015] eKLR**. In this regard, the 2nd respondent asserts therefore that the appellant cannot now argue that the trial court relied on disputed evidence when the court simply adopted the appellant's own narrative that termination occurred in 2012, and that the monetary claim relates to fixed sums tabulated in Schedules 1–8, with no allegation of any continuing injury within the meaning of section 90 of the Act.

33. As regards the allegation that the preliminary objection lacked a foundation in pleadings, it is submitted that a preliminary objection may be raised at any stage, including before a response is filed, and remains a valid procedural device for terminating incompetent proceedings. In support of this position, the 2nd respondent relies on **Wavinya Ndeti v Independent Electoral and Boundaries Commission (IEBC) & 4 Others [2014]**

eKLR, where this Court held that a preliminary objection may be raised to challenge proceedings *in limine* and, if successful, terminates them. The 2nd respondent therefore maintains that the objection

was properly anchored on the appellant's own statements in the Memorandum of Claim and that the trial court was correct in dismissing the suit under section 90 of the Act.

34. As for the arguments tied to the pendency of ELRC Petition No. 22 of 2012, the 2nd respondent maintains that they are misguided because the appellant itself acknowledges that the alleged terminations occurred while that petition was ongoing yet it did not pursue the claim in those proceedings or file a separate suit within the statutory timelines. The 2nd respondent adds that even if one were to treat the date of judgment in that petition, namely 31st July 2013, as the point at which time began to run, the appellant would still be out of time since it only filed the claim in May 2017. In the respondent's view, the appellant is effectively asking the court to extend equitable relief despite having neglected to act when it should have, which runs against the long- standing maxim that equity aids the vigilant and not the indolent.

35. To reinforce the point on limitation, the 2nd respondent relies on the decision of this Court in **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR,** wherein

employees dismissed in February 2010 filed suit in June 2014

arguing that limitation ought to run from their 2013 acquittal in related criminal proceedings. In a majority decision the Court (Waki, JA and Kiage, JA. with Nambuye, JA dissenting), held that a cause of action in employment accrues on the date of termination; that limitation under section 90 is absolute; and that once time lapses the claim cannot be revived. The 2nd respondent urges us to adopt the same reasoning and to affirm that the cause of action accrued on 29th May 2012 and became time-barred on 29th May 2015, thereby rendering the 2017 claim incompetent.

36. Through its **Supplementary Written Submissions** dated **19th March 2025**, the 2nd respondent reiterates that limitation was properly raised by way of preliminary objection, noting that the appellant itself pleaded that all employees were locked out and their employment terminated on or about 29th May 2012 while the related Petition was still pending, yet it waited for almost five years before filing suit. It relies on **Bhupinder Singh Dogra v Attorney General [2019] eKLR**, where this Court is said to have upheld a preliminary objection on limitation even though no defence had been filed. The 2nd respondent therefore urges

this Court to affirm

that the cause of action became time-barred on 29th May 2015 and to dismiss the appeal with costs.

37. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle v Associated Motor Boat Co. [1968] EA 123,** thus:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."***

38. We have considered the record, the submissions of counsel, and the judgment of the trial court. In our view, this appeal turns on the single question of whether the trial court was right to uphold the preliminary objection on the basis that ELRC Cause No. 806 of 2017 was statute-barred under section 90 of

the Act.

39. In considering whether the notice of preliminary objection was well-founded, the proper starting point, in our view, is the appellant's own pleadings. In its Memorandum of Claim dated 27th April 2017, the appellant expressly pleaded at paragraph 38 that on or about 29th May 2012, and during the pendency of ELRC Petition No. 22 of 2012, all employees were locked out and their services deemed terminated. At paragraph 45, it further sought monetary reliefs tied to alleged underpayments and other benefits under the 2007–2008, 2009–2010 and 2011–2012 CBAs.

40. There is no dispute that ELRC Cause No. 806 of 2017 was filed on 2nd May 2017, almost five years after the pleaded date of termination, which according to paragraph 38 of the memorandum of claim occurred on or about 29th May 2012. **Section 90 (now section 89**) of the Act provides that:

> **"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 continuing injury or damage within twelve months next**

after the cessation thereof.” [Emphasis added]

41. In resolving the limitation question, the learned judge relied on the dates pleaded by the appellant, assessed them against the

statutory framework, and reached the conclusion that the court lacked jurisdiction to entertain a claim brought long after the limitation period had expired. The learned judge observed:

> ***"6. That the Respondents also claims at paragraph 38(b) of the claim the Claimant states that the grievants were terminated on or about 29th May 2012 and at paragraph (d) it add that the grievants are presenting the claim as a consequence of the Respondent's actions in unlawfully terminating their service without recourse to existing collective bargaining and the law.***
>
> ***7. This suit was filed on 2.5.2017. This was after 5 years after the alleged date of termination of services of the grievants which the Claimant has alleged was on 29th May 2012.***
>
> ***8. By virtue of this, I agree that indeed the events being complaint of having occurred in 2012, this claim is time barred by virtue of Section 90 of Employment Act. This Court lacks jurisdiction to entertain it. The same is therefore dismissed accordingly."***

42. The appellant challenges the trial court's decision primarily on the basis that the preliminary objection was incompetent because it was not anchored on a defence and because the question of when termination occurred allegedly required evidence. It is not in dispute that after being served with the memorandum of claim, the 1st respondent filed a Memorandum of Appearance dated 25th May 2017 and a Notice of

Preliminary Objection dated 24th July

2017, but did not file a statement of defence. The question we must therefore determine is whether the preliminary objection was properly grounded in law despite the absence of a defence.

43. The law on preliminary objections is settled. In **Mukisa Biscuit** (supra), the Court held thus:

> *"**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 or 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… 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 had to be ascertained or if what is sought is the exercise of judicial discretion**."*

44. Limitation is a classic preliminary point. Once a party, or the court on its own motion, raises a question of jurisdiction, it must be addressed immediately since any decision made without jurisdiction is liable to be set aside *ex debito justitiae*. As this Court affirmed in the well-known decision of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989]**

eKLR, jurisdiction is everything, and where a court lacks it, it must down its tools.

45. The appellant posits that a plea of limitation must be specifically traversed in a statement of defence and cannot properly be taken by way of a preliminary objection alone. The appellant relies on the decision of this Court in **Stephen Onyango Achola & Another v Edward Hongo Sule & Another** (supra) in support of this argument. Upon our perusal of that decision, we are satisfied that the circumstances there were materially different from those before us. In that case, the defendant had already filed a defence which did not plead limitation, proceeded to trial, and only sought to invoke limitation at a later stage without first amending the pleadings. This Court held that a party who has filed a defence cannot thereafter rely on limitation unless it has been expressly pleaded. Contrary to the suggestion by the appellant, this Court did not hold that a defendant is barred from raising limitation *in limine* by way of a preliminary objection at the outset where the limitation issue is apparent on the face of the plaintiff's pleadings.

46. On the contrary, this Court in **Bhupinder Singh Dogra v Attorney General** (supra) rejected the argument that a preliminary objection on limitation could not be entertained

before a defence was filed. The Court noted that although the Attorney

General had not filed a defence, a Notice of Preliminary Objection had been filed and the appellant himself had responded to it by way of a replying affidavit. This Court held that the High Court was entitled to hear and determine the objection.

47. In this appeal, the appellant's attempt to reinterpret **Stephen Onyango Achola & Another v Edward Hongo Sule & Another** (supra) as a general prohibition against raising a preliminary objection in the absence of a defence is, with respect, misplaced. Here, the objection was firmly anchored on the appellant's own memorandum of claim which clearly disclosed the dates from which the cause of action arose. There was no element of ambush, as the objection was taken at the very outset, and in our view, no further pleading was required to determine whether the claim was statute-barred.

48. The appellant also challenges the trial court's decision on the basis that ELRC Petition No. 22 of 2012 was still pending, and therefore the cause of action could not have accrued in 2012. With respect, that argument cannot stand. The appellant expressly pleaded that the employees were locked out and

their services deemed terminated on or about 29th May 2012, and it is that

termination which formed the foundation of the claim for terminal dues and compensation. The cause of action for wrongful or unfair termination therefore accrued on that date. The existence of parallel proceedings or the observations made by the bench in Petition No. 22 of 2012 regarding the plight of the employees and the possibility of relief had they quantified their claims does not alter the statutory position that time begins to run from the date of termination.

49. Even if, purely for argument's sake, one were to take the date of judgment in Petition No. 22 of 2012, to wit, 31st July 2013 as the starting point, a claim filed on 2nd May 2017 would still be outside the three-year limitation period. What the appellant seeks is, in effect, an equitable extension of time. However, as this Court has consistently held, limitation statutes exist to bar stale claims and to protect parties from the injustice of defending matters long after the relevant facts have faded; they are not intended as a discretionary indulgence for litigants who fail to act with diligence. In any case, equity cannot override an express statutory time-bar.

50. The appellant further argued that the preliminary objection required the court to determine whether the end of the

outsourcing arrangement between the respondents amounted to a termination of employment and that this was a factual dispute unsuitable for determination at a preliminary stage. With respect, that contention is misplaced. In resolving the objection, the trial court was not, in our view, required to decide what actually happened on the ground; it was entitled, indeed bound, to proceed on the basis of the appellant's own version in the memorandum of claim. In its memorandum of claim, the appellant did not plead any uncertainty. It pleaded positively that all employees were locked out and their services deemed terminated on or about 29th May 2012. It is trite law that parties are bound by their pleadings and that litigation proceeds on the issues they present. A party is not permitted to depart from its own pleadings when it becomes tactically convenient to do so. Having elected to frame its case on the footing that termination occurred on 29th May 2012, the appellant cannot be heard to complain when the court, and indeed the respondents, adopted that date for purposes of determining the objection based on limitation.

51. In the circumstances, we find no basis for interfering with the decision of the trial court. The inescapable conclusion is that

ELRC Cause No. 806 of 2017 was statute-barred and the trial court was correct to uphold the preliminary objection and dismiss the suit for want of jurisdiction.

52. In the end, this appeal is without merit and it is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 28th day of November 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb, C.Arb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.