



Diba v Equity Bank Kenya Ltd (Employment and Labour Relations Cause 745 of 2022) [2024] KEELRC 850 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 850 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 745 OF 2022**

AN MWAURE, J

APRIL 12, 2024

BETWEEN

ROBA BORU DIBA CLAIMANT

AND

EQUITY BANK KENYA LTD RESPONDENT

RULING

1. The respondent filed a notice of preliminary objection dated October 25, 2023 in opposition to the claimants statement of claim dated October 15, 2022 on grounds that:-
 - i. The claimant’s suit is statutorily time barred by dint of section 90 of the *Employment Act* having not been commenced within 3 years next after the act, neglect or default complained of.
 - ii. The suit is incompetent, fatally defective and an abuse of the court process.

Claimant’s case

2. The claimant avers that he was arrested in Moyale on 12/9/2019 pursuant to the respondent’s complaint and was subsequently charged with robbery with violence on 1/10/2019.
3. The claimant avers that he remained in custody until 16/10/2019 where the court ordered is release on cash bail set at Kshs 500,000. He was able to raise this amount and was released on 17/10/2019.
4. The claimant avers that he travelled back to Moyale and reported back to work on 21/10/2019 but was informed he was required to report to the head office before he is cleared back to work.
5. The claimant avers that he travelled to Nairobi and visited the head office on 26/10/2019 and was advised that his services were terminated vide a letter dated 15/10/2019. He was given the letter and made to sign his clearance form.



6. The claimant avers that his claim arises out of the respondent's action of 26/10/2019 of handing over a letter of termination. His cause of action arose from the date he was made aware of the termination by his employer.

Analysis and determination

7. The principles guiding the merits of a preliminary objection were set out by the Court of appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd West End Distributors Ltd* [1969] EA 696. At page 700 law JA stated

“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.”

At page 701 Sir Charles Newbold, P added:

“A preliminary objection is in the nature of what used to be a demurrer. 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 any fact has to be ascertained or if what is sought is the exercise of judicial discretion.....

For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

8. The claimant was dismissed from his employment on October 15, 2019 and by then he was in remand prison and he came out of police custody on October 17, 2019 after being granted bail. The clearance form he annexed in court is dated October 26, 2019 and in any event the claimant avers he was released from police custody on October 17, 2019. The suit was filed on October 18, 2022.
9. The claimant in his replying affidavit has raised facts that will require the court to delve into the merits of the preliminary objection.
10. The court finds it is just and fair to allow the suit to be heard in full and all the issues including the limitation of time be interrogated in full.
11. Therefore, the court holds that the preliminary objection lacks merit and is dismissed accordingly and would order the case to proceed to full hearing.
12. Costs will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF APRIL, 2024.

ANNA NGIBUINI MWAURE

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 March 15, 2020 and subsequent directions of April 21, 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.

