



**Wamae v Mount Kenya University (Cause E725 of 2023)
[2024] KEELRC 1236 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1236 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E725 OF 2023**

**JK GAKERI, J
MAY 23, 2024**

BETWEEN

CLAIRE NJERI WAMAE CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

RULING

1. Before the court for determination is the Respondent’s Notice of Preliminary Objection dated 11th December, 2023 against the Claimant’s suit on the grounds that;
 1. As the Claimant resigned from employment by letter dated 31st October, 2017, the suit is statute barred by dint of Section 90 of the *Employment Act*, 2007.
 2. The Honourable Court has no jurisdiction to hear the Claimant’s case and must down its tools.
 3. The claim is irresponsible, incompetent, fatally defective and an abuse of the court process and liable to be struck out in limine with costs.
2. In her incomplete and undated Reply to the Preliminary Objection, the Claimant admits having resigned from employment vide letter dated 31st October, 2017 and maintained her duties until December 2017 and her advocates wrote a demand letter to the Respondent dated 15th June, 2019 and by letter dated 22nd November, 2019, the law firm of Adera & Kenyatta Advocates responded asking the Claimant to withhold any precipitate action as the law firm sought instructions from the Respondent, which request was granted as professional courtesy. However, follow-up emails yielded no feedback.



Respondent's submissions

3. Replying on the sentiments of the court in *Attorney General and another v Andrew Maina Gitbinji and another* (2016) eKLR, *G4S Security Services (K) Ltd v Joseph Kamau and 468 others* (2018) eKLR and *Maxwell Sifuna v Teachers Service Commission* (2022) eKLR, counsel submitted that the Claimant's suit is incurable and fatally defective as it is statute barred under Section 90 of the *Employment Act*, 2007, as the 3 year period has already lapsed.
4. That the Preliminary Objection meets the threshold in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA.

Claimant's submissions

5. The Claimant's counsel submits that the Claimant was not indolent but had extended professional courtesy to the Respondent and the Respondent was thus before the court with unclean hands citing the Court of Appeal decision in *John Njue Nyaga v Nicholas Njiru Nyaga & another* (2013) eKLR.
6. That despite the courtesy the Claimant extended to the Respondent, it failed and refused to pay the amount owed having failed to co-operate after initiating an out of court settlement.
7. Counsel urges that having sought for time, the Respondent cannot claim that the Claimant was indolent and is underserving of an equitable remedy.
8. The locus classicus rendition of what constitutes a Preliminary Objection are the often cited sentiments of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (*supra*), where 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 jurisdiction of the court 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. . . ”
9. Sir Charles Newbold V.P. stated as follows;

“ 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 has to be ascertained or if what is sought is the exercise of judicial discretion . . . ”
10. It requires no gainsaying that a Preliminary Objection is a threshold issue and when raised it ought to be disposed of at the earliest possible instance as it has the potential to dispose of the suit before hearing and final determination.
11. Relatedly, since the Respondent is challenging the viability of the suit on account of limitation of actions which implicates the court's jurisdiction, the court is satisfied that the Notice of Preliminary Objection dated 14th July, 2023 is competent.
12. As to whether the Respondent's Notice of Preliminary Objection is merited, it is common ground that the Claimant filed the instant suit on 7th September, 2023 alleging constructive dismissal by the Respondent and prays for various reliefs including gratuity, annual leave, salary for December 2017,



- forced Staff Welfare Deductions, internal Part-time 4 units, outstanding refund of travel expenses to the USA @ 50% of the total expenses and declarations among others.
13. Notably, the Claimant makes no claim for compensation for the alleged constructive dismissal.
 14. While the Respondent submits that the Claimant's suit is statute barred by virtue of the provisions of Section 90 of the *Employment Act*, 2007, the Claimant argues that it accorded the Respondent time on request to settle the matter out of court but the latter refused to do so.
 15. The Claimant does not contest that the suit was filed many years after the cause of action arose.
 16. Significantly, the Claimant admits that she resigned from employment vide letter dated 31st October, 2017 thereby terminating the employment relationship.
 17. By simple arithmetic, the instant suit was filed almost 6 years later.
 18. Section 90 of the *Employment Act*, 2007 provides that;

“Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act* (Cap 22), no civil action or proceedings based on 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 cessation thereof.”
 19. This provisions is unambiguous that the limitation period for actions based on the *Employment Act*, 2007 or contracts of service generally is three (3) years upon effluxion of which the action becomes statute barred or stale.
 20. In *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* (*supra*), the Court of Appeal laid it bare that in termination of employment contracts, the cause of action accrues on the date of termination or dismissal, and time starts running.
 21. It is trite that the provisions of Section 90 of the *Employment Act*, 2007 are couched in mandatory tone and phrased in the negative for emphasis to underline that no claim based on or arising under the Act or contract of service lies after 3 years.
 22. The foregoing was aptly captured by the Court of Appeal in *Beatrice Kabai Adagala v Postal Corporation of Kenya Ltd* (2015) eKLR.
 23. Similarly, it is trite law that the limitation period is not extended in matters based on contract. It only takes place in suits founded on tort as long as the provisions of Section 27 and 28 of the *Limitation of Actions Act* are satisfied.
 24. (See *Davecon v Samani* (1995 – 1988) EA 48, *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* (2013) eKLR as well *Beatrice Kabai Adagala v Postal Corporation of Kenya Ltd* (*supra*)).
 25. The object of the limitation period was captured in *Rosemary Wanjiru Kung'u v Elijah Macharia Githinji & another* (2014) eKLR as follows;

“The object of a limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other to protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time . . . “
 26. Based on the foregoing provisions and propositions of law, it is clear that the Claimant filed a statute barred suit.



27. The argument that Claimant accommodated the Respondent time at its instance vide letter dated 22nd November, 2019, to settle the matter out of court cannot avail the Claimant as the Claimant did nothing demonstrable by evidence to show that she followed up with the Respondent after the letter upto the end of October 2020 when the 3 year limitation period lapsed.
28. More significantly, however, it is trite law that engagement in other dispute resolution mechanisms such as mediation, conciliation, negotiation or alternative justice systems does not postpone the running of time under Section 90 of the Employment Act, 2007.
29. Regrettably, the Claimant fell into the Respondent's trap, hook, line and sinker, and was thus indolent and lost the right to sue the Respondent in October 2020.
30. Flowing from the foregoing, it is apparent that the Respondent's Notice of Preliminary Objection dated 11th December, 2023 is merited and is sustained.
31. The court hereby downs its tools.
32. Consequently, the Claimant's suit dated 7th September, 2023 is hereby struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF MAY 2024

DR. JACOB GAKERI

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 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 Civil 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.

DR. JACOB GAKERI

JUDGE

