



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1456 OF 2016**

(Before Hon. Justice Ocharo Kebira)

**LAWRENCE GACHAU KIHU ..... CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF NAIROBI.....RESPONDENT**

**RULING**

1. The claimant herein filed a statement of claim against the respondent, seeking for the following reliefs and orders:
  - a. Compensation for the period he stayed out of employment due to premature retirement amounting to two (2) years.
  - b. Payment of medallion after serving the council for 29 years.
  - c. Compensation of Kshs. 1,507 off duty days.
  - d. An order that the respondent pays the claimant general damages.
  - e. Interest from the dates payments were due at commercial rates and at court rates from the date of judgment.
  - f. Costs of the suit.
2. Upon being served with summons to enter appearance, the respondent did, and filed a response to the claim on the 29<sup>th</sup> September 2016 together with a notice of preliminary objection dated 19<sup>th</sup> September 2016. The crux of the objection being that by dint of the provisions of section 90 of the Employment Act, 2007, the claim was time barred.
3. On the 2<sup>nd</sup> December 2021, when this matter came up before this court for hearing, it was directed that the preliminary objection be canvassed first, and that the same be canvassed by way of written submissions. This court gave the parties timelines within which they were to file the submissions. The respondent obliged. The claimant didn't. This ruling shall be without the benefit of considering the claimant's submissions, therefore.
4. In her written submissions, counsel for the respondent proposes two issues for determination on the preliminary objection thus:
  - a. Whether the preliminary objection meets the set threshold.
  - b. Whether the suit is time barred by dint of section 90 of the Employment Act.
5. On the 1<sup>st</sup> issue counsel submitted that the issue raised in the preliminary objection is purely on a point of law based on the provisions of a statute. To express that the preliminary objection raised meets the legal requirements, the case of **Mathew Kamau Mwaura vs Permanent Secretary Office of the President Provincial Administration & 2 others [2018] eKLR** was cited.
6. On the second issue counsel submitted that the cause of action relating to this matter arose on the 31<sup>st</sup> December 2001. Therefore, the matter ought to have been filed by 31<sup>st</sup> December 2004. The claim herein was filed after 16 years, therefore not in accord with the provisions of section 90 of Employment Act. To buttress this argument the holding in **Mathew Kamanu Mwaura -vs- Permanent**

Secretary Office of the President Provincial Administration & 2 others [2018] eKLR was cited, thus:

“Section 90 of the Act now regulates limitation of time in Employment contracts to three years.... Section 4 (1) of the Limitation of Actions Act is not applicable and therefore the claimant cannot be heard to argue that the limitation was six years.”

**Determination**

7. As rightly put by counsel for the respondent, there are only two issues that present themselves for determination, namely:

- a. Whether the preliminary objection is properly taken.
- b. Whether the claimant’s claim herein is time barred by dint of the provisions of section 90 of the Employment Act.

8. As to what constitutes a properly taken preliminary objection Law J.A. in the case of **Mukisa Biscuit Manufacturing Co. Limited vs West End Distributor Limited [1960] E.A. 696** expressed himself, thus:

“..... 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.

Sir Charles Newbold P. added;

“A preliminary objection is in the nature of what used to be a demur. 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 an exercise of judicial discretion.”

9. No doubt, what the respondent has raised is a pure point of law anchored on a specific provision of statute. It is neither a point premised on facts which shall require ascertainment by taking evidence, nor a mixture of law and fact. The preliminary objection is properly taken therefore.

10. Section 90 of the Employment Act provides:

“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 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 whereof:

11. It is worth noting that the coming into effect of the Employment Act, 2007 and therefore the foretasted provision, had a twin effect. First it ousted the applicability of section 4 (1) of the Limitations of Actions Act on civil suits or proceedings premised on or arising from the Employment Act, or a contract of service in general. Second, unlike for actions of contract, tort, and certain other actions contemplated under section 4(1) of the Limitation of Actions Act, the provision reduced the limitation of time from 6 (six) years to 3 (three years) for the matters stipulated therein. In this view I am fortified by the holding in the case of **Ndirangu vs Henkel Chemicals E.A. Limited [2013] eKLR.**”

12. This court is cognizant of the fact that the enactment of the Employment Act, 2007, came in with expansive rights and protection in favour of employees, rights and protection which are constitutionally and equity spirited. However, I should point out that it was not the intention of the legislature that the Act goes into resuscitating matters that collapsed by operation of the law, (limitation of time).

13. This act complained of (premature retirement), as can be discerned from the claimant’s statement of claim paragraph 10, took place on the 31<sup>st</sup> December 2001. The claim herein was filed on the 20<sup>th</sup> July 2016, a period of more than 15 1/2 years after the act. I have no doubt in my mind that the claim herein was filed out of the statutory period. It is a fit candidate for dismissal. It is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2022**

**OCHARO KEBIRA**

**JUDGE**

In Presence of:

..... for the Claimant.

..... for the Respondent.