



REPUBLIC OF KENYA



**Kimani v Hayer Bishani Singh & Sons Ltd (Cause E021 of 2023)  
[2024] KEELRC 2569 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2569 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E021 OF 2023  
JK GAKERI, J  
OCTOBER 24, 2024**

**BETWEEN**

**ELIJAH MWAURA KIMANI ..... CLAIMANT**

**AND**

**HAYER BISHANI SINGH & SONS LTD ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the Respondent's Notice of Preliminary Objection dated 30<sup>th</sup> April, 2024 to the effect that the Claimant's suit is statute barred, contrary to Section 90 of the *Employment Act* on account that the Claimant's last working day was March, 2020 and the instant suit was filed on 28<sup>th</sup> April, 2023.
2. By a Replying Affidavit sworn on 14<sup>th</sup> June, 2024, the Claimant deposes that he was employed by the Respondent on or about 13<sup>th</sup> October, 2016 as a Quantity Surveyor on permanent terms and resigned from employment around March 2020 owing to frustration by the Respondent's non-payment of salary arrears but the Respondent declined the resignation and asked him to continue working and would be paid to complete the projects he had started.
3. The affiant states that one of the projects was from Kebirigo shopping center in Nyamira County where the site Agent was Edward Musaze and Peter Mbuthia the site Assistant whom the affiant reported to. That Mr. Mbuthia would sign all interim pay certificates prepared by the Claimant.
4. That Sapp excerpts from Mr. Peter Mbuthia show that he was still working after March 2020, and had work conversations dated 2<sup>nd</sup> May, 2020, 16<sup>th</sup> October, 2020, 11<sup>th</sup>, 12<sup>th</sup>, 24<sup>th</sup> and 28<sup>th</sup> November, 2020 and 31<sup>st</sup> December, 2020 until January, 2021 when the projects were completed and received Kshs 73,800.00 from Mr. Peter Mbuthia via Mpesa on 1<sup>st</sup> April, 2020 after the resignation and Kshs 179,008.00 from the Respondent vide cheque on 16<sup>th</sup> October, 2020.



5. The affiant deposes that he was paid a salary for 3 months from April to January 2021 by Mpesa 2 months by cheque and payment was irregular and by March 2020 salary arrears stood at 7 months.
6. That he stopped working in 2021 and the claim is not statute barred as contended by the Respondent.
7. The affiant prays for dismissal of the Notice of Preliminary Objection with costs.

#### **Applicant's/Respondent's further submissions**

8. As to what a Preliminary Objection entails, Counsel relied on the sentiments of the Court in the *Mukisa Biscuits Manufacturing Ltd case (supra)* cited in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* [2014] eKLR affirmed by the Supreme Court in *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR.
9. Reliance was also made in *Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu* HCCC No 22 of 1999 and *David Ngugi Waweru v Attorney General & another* [2017] eKLR for the proposition that time starts running when employment terminates.
10. Counsel urges that the memorandum of claim on record falls within the provision of Section 90 of the *Employment Act* as the case of action arose in March 2020 and the suit was filed in April 2023 and thus the suit is statute barred and ought to be struck out.
11. As to whether the Claimant continued working after March 2020, Counsel for the Respondent submitted that the Claimant had not attached a re-engagement contract executed by the Respondent after March 2020 or logging in time stamps after March 2020 or letter of extension of his contract.
12. That the snap shots of conversation between parties cannot be verified and are not conversations with the Respondent, no telephone numbers and the communication cannot be confirmed.
13. Reliance was made on Section 107 of the *Evidence Act* on the burden of proof.
14. On remuneration after March 2020, Counsel urges that the Claimants list of documents showed that he used to receive a pay slip at the end of every month but has not attached any after March, 2020.
15. Finally, Counsel submitted that the Claimant's suit is statute barred as Section 90 of the *Employment Act* is framed in mandatory terms and the Court lacks jurisdiction after 3 years and as the cause of action arose at the end of employment in March 2020, the suit is time barred.

#### **Counsel prays for the striking out of the suit.**

16. Guided by the sentiments of Law JA and Sir Charles Newbold VP. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the Court is satisfied that the Respondents Notice of Preliminary Objection meets the threshold as it is one of the examples provided by Law JA in his often cited rendition of what a preliminary objection entailed.

In the words of Sir Charles Newbold VP;

“ 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 what is sought is the exercise of judicial discretion....”



17. Since the Respondent's Notice of Preliminary Objection assails the Claimant's suit on the ground that it is statute barred, and thus the Court lacks jurisdiction to hear and determine it, the Notice dated 30<sup>th</sup> April, 2024 meets the threshold of a Preliminary Objection.
18. As to whether the Notice of Preliminary Objection is merited the Court Proceeds as follows;  
In his Memorandum of Claim dated 10<sup>th</sup> March, 2023 and filed on 28<sup>th</sup> April, 2023 the Claimant avers that he was employed by the Respondent on permanent terms effective 13<sup>th</sup> October, 2016.
19. Strangely, the Memorandum of Claim is reticent on when and how the parties separated.
20. In his witness statement dated 10<sup>th</sup> March, 2023, the Claimant states that he worked for the Respondent for 3 years from 13<sup>th</sup> October, 2016 but again is silent on when and how the parties separated.
21. According to the Respondent, the Claimant's last day of employment was 26<sup>th</sup> March, 2020 when he absconded duty and handed in an unverified resignation letter.
22. The Claimant admits that he resigned from employment but his resignation was not accepted and he continued working yet the Respondent alleges that he absconded duty.
23. However, the Respondent has not provided evidence to demonstrate the actions it took to ensure that the Claimant resumed duty or was put on notice that disciplinary action was being contemplated on account of the desertion.
24. The inelegance drafting of the Claimants suit notwithstanding, it is puzzling how and when the parties separated as there is a definitive date bearing in mind that the alleged resignation letter was unsigned and the Respondent has not provided evidence on what it did in response to the letter. Although copies of the documents filed by the Claimant in response to the Notice of Preliminary Objection were not filed earlier nor disclosed in the earlier filings, they would appear to suggest that the parties continued interacting even after the Claimant's purported resignation, the capacity in which they interacted notwithstanding.
25. It is clear that there are certain facts which can only be evidentiary established at the hearing.
26. Since the Claimant is disputing the date of separation and the Respondent lacks a definitive date of separation or payment of the Claimant's dues, it is only fair that the Claimant be accorded the opportunity to place the facts of his case before the Court for a just determination of the suit.
27. In the circumstances, it is the finding of the Court that the Respondent's Notice of Preliminary Objection dated April 30, 2024 is unmerited in this instance to enable the parties canvass their cases for determination on merits.

There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24<sup>TH</sup> DAY OF OCTOBER, 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 15<sup>th</sup> March 2020 and subsequent directions



of 21<sup>st</sup> 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**

