



Joseph v Kibet & 4 others (Employment and Labour Relations Cause E016 of 2021) [2024] KEELRC 1691 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1691 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E016 OF 2021
AN MWAURE, J
JUNE 28, 2024**

BETWEEN

WAMBUA JOSEPH CLAIMANT

AND

JINARO KIBET 1ST RESPONDENT

AUTOMOBILE ASSOCIATION OF KENYA 2ND RESPONDENT

MILCAH MUGO 3RD RESPONDENT

ERASTUS MWONGERA 4TH RESPONDENT

DAVID KINYUA WAWERU (BOARD OF GOVERNORS, AUTOMOBILE ASSOCIATION OF KENYA) 5TH RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated 16th February 2024.
2. The Respondent raised a preliminary objection that this Honourable Court lacks jurisdiction to hear and determine the claim as it is statute barred having been filed after more that 3 years from the date of termination of employment.

Claimant's Case

3. In opposition to the Respondent's preliminary objection, the Claimant filed Grounds of Opposition dated 27th February 2024 on grounds that:
 1. The preliminary objection is incompetent and lacks merit as the same is not premised on a pure point of law and thus does not satisfy the criteria set out in the case of *Mukisa Bisquit Manufacturing Co. Ltd v West End Distributors Ltd*(1969)EA.



2. The Preliminary Objection does not plead the express statute law relied upon.
3. The preliminary objection involves a matter requiring the court to investigate the facts upon which the claim is based as the evidence on record sets out the correspondence between the parties in the year 2020 constituting an acknowledgment of the claimant's grievances by the respondent.

Respondent/ Applicant's Submissions

4. The Respondent/Applicant submitted that the Notice of Preliminary Objection dated 16/02/2024 meets the threshold set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (1969) EA 696. It consists of pure point of law pleaded at paragraph 12 of the amended Memorandum of Defence that the claim is statute barred having arisen in the year 2011 and filed in 2021.

Claimant/Respondent's Submissions

5. The Claimant/Respondent submitted that the preliminary objection does not plead the express statute law relied upon. This is a necessary requirement in order to focus the mind to the specific point raised without requiring the court to engage in an inquiry of the basis of the objection if no other material is placed before the court.
6. The Claimant/Respondent submitted that the preliminary objection is not based on a pure point of law thus does not satisfy the criteria set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (1969) EA 696.
7. The Claimant/Respondent submitted that his grievance is entangled in law and fact. The fact that his termination letter dated 16/12/2011 may create the false impression that the issue is a simple one involving a computation of time from the date of the said letter to the date of filing the suit.
8. The Claimant/Respondent submitted that the suit involves examination of the evidence and factual details of the case, hence, the preliminary objection is no longer a pure matter of law but entails facts and assertions to be determined at trial.

Analysis and Determination

9. Having considered the application and submissions on record, the issue for determination is whether the notice of preliminary objection is merited
10. The threshold to determine whether a preliminary objection is merited was held in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* (1969) EA 696:

“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 ... 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.”
11. It is not in dispute that the Claimant's employment was terminated vide a letter dated 16/12/2011 while the suit was filed in the year 2021.



12. It is the Claimant’s submission that the claim involves a debt acknowledged by the Respondent which is a factual matter which needs to be established through evidence.

13. Section 89 of the Employment Act, Cap 226, Laws of Kenya clearly states: -

“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 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 the cessation thereof.”

14. Further, in John Kiiru Njiri v University of Nairobi [2021] eKLR, Lady Justice Mbaru held:-

“Section 90 of the Act is framed in mandatory terms. A claim based on a contract of employment must be filed within 3 years. This Court is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose.

.....

The limitation period is never extended in matters based on an employment contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act which provisions do not apply in employment and labour relations claims.

In the case of James Mugeria Igati v Public Service Commission [2014] eKLR the court held that the accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination of employment as stated in the letter communicating the same.”

15. The cause of action herein arose on 16th December 2011 whereas the suit was filed in the year 2021 long after the expiry of 3 years after the termination of the Claimant’s employment. This clearly takes away the jurisdiction of this court due to the fact that the case was filed way out of the mandatory three years’ timelines. The court has on leeway to extend the time after expiry of the 3 years according to section 90 of the Employment Act 2007.

16. The respondent’s preliminary objection is merited therefore and the suit is dismissed as this court has no jurisdiction to handle the same.

17. Each party will meet their costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF JUNE, 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 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.

ANNA NGIBUINI MWAURE

JUDGE

