



Gicheha & 294 others v Uniliver K. Ltd & another (Employment and Labour Relations Cause 942 of 2017) [2024] KEELRC 646 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 646 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 942 OF 2017**

**K OCHARO, J
MARCH 19, 2024**

BETWEEN

SIMON NGIGE GICHEHA & 294 OTHERS CLAIMANT

AND

UNILIVER K. LTD 1ST RESPONDENT

MACHIM CHIM LTD 2ND RESPONDENT

RULING

Introduction

1. Through a Notice of Preliminary Objection dated 5th July 2022, the 2nd Respondent seeks that the Claimants' suit herein be dismissed, citing the following grounds:
 - a. That the service of summon on the 2nd Respondent on 27th May 2022, five years after the institution of the suit, offends the provision of Order 5 Rules 1 and 2 of the [Civil Procedure Rules](#).
 - b. That the suit herein abated and against the [Limitation of Actions Act](#) which specifically provides for a limitation period of three years in actions based on breach of contract of service arising out of the [Employment Act](#).
 - c. The summons issued herein have expired and their validity has not been sought to be extended within 12 months of their issuance.
2. This court directed that the Preliminary Objection be canvassed by way of written submissions. The parties obliged the directions. Their written submissions are on record.



The 2nd Respondent's/Applicant's submissions

3. Counsel for the 2nd Respondent identifies two issues for determination, thus:
 - a. Whether the suit has abated.
 - b. Whether the suit is time-barred.
4. On whether the suit has abated, Counsel for the 2nd Respondent submits that Rule 11 of the Employment Act provides for service of summons and their validity period. The Claimants' failure to serve the summons on the 2nd Respondent for 5 years after the institution of the suit, rendered the suit a non-starter. It should be treated like it was never commenced against the 2nd Respondent. Service of the court process is not a light matter. It goes to the jurisdiction of the court.
5. It was further argued that Rule 11, aforementioned, is couched in mandatory terms and cannot be taken casually, and until summons are served on a Respondent, there can not be said to be a proper invitation to the Respondent to defend the suit. To support this point, reliance was placed on the decision in *Abdulbasit Mobammed Ahmed Dahmar & Another v Fidelity Commercial Bank Ltd* (2010) eKLR.
6. On the issue of this matter being time-barred, Counsel for the Respondent urged this court to consider the provisions of section 90 of the *Employment Act*. He states that this is a 2017 matter.

The Claimants' Submissions

7. Counsel for the Claimants submits that the Preliminary Objection should fail as it is anchored on the provisions of the Civil Procedure Rules, yet the *Civil Procedure Rules* do not apply to the proceedings of this court. The rules applicable are those embodied in the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
8. It is further submitted that the 2nd Respondent was initially approached for service of summons to enter appearance in the year 2017, but he deliberately refused to accept the service. A testament to this is an affidavit of Ambrose Onyancha, a Process Server, filed herein. Technically service of summons was effected on the 2nd Respondent. The issue of the validity of summons does not arise therefore.
9. Counsel further submits that it is unconscionable for the 2nd Respondent to attempt to frustrate and or evade the course of justice by refusing to accept the summons and subsequently turn around with the urge to benefit from the unconscionable act.
10. Counsel further submitted that to establish whether or not the 2nd Respondent was served with the summons the process server should be called for cross-examination. This could be the most appropriate approach to employ in a matter as is the instant. To buttress this submission reliance was placed on the Court of Appeal decision in *Saighi t/a Enterprise Panel Baeters v Kasuku* (1988) eKLR.
11. It was further submitted that the suit herein was filed within 3 years. It cannot therefore be impacted negatively by the operation of the provisions of section 90 of the *Employment Act*, as suggested by the 2nd Respondent. The cause of action arose on the 31st May 2014 and the matter was filed on 18th May 2017.

The 1st Respondent's submissions

12. The 2nd Respondent's Counsel identifies five issues for determination flowing from the Preliminary Objection, thus;



- i. Whether the 2nd Respondent has raised a proper Preliminary Objection.
 - ii. Whether the suit is time-barred as per the Limitation of Action under Section 90 of the Employment Act.
 - iii. Whether the suit has abated due to delayed service of summons on the 2nd Respondent.
 - iv. Whether it is in the interest of justice that the claim be struck out as against the 2nd Respondent.
 - v. Who should bear the costs of the 2nd Respondent's Preliminary Objection?
13. Counsel for the 1st Respondent submits that the Preliminary Objection ought to be dismissed. First, the Preliminary Objection does not raise a Pure Point of Law. Secondly, the Claimants' suit herein was filed within time as provided under section 90 of the *Employment Act*. Thirdly, in any event, improper service of summons is not fatal and the court may extend the validity of summons under Rule 11 of the *Employment Court (Procedure) Rules* 2016, depending on the circumstances of the case. Fourthly and finally, the 2nd Respondent is a necessary party in the suit, and the court cannot adequately determine the matters before it without the 2nd Respondent's continuance in the suit.
14. It is argued that the 2nd Respondent's Preliminary Objection raises a matter of both fact and law. It requires the court to inquire into the fact of service of summons, the mode of service and the circumstances that informed the service or lack of it on the 2nd Respondent. Additionally, to determine whether the Claimants, sought an extension of the initially issued summons to enable service on the 2nd Respondent. Counsel argues further that it is trite law that a Preliminary Objection has to be on a Point of Law which has been pleaded or which arises by clear implication out of pleadings. To buttress these submissions, reliance has been placed on the case of *Attorney General & Another v Azuken Maina Gitbinji & Another* (2016) eKLR where the court held as follows:
- “The test to be applied in determining whether the Appellant's Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in Mukisa Case (supra). That is first that the Preliminary Objection raises a pure point of law. Second, that there is a demonstration that all facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”
15. To buttress the point that the issue on the service of summons as raised by the 3rd Respondent is not on a pure point of Law, the 1st Respondent cites the holding on *Mwangangi v Mutua & Another* (Environment & Land Case E005 of 2021 (2022) KEELC 2208 (KLR) (30 June 2022) (Ruling), thus:
- “I opine that service of the summon to enter appearance is not a pure point of Law and the Notice of Preliminary Objection would fail on this ground. In summary, I do find that the issues raised in the Notice of Preliminary Objection on the Plaintiff's failure to prepare, have signed, collect and serve summons to enter appearance and the consequences thereof are issues of fact and law which if the facts are not in dispute may result in disposing of the suit. I however find that in the present case, the issue of fact remains in dispute and unascertained at the moment and the same cannot form the basis for determination by way of a Preliminary Objection.”



16. And *Jacqueline Muthoni Wachira v Mwalimu Investment Company Limited & 3 Others* (2021) eKLR where the court stated:

“Going by nature of the Preliminary Objection highlighted above, the question of service is not a Pure Point of Law that this court can determine without calling for evidence. Service of summons is a question of fact. With that, the Preliminary Objection is rejected.”

17. Counsel further submits that the claim herein was filed within the period contemplated under section 90 of the Employment Act.

18. As to whether the suit herein has abated for lack of proper service of summons, Counsel for the 1st Respondent submits under the overriding of objectives under the Civil Procedure Rules, is the recognition that justice should be done without undue regard to procedural technicalities. Courts should make orders to meet the ends of justice, depending on the circumstances of each matter. To support these submissions, Counsel sought fortification in the cases of *Eunice Nyambura Irungu v Libey Njoki Munene & 2 others* (2012) eKLR, and *Paulina Wanza Maingiv Diamond Trust Bank Ltd & Another* (2015) eKLR.

19. Counsel submits that flowing from the various judicial decisions he has cited, it is clear that the effect of non-service of summons to enter appearance within the stipulated time, depends on the peculiar circumstances of each case. Counsel submits further that this court should not be persuaded to dismiss the Claimants’ case only on the reason that service of summons was effected out of time. The question of service of summons herein does not go to the root of the jurisdiction of the court. Further, the 2nd Respondent has not demonstrated the prejudice it will suffer if it is maintained in the suit despite delayed service of summons.

Analysis and Determination

20. For the 2nd Respondent’s Preliminary Objection to be adequately and justly addressed, the following issues shall be determined by this court;

- a. Whether the preliminary objection has been properly taken.
- b. Whether the Claimants’ suit herein is time-barred.
- c. Whether the Claimants’ suit herein should be struck out for lack of proper service on the 2nd Respondent.

a. Whether the 2nd Respondent’s Preliminary Objection is properly raised

21. It is trite law that a Preliminary Objection should be confined to issues of law only. The factors that the court shall have to consider in interrogating whether or not a Preliminary Objection before it has been properly taken, was aptly put forth in the case of *Mukisa Biscuit Manufacturing Co. Ltd* (1969) EA page 700, by Law JA, 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 on the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound they the contract giving rise to the suit to refer the dispute to arbitration.”



22. At page 701, Sir Charles Newbold, P stated:

“A Preliminary Objection is in the nature of what was to be a demur. It raises a Pure Point of Law which is usually 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 an exercise of judicial discretion.”

23. The 2nd Respondent’s objection is heavily premised on the assertion that the summons to enter appearance were served upon it way outside the time stipulated by the *Civil Procedure Rules*. That, therefore, the suit against it abated rendering it null and void. In my view, and the circumstances of this matter, the issue as to whether service was effected in time or not is an issue of fact. The consequence of lack of service as required by the law is a point of law. The Court hasn’t lost sight of the fact that in his submissions the Claimants have asserted that in the year 2017, the 2nd Respondent was served with the summons to enter an appearance but deliberately declined to accept service.

24. I am convinced that the issue as to whether there was proper service or not can only be determined after taking evidence from the rival camps, and this pushes the 2nd Respondent’s Preliminary Objection off the space of a Preliminary Objection properly taken.

25. By reason of the foregoing premises, I conclude that the Preliminary Objection is not properly taken. It is not purely on points of law.

Whether the Claimants’ claim herein is time-barred

26. In paragraph 10 of their statement of claim, the Claimants stated:

“That the Claimants were verbally declared redundant on 31st May 2014. The Claimants reported to the Ministry of Labour Social Security and Services on 2nd June 2015. The Sub-county Labour Officer was appointed to investigate the matter by a letter dated 8th June 2015. The Claimants were not assisted by the said Labour Officer and thereafter opted to seek services of an advocate.”

Here, the Claimants did explain when the cause of action in this matter accrued, 31st May 2014. The statement of claim herein was filed on 18th May 2017. Therefore, in my view, the suit was filed within 3 years. I am not persuaded that it was filed out of the statutory period.

27. The 2nd Respondent has not in any clear and sufficient way demonstrated in its submissions or at all why it holds that the claim herein was filed out of time.

28. I hold that the 2nd Respondent’s assertion that the matter herein runs afoul the limitation of time set out under section 90 of the Employment Act is without merit.

Whether the suit herein should be struck out for lack of proper service

29. Having found as I have herein on the 1st issue, I find it improper, to proceed to consider this issue in this forum.

Conclusion

30. In conclusion, and by reason of the foregoing premises, I find the Preliminary Objection, a fit candidate for dismissal. It is hereby dismissed with costs.

READ, DELIVERED AND SIGNED THIS 19TH DAY OF MARCH, 2024.



OCHARO, KEBIRA.

JUDGE

In the presence of:

Ms Kubai for the Claimants

Ms Chepkoech for 2nd Respondent

Ms Cheptoo holding brief for Mr. Opiyo for 1st Respondent.

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

