



**Oduori v Lycan EPZ Enterprises Limited & another (Cause
1981 of 2017) [2023] KEELRC 2657 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2657 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1981 OF 2017
JK GAKERI, J
OCTOBER 30, 2023**

BETWEEN

JOASH ODUORI CLAIMANT

AND

LYCAN EPZ ENTERPRISES LIMITED 1ST RESPONDENT

CATHERINE NJENGA 2ND RESPONDENT

RULING

1. Before the court for determination are two Preliminary Objections by the Respondents dated 4th May, 2023 and 14th September, 2023 respectively which poist that the claim as amended on 16th March, 2023 is statute barred as against the 2nd Respondent as are the new claims introduced by the amendment and the entire claim against the 2nd Respondent was statute barred and contrary to Order 8 Rule 3 of the Civil Procedure Rules, 2010 and ought to be struck out.
2. The Preliminary Objection dated 14th September, 2023 prays for the striking out of the entire claim against the Respondents on the ground that it contravened the provisions of Section 90 of the Employment Act, 2007 and should be struck out.
3. As the Preliminary Objection dated 14th September, 2023 encompasses the entire suit whether as amended or not, the court will determine the two objections concurrently.
4. In her Supplementary Affidavit sworn on 14th September, 2023, the 2nd Respondent deposes that the Claimant was employed as a Caretaker in October 2010 and his employment was unilaterally terminated on 1st May, 2014 by the 1st Respondent.
5. The affiant avers that the Claimant sought to amend his claim after the Respondent had expressed its desire to amend its statement of response on 23rd February, 2023 which the court allowed and the same was amended and filed.



6. The affiant avers that the Claimant's counsel did not seek leave to amend the claim and the amendments effected are not minor as an amount not claimed in 2017 was incorporated.
7. That it was untruthful for the Claimant to allege that the injury the subject of the suit was continuing and the limitation period for the suit is 3 years.
8. That since the amendment introduced a new party and leave had not been sought, the same is impermissible.
9. The affiant urges that the Preliminary Objection dated 4th May, 2023 be granted as prayed.

Replying Affidavit

10. In his Replying Affidavit dated 4th August, 2023, the Claimant deposes that his cause of action was grounded on a continuing injury and the limitation period for an employment contract was 6 years.
11. That after the Respondent sought leave to amend its response, the Claimant made a similar application by word of mouth and leave was granted as evidenced by the 2nd Respondent's letter dated 6th March, 2023.
12. That it was insincere for the 2nd Respondent to claim that leave was not granted and the Preliminary Objection was an afterthought.
13. The affiant states that it was essential to include the 2nd Respondent and the Preliminary Objection ought to be dismissed as it would lock out part of the Claimant's claim.
14. Finally, the affiant states that the 2nd Respondent was not prejudiced by the amendment.

Applicant's submissions

15. Counsel isolated five issues namely; whether,
 - i. Leave was sought and/or was granted to amend the memorandum of claim.
 - ii. The amended claim constitute a new suit.
 - iii. The 2nd Respondent was sued out of time.
 - iv. The suit contained in the amended memorandum of claim was statute barred.
 - v. The entire suit is statute barred.
16. On the 1st issue, counsel submitted that amendment of proceedings after the pre-trial stage required leave under Order 1 Rule 9 and 10 and Order 3, 4, 5 and 6 of the [Civil Procedure Rules](#), 2010 and none was sought.
17. That the proposed amendments were not disclosed and counsel ambushed the court and the Respondents.
18. That the Claimant acted without leave.
19. Reliance was made on the sentiments of the court in [Diamond Trust Bank Kenya ltd V Invesco Assurance Co. Ltd & another](#) (2021) eKLR on the extent to which a party may amend its pleadings with leave of the court as regards absence of undue delay, inconsistent cause of action, no vested interest or accrued legal right is affected and without injustice to the other side
20. Counsel urged the court to find and hold that leave was not sought to amend the claim.



21. The decision in *Nyamodi Ochieng Nyamongo V Kenya Posts & Tele-Communications Corporation* (2005) eKLR was cited to demonstrate that only minor amendments could be sought orally.
22. As to whether the amended claim was a new suit, counsel wondered how the Claimant could allege that a suit filed on 26th August, 2017 to challenge a termination of employment on 1st May, 2014 could have been filed within time and amendments were part of the continuing injury.
23. Counsel relied on the provisions of Order 1 Rule 10 and Order 8 Rule 3 of the *Civil Procedure Rules*, 2010 on the joining of the 2nd Respondent which the court had not sanctioned.
24. Counsel submitted that the three years within which to enforce the claim lapsed on 1st May, 2017.
25. That the claim for non-payment of salary was new.
26. Reliance was also made on the sentiments of the Court of Appeal in *G4S Security Services (K) Ltd V Joseph Kamau & 468 others* (2018) eKLR on the accrual date of a cause of action in employment matters to urge that the Claimant's cause of action became statute barred on 1st May, 2017.
27. Counsel urged the court to find that the amended claim was a new cause.
28. As to whether the 2nd Respondent was sued out of time, counsel submitted that since she was not party to the original suit, any claim against her became statute barred on 1st May, 2017 and the amended claim was statutorily barred.
29. On the status of the entire suit, counsel submitted that the Claimant's suit offended Section 90 of the *Employment Act*, 2007 and the court had no jurisdiction to resuscitate it and the Respondent's leave to amend its response could not do so either as both claims maintain the same date of accrual of the cause of action.
30. According to counsel, the issues raised were points of law as enunciated in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696.
31. Counsel urged that the two Preliminary Objections disposed of the Claimant's suit in its entirety.

Respondent's submissions

32. Counsel addressed four issues touching on whether the Preliminary Objection had been overtaken by events, raises a pure point of law, amended claim was statute barred and/or violated Order 8 Rule 3 of the Civil Procedure Rules and whether it was in the interest of justice that the Preliminary Objection be dismissed.
33. According to counsel, the preliminary Objection was an afterthought since it was filed 3 months after the response was filed and was vexatious, frivolous and scandalous and did not raise a pure point of law as laid down in Mukisa's case (Supra).
34. Sentiments of the court in *Oraro V Mbaja* (2005) 1 KLR 141 were cited to reinforce the submission that the Preliminary Objection dealt with disputed facts and it was necessary to amend the claim.
35. That the amendment to the claim was procedural and not time barred as Section 90 of the *Employment Act* was defeated when the suit was filed in August 2017 and the running of time stopped.
36. Counsel submitted that the amendment did not violate Order 8 Rule 3 of the *Civil Procedure Rules*, 2010.



37. Reliance was made on Rule 14 (6) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* to underline the fact that the oral application made in court on 6th March, 2023 sufficed.
38. Counsel further submitted that the Claimant's case raised triable issues as held in *Job Kilach V Nation Media Group Ltd & others* (2015) eKLR on employment, gross salary, termination, eviction, deduction of Kshs8,500/= and underpayment and the Claimant could suffer irreparable damage if the issues were not addressed.
39. Counsel urged that it was in the interest of justice that the Preliminary Objection be dismissed as it was a technicality under Article 159 of *the Constitution* of Kenya, 2010 and the Respondent stood to suffer no prejudice if the suit proceeded to hearing.

Determination

40. The issues for determination are;
 - i. Whether the Claimant had leave to amend the memorandum of claim.
 - ii. Whether the Respondent's Preliminary Objections dated 4th May, 2023 and 14th September, 2023 were competent.
 - iii. Whether the Claimant's suit as initially framed and/or as amended is statute barred.
41. As to the amendments effected by the Claimant, although the Respondent/Applicant avers and asserts that the Claimant had not sought leave to amend the claim, the record reveals a different picture as the Claimant relied on the Respondent counsel's leave to amend the response pursuant to the application dated 22nd February, 2023.
42. Although initially the Claimant's counsel opposed the proposal, he subsequently agreed on condition that he was granted leave to amend the claim accordingly, and the Respondent's counsel had no objection.
43. The court, as a consequence granted the Claimant's counsel leave to amend the claim as necessary in response to the Respondent's amendment and the application dated 22nd February, 2023 was granted and the amendments took place.
44. Contrary to the Respondent's counsel's submission that the Claimant's counsel ought to have disclosed the nature of the intended amendments, the Claimant's counsel could not have done so as he was unaware of the nature of the amendments the Respondent intended to make to the response.
45. It is puzzlingly for the Respondent to aver and submit that the Claimant had no leave to amend the claim as the record shows that the court granted leave on 6th March, 2023.
46. Noteworthy, the *Employment and Labour Relations Court (Procedure) Rules, 2016* do not require a formal application as submitted by the Respondent's counsel, the nature of the amendment notwithstanding.
47. The proviso to Rule 14(6) of the *Rules* provides that;

“Provided that after the close of pleadings, the party may only amend pleadings with the leave of the court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.”



48. The sentiments of the court in *Nyamodi Ochieng Nyamongo's case (Supra)* are inapplicable in light of the foregoing provision.
49. Undoubtedly, the Claimant had leave of the court to amend the memorandum of claim contrary to the Respondent's averments and submissions.
50. Relatedly, the court is not persuaded that introduction of a new prayer by the Claimant constituted a new suit or an inconsistent cause of action.
51. As to whether the objections by the Respondent meet the threshold of a Preliminary Objection, parties have adopted contrasting positions with the Claimant's counsel submitting that the same objections addressed disputed facts and as such did not meet the threshold in the *Mukisa Biscuits Manufacturing Co. Ltd* case (*Supra*).
52. It requires no belabouring that the threshold of a Preliminary Objection was enunciated by the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (Supra)* where Law JA stated;
- “So far as I am aware, a Preliminary Objection consists of a pure 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 submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration . . .”
53. The court expressed similar sentiments in *John Musakali V Speaker County Assembly of Bungoma & 4 others* (2015) eKLR.
54. As correctly submitted by the Claimant's counsel, a Preliminary Objection cannot deal with disputed facts as held by Ojwang J. (as he then was) in *Oraro V Mbaja* (*Supra*) cited by counsel.
55. In the instant case, the Respondent's objections implicates two of the three examples provided by Law JA in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (Supra)*.
56. The gravamen of the Preliminary Objections is that the Claimant's suit as framed on 26th August, 2017 and filed on 4th October, 2017 and as amended on 16th March, 2023 was unsustainable against the provisions of Section 90 of the *Employment Act*, 2007.
57. While the Preliminary Objection dated 4th May, 2023 focuses on the sustainability of the prayer inserted by the amendment, namely underpayment, the objection dated 14th September, 2023 questions the sustainability of the entire suit.
58. For these reasons, the court is satisfied that the two objections on record meet the threshold of a Preliminary Objection for the simple reason that if an action is statute barred, then the court would have no jurisdiction to hear and determine the suit.
59. Finally, as to whether the Claimant's suit is statute barred, the court proceeds as follows;
60. Contrary to the Claimant's deposition that the limitation period for an employment contract is 6 years, the provisions of Section 90 of the *Employment Act*, 2007 are unambiguous that it is 3 years.
61. Needless to gainsay, the provisions of the *Limitation of Actions Act*, applicable before the *Employment Act*, 2007 are no longer applicable to contracts of employment.



62. Section 90 of the *Employment Act*, 2007 is categorical that;

“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 cessation thereof.”

63. Although the Claimant equally averred that the injury complained of was continuing, the factual basis of the averment was neither established nor demonstrated.

64. As the Claimant’s cause of action is based on an employment contract, the action ought to have been instituted within 3 years from the date the cause of action arose or accrued, which is invariably the date of dismissal or termination of employment.

65. Fortunately, both the original and amended memorandum of claim are emphatic that the Claimant’s employment was terminated on 1st May, 2014. The attached witness statement has a similar date.

66. Guided by the Court of Appeal decision in *G4S Security Services (K) Ltd V Joseph Kamau & 468 others* (*Supra*) cited by the Respondent’s counsel, the Claimant’s cause of action accrued on 1st May, 2014 and since the claim was filed on 4th October, 2017, by simple arithmetic, the three (3) year period lapsed on 1st May, 2017 and the Claimant’s action became statute barred and ought not to have been filed. The court so finds and holds.

67. Unfortunately, Section 90 of the *Employment Act*, 2007 has no provision for leave to file a suit out of time

68. Having found that the original memorandum of claim was filed out of time, any subsequent amendment is also statute barred as it’s substratum was statute barred.

69. The Claimant’s action was statute barred ab initio and the court has no jurisdiction to hear and determine it.

70. The Respondent’s Preliminary Objections dated 4th May, 2023 and 14th September, 2023 are merited and the suit is struck out on account of being statute barred.

71. There shall be no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF OCTOBER 2023

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

