



**Ouma v Cempack Solutions Limited & another (Cause
46 of 2016) [2022] KEELRC 1591 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1591 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 46 OF 2016
AN MWAURE, J
JUNE 2, 2022**

BETWEEN

ALFRED OYARE OUMA CLAIMANT

AND

CEMPACK SOLUTIONS LIMITED 1ST RESPONDENT

EAST AFRICA FOUNDRY LTD 2ND RESPONDENT

RULING

1. The Claimant instituted this claim on the 7th /1/2016 claiming unlawful redundancy and non-payment of redundancy benefits by the Respondents. The Claimant says he was employed by the 2nd Respondent on the 8th May 1995 as a moulding machine operator at a monthly salary which rose to ksh 7,035/= per month.
2. He says that there were letters of transfers of his services in the years 2010 and 2015 to sister Companies of the 2nd Respondent. His services were terminated by the letter dated 2/11/ 2015 from the 1st Respondent, a sister company of the 2nd Respondent. The Claimant faults the termination and non-payment of the benefits.
3. The 2nd Respondent entered an appearance through the firm of Kimathi Wanjohi Muli. It then filed a Notice of Preliminary Objection dated 14th February 2022 which comes out as follows;

That the suit against the 2nd Respondent herein is statute barred by virtue of section 90 of the *Employment Act*.
4. The Claimant filed a replying affidavit dated 21st March 2022 where he says that he worked for the 2nd Respondent from the year 1995 and in the year 2010 he was supposedly transferred to work for a Company by the name Tantalite holdings Limited which he says was a sister company of the 2nd



respondent. Nothing however, changed on the ground as he continued working at the same premises of the 2nd Respondent and was being paid salary by the personnel manager of the 2nd Respondent.

5. In a similar fashion on 15th May 2015, the 1st Respondent which is a sister company took over his employment but he continued to work at the same premise/ go down of the 2nd Respondent whose personnel Manager continued to pay his salary. The Notice of Preliminary Objection was canvassed by way of written submissions.

2nd Respondent's Written Submissions

6. The 2nd Respondent says that the Claimant was employed by the 2nd Respondent on 8th May 1995 and declared redundant on 31st December 2009 and subsequently instituted this suit on the 19th January 2016. Under section 90 of the *Employment Act* 2007, employment disputes have to be instituted within a period of three (3) years next after the employment contract has been terminated.
7. The Claimant instituted this claim against the 1st and the 2nd Respondent on the 7th January 2016, which is more than 6 years after the termination of employment as per the 2nd Respondent's assertion. Accordingly, no claim can lie against the 2nd Respondent as the Court lacks jurisdiction to entertain this claim as the same is statute barred by dint of section 90 of the *Employment Act* 2007.
8. The Respondent cites the case of *G4S Security Services (k) Limited versus Joseph Kamau and 468 others* (2018) eKLR where it is argued the Court of Appeal observed that
"As stated in the renowned case of Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd 1969 EA 696 "Preliminary objection consists of a pure point of law which has been pleaded, or which arises by implication out of the pleadings and which if argued as 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"
9. The 2nd Respondent submits that its objection is based on section 90 of the *Employment Act* 2007 which stipulates that no civil action or proceedings based or arising out of the Act or a contract of service in general shall lie or be instituted unless it is commenced within 3 years after the act, neglect, or default complained or in the case of continuing injury or damage within 12 months next after the cessation thereof.
10. The Respondent further confirmed that in a claim arising from termination of employment, the cause of action accrues on the date of termination, as communicated to the employee. In this case the 2nd Respondent's declaration of redundancy was cause of action and time therefore began to run from the date the declaration was made, being 31st December 2012.
11. The Respondent says that it is now well settled that section 90 of the Act leaves no room for extension of time. The Case of *Beatrice Kabai Adagala versus Postal Corporation of Kenya* 2015 eKLR was cited in support of this proposition. The Respondent submitted that the Court have nothing more to do except to uphold the 2nd Respondent's Preliminary objection and declare the claimant's claim filed on 7th January 2016 as incompetent on account of limitation of time.

Claimant's Written Submissions

12. The Claimant submits that the question before this Court is one that arises out of the Preliminary Objection raised by the 2nd Respondent. The Claimant says that the 2nd Respondent never issued to him any termination letter. The personnel manager of the 2nd Respondent continued to pay the Claimant



his usual salaries while he worked at his usual station. It was on the 2nd December 2015 that the 1st Respondent terminated his services citing low operations.

13. The Claimant submits that when he filed a claim at this juncture the 2nd respondent /applicant claimed that he was a stranger to the claimant. The claimant avers that all this period he worked for the various companies the 2nd Defendant/Applicant have never refused to pay his dues.
14. The Claimant proceeded to file his claim against the 1st and the 2nd Respondent in the year 2016. The 2nd Respondent communicated to him by their action that they had dismissed him from employment without him being given any dismissal letter. The filing of the claim is therefore clearly within the time stipulated under Section 90 of the Act as the limitation would expire in 2018. The Claimant quoted the authority of *Attorney General and Another versus Andrew Maina Gitinji and Another* 2016 eKLR for the proposition that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination.

Determination

15. The Court has carefully considered the preliminary objection by the 2nd respondent and the claimant response together with the rival written submissions by the respective parties and renders itself as follows;
16. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd* (1969) EA 696 to mean: - “So far as I am aware, 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”.
17. Further, Sir Charles Newbold, JA stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.
18. In the case of *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the Court held that:- “When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
19. In *Avtar Singh Bhamra and Another versus Oriental Commercial Bank Ltd* Kisumu HCC No 53 of 2004. “A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
20. The import of the foreshadowed authority of Avtar Singh Bhamra (supra) is that the pleadings so filed by the parties are definitive in the determination as to the merit of a point of preliminary objection raised.
21. The 2nd Respondent contends that under section 90 of the *Employment Act* 2007, employment disputes have to be instituted within a period of three (3) years next after the employment contract



has been terminated. The Claimant instituted the claim against the 2nd Respondent on the 7th January 2016 which is more than 6 years after termination of employment. The Respondent says that the court accordingly lacks jurisdiction to entertain the claim.

22. In the statement of claim filed by the claimant, he says under paragraph 4 that he was first employed verbally by the 2nd Respondent as a moulding machine operator on the 8th /5/1995 all the way upto 15/1/2010 when a sister company namely Tantalite holdings ltd served the claimant with appointment letter. He says this Company is working alongside the 2nd Respondent in one Godown with the same job. Later on, another company, the 1st Respondent, still working alongside the 2nd Respondent gave him a transfer letter and transferred the Claimant's services to it.
23. In my view, what the claimant at the outset appears to be saying is that irrespective of the various letters relating to his employment, he in reality still offered his services to all the Respondents jointly upto termination in the year 2015. And he can therefore be said to be within the stipulated time when the claim was filed in the year 2016.
24. He expounds this in the replying affidavit at paragraphs 6 and 8 where he says that the 2nd Respondent personnel manager continued to pay his salary and that he worked in the same Godown of the 2nd Respondent after the take overs of the years 2010 and 2015.
25. It follows from the foregoing that it is in contention when the Claimant can be said to have left the employment of the 2nd Respondent so as to bring into play the provisions of section 90 of the Employment Act 2007 on the limitation period. The applicability of the said section on the time the claimant left employment of the 2nd Respondent can only be ascertained upon listening to the facts at the hearing of the claim and not by looking at the pleadings simpliciter.
26. The Respondents as provided in the employment Act 2007 Section 9 (2) as the employer have the mandate to give a contact to their employees and also to keep their records. The Respondents did not provide the Court with records of when they employed the Claimant and when and how they terminated his employment. It is not in the court's records therefore when the claimant was employed by the 2nd respondent and when he was terminated and under what circumstances his termination was effected.
27. In the absence of such records it becomes difficult to ascertain if the claim was filed out of time or not. The only record in court is the termination letter addressed to the claimant dated 2nd November 2015 and written by the 1st respondent. The court would rather the case goes for full hearing and all these issues can be determined during the delivery of the judgement and with full submissions by the respective parties.
28. The upshot of the foregoing analysis is that the 2nd Respondent's Preliminary Objection dated the 14th February 2022 is not merited at this point and the same is dismissed entirely with costs.

Orders Accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 2ND DAY OF JUNE, 2022.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE

