



**Fazal v Fidelity Commercial Bank Limited & another (Cause
220 of 2020) [2024] KEELRC 22 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 22 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 220 OF 2020
L NDOLO, J
JANUARY 25, 2024**

BETWEEN

MOHAMED SALIM FAZAL CLAIMANT

AND

FIDELITY COMMERCIAL BANK LIMITED 1ST RESPONDENT

SBM BANK (K) LIMITED 2ND RESPONDENT

RULING

1. This ruling flows from the 2nd Respondent’s Preliminary Objection raised by notice dated 15th September 2020. The Objection is premised on the ground that the Claimant’s claim is statute barred, by dint of Section 90 of the *Employment Act*.
2. The parties urged their respective positions by way of written submissions. Both sides relied on the authoritative decision in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* (1969) EA, 696 where a Preliminary Objection was defined 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....

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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.”



3. Treading on this path, Ojwang J (as he then was) in *Oraro v Mbaja* [2005] eKLR remarked as follows:

“I think the principle is abundantly clear. A preliminary objection, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence of its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”
4. Reading from the parties’ submissions, it is evident that the effective date of the Claimant’s separation from employment is a contested issue of fact. On the one hand, the Claimant states that he remained in employment until 16th April 2017, when his terminal leave came to an end. On the other hand, the Respondents maintain that the employment relationship terminated on 28th February 2017.
5. In light of the foregoing, the effective date of the Claimant’s exit from employment is not a matter that can be determined as a preliminary point. Rather, it is matter on which the Court would need to take evidence before rendering a conclusive finding.
6. That being the case, the Preliminary Objection, which is hinged on the effective date of separation is not well taken and is overruled with costs in the cause.
7. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JANUARY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Otieno for the Claimant

No appearance for the 1st Respondent

Miss Odongo for the 2nd Respondent

