



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A)**

**CIVIL APPEAL NO. 302 OF 2015**

**BETWEEN**

**NYABUTO ARAMBE ABUSA ..... APPELLANT**

**AND**

**KENYA POWER & LIGHTING**

**COMPANY LIMITED.....RESPONDENT**

*(Appeal from the Ruling and Order of the Industrial Court of Kenya at Nairobi (Mbaru, J) dated 30th June, 2015 in E.L.R.C CAUSE NO. 574 OF 2013)*

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**JUDGMENT OF THE COURT**

**Nyabuto Arambe Abusa** (Nyabuto) was employed as an artisan by the respondent Kenya Power & Lighting Company Limited (KPLC) on 1st July 1991 but eventually he was designated to the position of Installation Inspector in 2007.

On 26th March, 2007, the respondent was informed vide a letter dated 21st March, 2007 from Kenya Anti-Corruption Commission that Nyabuto was charged with soliciting a bribe from Mini Bakeries of Kariobangi within Nairobi. By a letter dated 18th June, 2007 the KPLC's Chief Engineer, Customer Service, Nairobi North demanded a written explanation from Nyabuto of the whereabouts of Mini Bakeries Limited and show cause why disciplinary action should not be taken against him (Nyabuto) for involvement in fraudulent activities. In his written explanation dated 21st June, 2007 Nyabuto indicated that there was no basis for his arrest by KACC since he was undertaking his normal duties of inspection of meters in the Kariobangi area.

As the criminal matter was pending before the Anti-Corruption Court he was terminated on the 25th June, 2007. Ultimately, on 23rd April 2012 Nyabuto filed a Claim in the Employment and Labour Relations Court seeking reinstatement or, in the alternative, damages for wrongful dismissal. KPLC filed a reply to the Claim and denied the allegations made by Nyabuto and maintained that his dismissal was proper and within the confines of law. It was KPLC's case that Nyabuto's conduct amounted to fraud, dishonesty and violation of the Code of Conduct. According to it, Nyabuto admitted as much in his explanation in a statement dated 21st March, 2007.

Upon consideration of the matter, Mbaru, J dismissed Nyabuto's claim by its ruling dated 30th June,

2015. The learned judge observed,

***“The claim being statute barred renders a fatal blow to it as it must be struck out. Other factors considered are that the claim has no Supporting Affidavit in verification of the same. The preliminary objections herein have merit with the effect being; suit herein is struck out. Each party shall bear their own costs.”***

It is that decision that has provoked this appeal in which it is complained the learned judge erred in law and in fact by;

- ***Finding that provisions of the Trade Disputes Act Cap 226 applied in the appellant’s case despite evidence to the contrary.***
- ***Basing her decision on that provision of the Trade Disputes Act Cap 226, instead of Employment Act, 2007.***
- ***Holding that the appellant’s case was time barred despite evidence to the contrary.***
- ***Not considering the submissions of the claimant on verifying affidavit and misdirected herself by finding that a non-dated affidavit is no affidavit at all.***
- ***Failing to find that the time to file suit started running on 23rd April, 2012 and not 25th June, 2007.***
  
- ***Failing to properly evaluate the evidence before her and reaching a conclusion that was wrong and unsupported by the evidence and law.***
- ***Failing to find that the provisions of the Anti-Corruption and Economic Act No. 3 of 2003 were applicable in the appellant’s case.***
- ***Striking out the appellant’s case on the ground that it was time barred and it had no verifying affidavit.***

At the hearing of this appeal **Mr. Makori** learned counsel for Nyabuto faulted the learned judge for basing her decision on Trade Disputes Act and not the Collective Bargaining Agreement as the Nyabuto’s suspension was done in accordance to **Clause 29 (a)** of Collective Bargaining Agreement and not Trade Disputes Act.

Placing reliance on the decision in **KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS vs. WATER RESOURCE MANAGEMENT AUTHORITY AND ANOTHER [2015] eKLR** that there can arise intervening circumstances which would affect limitation of action, counsel charged that under the Collective Bargaining Agreement Nyabuto was barred from instituting a suit until the final determination of the matter. He therefore submitted that the appellant’s cause of action arose in April 2012 when he was acquitted.

**Mr. Makori** then basing his submissions on **Rule 5(1)** of the **Industrial Court Rules** contended that on the authority of **ERASTUS K. WAMEYA AND 4 OTHERS vs. JOTHAM WABOMBA AND ANOTHER [2008] eKLR** and **STANLEY NJOKA KENYA AND 2 OTHERS vs. MUIRU FARMERS CO-OPERATIVE SOCIETY LIMITED [2016] eKLR** an undated verifying affidavit such as the one filed for Nyabuto is not defective.

**Mr. Ouma**, learned counsel for KPLC in opposing the appeal relied on the case of **GERALD MULI KIILU vs. BARCLAYS BANK OF KENYA LIMITED [2016] eKLR** and submitted that the date of termination determines when the time begins to run for purposes of time limitations as that is when the cause of action arises being 27th June, 2007 in the instant case. He also argued that the claim ought to have been brought under the provisions of the Trade Disputes Act, Cap 234 instead of the Employment Act of 2007 which came into force on the 2nd June, 2008 way after the cause of action accrued. Counsel contended that **Section 90** of the **Employment Act** stipulates a limitation period of 3 years and there is no provision for extension. The Memorandum of Claim was defective and that the court below was within rights to strike out the matter the on Preliminary Objection raised.

We say at the outset that the Preliminary Objection was properly taken before the learned judge. The

matter raised fell within the meaning of what a Preliminary Objection is, as was expressed by law JA in MUKISA BISCUIT MANUFACTURING CO. LTD vs. WESTEND DISTRIBUTORS LTD [1969] EA 696 thus, at page 700;

*“So far as I am aware, 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.”*

The appellant now challenges the learned Judge’s findings on the Preliminary Objection and the consequential striking of the suit and this is our own view of the matter.

On the question of when the time starts running, it is the accrual date of the cause of action that determines it. This was settled in our recent decision of ATTORNEY GENERAL & ANOTHER vs. ANDREW MAINA GITHINJI & ANOTHER [2016] eKLR. Waki, JA with whose decision Kiage, JA agreed, examined the same issue and stated as follows:

*“9. When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy from their employer through the court? On the one hand, the AG contends that it was on the date of the respondents’ dismissal while the respondents insist it was after their criminal trial was exhausted. There does not seem to be a direct authority from this Court on the issue, but the Employment and Labour Relations Court has pronounced itself on the matter in several cases, sometimes in conflicting fashion. In many of them however, it has been held that the cause of action for wrongful/unfair termination arises once a claimant is terminated from employment. I will refer to a few of them by way of illustration.*

**10. In the Benjamin Wachira case (supra), for example, the court, (L. Ndolo J.) expressed itself as follows:-**

*‘On the accrual date of the cause of action which has a direct bearing on running of time, the Claimant takes the view that the cause of action in his case did not accrue until 8th August 2006 when he was notified that his employment file had been closed, thus dashing any hopes of his reinstatement to the public service.*

This Court has however taken a different view on this matter in the case Hilarion Mwabolo vs. Kenya Commercial Bank [2013 eKLR] to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.

*In the instant case, the Claimant's termination from the 1st Respondent's employment took effect on 1st October 2000 as communicated by letter dated 29th September 2000. It follows therefore that the cause of action upon which the Claimant's claim is based accrued on 1st October 2000 and that is the date when time began to run as against the Claimant's claim.’”*

See also; DAVID NGUGI WAWERU vs. ATTORNEY GENERAL & ANOTHER [2017] eKLR.

It is Nyabuto’s case that the cause of action in his case did not accrue until April, 2012 when he was acquitted by the Anti-Corruption Court of his charges. However, we have a different understanding on this matter to the effect that accrual of the cause of action in this claim took effect on 27th June, 2007 as communicated by a letter dated 25th June, 2007. It follows therefore that the cause of action which his claim is based accrued on 27th June, 2007 and that is the date when time began to run as against the appellant’s claim. It was therefore clearly time barred as the learned Judge found under the then law then

applicable which was the Employment Act Cap 226 and Trade Disputes Act. It is also noteworthy that Nyabuto did not follow the procedure as laid down in the Trade Disputes Act of reporting the claim to the Minister within twenty-eight days.

Furthermore, the learned judge established that he did not have a discretion to extend time and therefore lacked jurisdiction to entertain the suit by dint of the provisions of the Trade Disputes Act at Section 9 (b), (e) and (f) which provide;

**9. The Court shall not take cognizance of any trade dispute or deal with any matter connected therewith-**

....

**b. Unless the trade dispute has been reported to the Minister and twenty-one days have elapsed since the date on which the dispute was so reported;**

....

**e. Unless the Court has received a certificate signed by the Labour Commissioner stating that the Minister has accepted the report of the trade dispute and that all available machinery (including statutory machinery) for the voluntary settlement of disputes prior to reference the Court has been exhausted;**

**f. Where the trade dispute solely concerns the dismissal or reinstatement of any employee, unless the Court has received, in addition to the certificate required by paragraph (e) the written authority of the Minister for that purpose.**

Moreover, the claim having been brought under the provisions of the Employment Act, 2007 whose effective date was 2nd June, 2008, as well, it was still time barred. This is because it was filed on 23rd April, 2012 which was 4 years and 10 months from the date of termination.

**Section 90** of the **Employment Act, 2007** places a time limit on actions brought under the said Act, at 3 years. It stipulates 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 the 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.”**

See also; **E. TORGBOR vs. LADISLAUS ODONGO OJUOK [2015] eKLR.**

Given that position of the law, we are not satisfied and therefore see no reason to interfere with the learned Judge’s decision. We accordingly dismiss the appeal with costs.

**Dated and delivered at Nairobi this 6th day of October, 2017.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**