



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1942 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

BONIFACE KARAU.....CLAIMANT

VERSUS

FIRST COMMUNITY BANK.....1ST RESPONDENT

TAKAFUL INSURANCE OF AFRICA2ND RESPONDENT/OBJECTOR

RULING NO. 2

1. By a notice of preliminary objection dated 9th July 2021, the 2nd Respondent objects to its joinder to the proceedings herein on the following grounds –

(1) *TAKE NOTICE that the 2nd Respondent hereby raises a Preliminary Objection to this suit and prays for the case against it to be struck out with costs on the ground that the suit against it is time barred under Section 90 of Employment Act. This is because the cause of action arose on or around August 2015 and the 2nd Respondent was then enjoined in the suit and an Amended Claim was filed on 1st April 2021. Having been enjoined in the suit after the limitation period, the suit against the 2nd Respondent is incompetent and ought to be struck out.*

(2) *FURTHER TAKE NOTICE that the 2nd Respondent hereby raises raising a Preliminary Objection to this suit and prays for the case against it to be struck out on the ground that the suit between the Claimant and the 2nd Respondent is not a dispute contemplated under Section 12(1)(a) to (j) of the Employment and Labour Relations Court Act 2011 and this Honourable Court therefore lacks jurisdiction to entertain the dispute.*

2. In its submissions in support of the preliminary objection dated 22nd August 2021, the 2nd Respondent states that it was enjoined to the proceedings herein vide amended memorandum of claim filed on 1st April 2021. That the claim was initially instituted by memorandum of claim dated 30th October 2015.

3. It is the 2nd Respondent's submission that its joinder offends Section 90 of the Employment Act which provides for a limitation period of three years.

4. It is the submission of the 2nd Respondent that the cause of action arose on one of two dates, either on the date of the Claimant's termination which is 7th August 2015, or 9 months after termination during which period it is alleged that the 2nd Respondent should have been making loan repayments on the Claimant's behalf.

5. The 2nd Respondent contends that its joinder to this suit at this stage (on 1st April 2021) is equivalent to the 2nd Respondent being sued for the first time on that date. That the joinder was done too late in the day when the suit against the 2nd Respondent is already time barred. That a party enjoined to a suit after the suit has already been filed does not lose defences such as limitation of actions. That, a Plaintiff or Claimant cannot escape limitation of actions by enjoining a party in later stages of a dispute.

6. The 2nd Respondent relies on the decision of Visram J. (as he then was) in **Fredrick Waweru & Another v Peter Ngure Kimingi [2007] eKLR** where the Court held that

“This appeal raises an important issue of law and procedure. The issue here is not just one of the amendment of plaint, and the circumstances in which it can be done. Rather, the issue is one of substitution of a party, through an amendment application, long after the limitation period to commence the action has expired. In other words, subjecting a party to litigation some 15 years after

the cause of action against that party expired, through an application to “amend” the Plaintiff. Can that be done?”

7. The 2nd Respondent further relies on the case of **Peres Atieno v Moses Angura Omoro [1985] eKLR** where the Court held as follows –

“The position with regard to the effect of the Limitation of Actions Act where a party is added is now so well established that it requires little comment. Mr. Gitau referred to many cases on the point some dating a long way back but I do not intend to cite them. I prefer to cite the latest decision of this court and in which reference is made to an English decision which in turn refers to, or cites some of the cases cited before me.”

“The number of cases that have been reported dealing with applications to amend proceedings by adding a new party are many. The position now seems to be well established. Where the application is granted the new party will not be prejudiced. Any defence that is open to him at the time the application is granted is available to him as if proceedings were first instituted against him at that time. To put it another way, the Act may be relied on as a defence if the period has expired. It would appear from the cases that I have found, and there are many, that time is calculated up to when the proceedings are instituted; in the case of an added party time continues to run until the amendment adding him as a defendant is ordered.”

*A very helpful case, and one which one might well have anticipated being opened to the court by the counsel for the defence, is **Lipton’s Cash Registers and Business Equipment Ltd v Hugin (G B) Ltd and others [1982] 1 ALL E R 595**. In it a very thorough review, if I may respectfully say so, of a great number of cases over the years is made. In it, it was held, inter alia.*

“(3) Accordingly the appeal would be allowed and the orders made in May and June giving leave to amend the writ by adding the third and fourth defendants would be restored, subject to the adding of the new defendants being treated as operative only from the date when the amendment was made, ie 16th June, 1978.”

In his judgment His Honour Judge Hawser said that the amending order would be treated as if there had been a fresh writ issued on the date the orders were made.”

8. The 2nd Respondent submits that time continues to run from the date a cause of action accrues until the addition or substitution of a party and such addition/substitution does not have retrospective effect. That time has been running since the accrual of the cause of action on 7th August 2015 or alternatively 9 months after 7th August 2015 and since the filing of the suit. Limitation of actions 3 year period has caught up with the Plaintiff as regards addition/substitution of a further Respondent.

9. The Claimant opposed the notice of preliminary objection and filed its submissions dated 20th October 2021 in which it posits that the cause of action arose nine months after the termination of the Claimant by letter dated 7th August 2015 as this is the time the 1st Respondent’s obligations under the policy of insurance would arise. That the cause of action against the 2nd Respondent therefore arose on 7th May 2016 and would therefore lapse on 7th May 2019.

10. It is the submission of the Claimant that the defence of limitation of actions was available to the 2nd Respondent as early as 7th May 2019. That the defence of limitation is therefore *res judicata* since it was not raised before the ruling of 23rd April 2020. That the principle of *res judicata* bars a party from raising points of attack and defence which were available in the first instance.

11. It is further the submission of the Claimant that the 2nd Respondent did not appeal against the decision of this Court dated 23rd April 2020 wherein the Court directed that it be formally enjoined as a party to the suit. The Claimant submits that the Court is therefore *functus officio* in so far as the issue is concerned.

12. On the second ground in the preliminary objection the Claimant submits that it is a replica of the objections raised by the 2nd Respondent on 5th December 2016, and which has already been determined by the Court and that the Court found it was necessary to join it as a party to the suit. That the said ruling was not challenged through an appeal. That the second ground of objection is therefore also *res judicata*.

13. The Claimant relies on the decision in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** where the Court of Appeal held:

*“There is not one case cited to show that an application in a suit once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our Civil Procedure Act caters for.*

*...But we need not rely entirely on the Indian Authorities. Here at home in the case of **Mburu Kinyua Vs Gachini Tuti (1978) K.L.R. 69** the majority of this court held that a second application to set aside a judgment entered *ex-parte* would be *res-judicata* when the fact upon which it was based were known to the appellants.*

...Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they

have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

14. On whether the claim against the 2nd Respondent is time barred, the Claimant submits that he filed the Notice of Motion dated 13th October 2016 and named the 2nd Respondent as an Interested Party. The 2nd Respondent filed a replying affidavit on 8th December 2016. That the Application dated 13th October 2016 was a civil suit, action and/proceeding against the 2nd Respondent. That the application thus was a suit against the 2nd Respondent as recognized by law. That the objection anchored under Section 90 aforesaid therefore cannot arise.

15. It is further the Claimant's submission that the Court has powers to extend limitation period in special circumstances as was held in the case of **James Ochieng' Oduol T/A Ochieng Oduol & Co. Advocates v Richard Kuloba [2008] eKLR** where the Court stated as follows:

"It is quite clear from decided cases that a trial court has power to allow amendments of a plaint disclosing no cause of action (See MOTOKOV V. AUTO GARAGE LTD. AND ANOTHER [1971] EA. 353. In special circumstances amendment of a plaint may be allowed, notwithstanding that the effect will be to defeat a defence of limitation (BARCLAYS BANK D.C.O. VS. SHAMSUDIN [1973] E.A. 451). However, such amendments can only be allowed where peculiar circumstances are present."

16. The Claimant submits that the circumstances of this case are special and call for the extension of the time for amendment of the pleadings to bring the 2nd Respondent on board as a Respondent since it was aware since 2016 that the Claimant has a claim against it.

17. It is further the Claimant's submission that the 2nd Respondent participated in the application dated 23rd April 2020 being the application for joinder. That the 2nd Respondent thus waived his right to plead limitation. For emphasis the Claimant relied on the decision in **748 Air Services Limited v Theuri Munyi [2017] eKLR** where the Court of Appeal stated as follows:

"Waiver is an intentional relinquishment or abandonment of a known right or privilege. In the case of Banning vs Wright (1972) 2 All ER 987, at page 998 the House of Lords stated thus:-

"The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver – waiver by conduct".

18. The Claimant also relied on the case of **Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd [2007] eKLR** where the Court stated thus:

"A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right."

19. It is further the submission of the Claimant that the charge of his property at LR NO. RUIRU/KIU BLOCK 3/2343 to the 1st Respondent created a continuing security which means that until the Claimant clears the facility in full and until the security is discharged, the cause of action created under the continuing security would not lapse. For emphasis the Claimant relies on the Court of Appeal decision in **Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation [2019] eKLR** where the Court stated as follows:

"We find that the Judge in upholding this position rightfully upheld the 2nd, 3rd and 4th defendants' defence on statutory limitation against the counterclaim. The 1st appellant faced no such luck. It is trite law that as long as a contract is tied to a legal charge there is a continuing security; until the debt is paid and until the security is discharged, none of the parties can claim a cause of action based on a charge to be time barred. A cause of action under a continuing security never dies or lapses.

20. The Claimant avers that the 2nd Respondent by raising the defence of limitation period is attempting to defeat the very purpose of the insurance cover which it agreed to provide. That if the court finds merit in the Preliminary Objection and is allowed, the court will have allowed the 2nd Respondent who had through acquiescence agreed to be party to this suit plead a limitation period. Consequently, the Claimant will be left exposed *ad infinitum* to pay for the facility for which the 2nd Respondent agreed to provide an insurance policy. This will cause injustice and disproportionality. That for purposes of ensuring substantive justice, the limitation period ought to be deemed to have been extended by the court orders dated 20th April 2020 and 25th January 2021 if the same is found to have lapsed.

21. The 1st Respondent informed the Court that it did not intend to participate in the preliminary objection.

Analysis and Determination

22. Having considered the submissions in support of and against the preliminary objection, it is my view that the issue for determination is whether the joinder of the 2nd Respondent as a party to this suit is time barred under Section 90 of the Employment Act and whether the dispute against the 2nd Respondent is a suit contemplated under Section 12(2) of the Employment Act.

23. Section 90 of the Employment Act provides as follows –

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.

24. Further Section 12(1) of the Employment Act provides as follows:

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

- (a) disputes relating to or arising out of employment between an employer and an employee;**
- (b) disputes between an employer and a trade union;**
- (c) disputes between an employers' organisation and a trade union's organisation;**
- (d) disputes between trade unions;**
- (e) disputes between employer organisations;**
- (f) disputes between an employers' organisation and a trade union;**
- (g) disputes between a trade union and a member thereof;**
- (h) disputes between an employer's organisation or a federation and a member thereof;**
- (i) disputes concerning the registration and election of trade union officials; and**
- (j) disputes relating to the registration and enforcement of collective agreements.**

25. The issue whether the dispute between the Claimant and the 2nd Respondent is a dispute contemplated under Section 12(1)(a-j) of the Employment Act was raised by the 2nd Respondent in a preliminary objection dated 5th December 2016 and this Court exhaustively determined the same in the ruling dated and delivered on 23rd April 2020. I thus agree with the Claimant that the issue is *res judicata* and cannot therefore be subject of a second preliminary objection or any other or further determination by this Court.

26. On the issue whether the suit against the 2nd Respondent is time barred, the Court would have to consider the objective of the law of limitation of actions.

27. In the case of **Haron Onyancha v National Police Service Commission & another [2017] eKLR** the Court considered the effects of a claim being statute barred and held thus –

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

28. In the instant case, the 2nd Respondent has been a party to this suit since it was enjoined to the suit as an Interested Party pursuant to an application by the Claimant dated 13th October 2016. The liability of the 2nd Respondent has not changed by the amendment of the suit so that it becomes a 2nd Respondent instead of an Interested Party as previously enjoined. In the ruling of this Court dated 23rd April 2020, it made a finding that –

“As the Interested Party has already defended itself in respect of the application, it will not be prejudiced by being formally joined to the suit. I however grant the applicant limited leave of 14 days within which it may file an application to join Takaful Insurance of Africa as a party to the suit.”

29. This position still remains the same. There is no new cause of action introduced by the joinder of the Interested Party to this suit either as Interested Party, or as 2nd Respondent. The facts and prayers in the claim still remain substantially as filed with only the capacity of the 2nd Respondent changing from Interested Party to 2nd Respondent.

30. I find that the law of Limitation of Actions as set out in Section 90 of the Employment Act is not applicable to the 2nd Respondent who has been a party to this suit in the capacity of an Interested Party. I further find no new cause of action arises by the joinder of the 2nd Respondent.

31. For these reasons, I find no merit in the notice of preliminary objection dated 9th July 2021 and dismiss it with costs to the Claimant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE