



**Kazungu v Navistat Telematics Ltd (Cause E067 of 2021)
[2022] KEELRC 1648 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1648 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E067 OF 2021**

**AK NZEI, J
JUNE 20, 2022**

BETWEEN

BENSON CHOGA KAZUNGU CLAIMANT

AND

NAVISTAT TELEMATICS LTD RESPONDENT

RULING

1. The suit herein was instituted by the Claimant vide a statement of claim dated July 13, 2021 and filed in this Court on the same date. In the statement of claim, the Claimant alleges unfair and unlawful termination of his employment by the Respondent and pleads, inter-alia:-
 - a) that the Claimant was employed by the Respondent as an Accountant in the Respondent's Mombasa office on April 1, 2015.
 - b) that sometimes in 2018, the Claimant was informed by Walter Mbindyo, the Respondent's Chief Executive Officer, that he should only report to work when the Respondent company instructed him to do so.
 - c) that the Respondent did not pay the Claimant for the months of April, May, June and July 2018 and has not paid him any salary for the subsequent months.
 - d) that towards the end of July 2018, the Claimant reported the matter to Mombasa Labour Office, upon which the Respondent promised to resolve the Claimant's complaint once it clarified some issues which it did not specify.
 - e) that on August 17, 2018, the Claimant was arrested and charged in Shanzu Law Courts with the offence of stealing by servant vide the said Court's Criminal Case No. 1190 of 2018.



- f) that on June 24, 2021, the charge against the Claimant was withdrawn under Section 87(a) of the Criminal Procedure Code without any witness being called to testify in support of the charge.
 - g) that during the time that it took for the Claimant to be discharged, the Respondent did not allow the Claimant to report to work, assign him any duties or pay him his salary.
 - h) that the Respondent has not served the Claimant with any letter to notify him that his employment has been terminated.
 - i) that the Respondent's conduct amounts to constructive dismissal of the Claimant from his employment with the Respondent.
 - j) that the Respondent has not issued the Claimant with a Certificate of Service.
2. One of the reliefs sought by the Claimant is a declaration that the Respondent's acts in regard to the Claimant's employment amount to constructive dismissal of the Claimant from his employment with the Respondent, and that the same is unfair and/or unlawful.
 3. The Claimant pleaded to alleged acts of the Respondent which allegedly commenced in May 2018 and escalated to the Claimant's arrest and arraignment before a Criminal Court on August 17, 2018, before the criminal case against him was subsequently withdrawn in June 2021.
 4. The Claimant further pleaded that he has never received a letter terminating his employment, and has not received his salary from April 2018, and was not assigned duties even after he was discharged from the criminal case.
 5. The Claimant has not pleaded any specific date as being the date when the alleged constructive dismissal took effect. He has invited the Court to make a finding that the Respondent's acts amount to constructive dismissal of the Claimant.
 6. On October 6, 2021, the Respondent filed a statement of defence dated 23rd September 2021 and pleaded, inter-alia, that the Respondent effectively terminated the services of the Claimant on the 7th of May 2018 vide a termination letter dated 7th May 2018.
 7. On September 8, 2021, the Respondent filed a Notice of Preliminary Objection dated 6th September 2021 and sought to have the Claimant's suit struck out on grounds:
 - a) that the claim is statute bared, as it offends Section 90 of the [Employment Act](#), 2007.
 - b) that the suit is incompetent and an abuse of the Court process.
 - c) that the suit should be struck out with costs to the Respondent.
 8. In view of the pleadings filed by both the Claimant and the Respondent, the Court will have to take evidence in order to determine the following issues, among others:-
 - a) whether the Claimant's employment was terminated by the Respondent and if so, when the termination was done.
 - b) if the Claimant's employment was never terminated by the Respondent as pleaded by the Respondent, whether the Respondent's acts alluded to by the Claimant amount to constructive dismissal, and when such constructive dismissal took effect.



9. It was held as follows in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited* [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 the suit.”

10. A Preliminary Objection can only be taken where what is involved is a pure point of law. In a situation where what is involved is a conflict or clash of facts, a trial must be conducted, witnesses must be called, testimonies must be given and evidence

11. adduced for assessment by the trial court; and determination of the case on merits.

12. The issue of whether or not the claimant’s claim is statute- barred pursuant to Section 90 of the *Employment Act* can only be determined upon assessment of evidence given in a full trial.

13. In the Mukisa Biscuits case (supra) Sir Charles Newbold stated as follows:-

“...a preliminary objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was argued on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion confuse the issue. The improper practice should stop.”

14. In the present case, the point raised in the preliminary objection, though seemingly a point of law, is not a pure point of law. It is a point that will need to be proved by presentation of evidence. Once an otherwise point of law is clouded with matters of fact, it ceases to be a point of law. Such is the point raised by the Respondent in the present case.

15. Consequently, and having considered rival submissions filed by Counsel for both parties, I find no merit in the preliminary objection dated 6th September 2021. The same is dismissed with no order as to costs.

16. The suit will be mentioned in Court in 20th June 2022 for purposes of taking pre-trial directions.

17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF MAY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant



..... for Respondent

