



REPUBLIC OF KENYA



KENYA LAW
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**Wambua v Emco Billets & Steel Ltd (Cause 1088 of 2015)
[2022] KEELRC 3843 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3843 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1088 OF 2015**

JK GAKERI, J

JULY 27, 2022

BETWEEN

EDWARD MUIA WAMBUA CLAIMANT

AND

EMCO BILLETS & STEEL LTD RESPONDENT

RULING

1. Before the court for determination is the respondent's preliminary objection dated September 27, 2021 seeking the striking out of the suit for being statute barred as ordained by the provisions of section 90 of the *Employment Act*, 2007.
2. The claimant did not respond to the preliminary objection dated September 27, 2021.
3. There is no dispute that the claimant commenced this suit by way of a memorandum of claim dated June 22, 2015 and filed on June 24, 2015 alleging unfair termination of employment by the respondent on April 12, 2012 and prays for various reliefs including house allowance, overtime pay, leave days, service leave and 12 month's compensation.
4. The memorandum of claim does not set out the circumstances in which the respondent's directors, supervisor and/or agents unlawfully terminated the claimant's employment having been employed in November, 2009.
5. This is the suit the respondent is desirous of having struck out for having been filed after the 3 years limitation period.
6. While the claimant was present in court on August 2, 2019 when a hearing date was issued, he did not participate in subsequent mentions notwithstanding service of mention notice.



Respondent's Submissions

7. The respondent submits that the suit herein is statute barred and relies on section 90 of the *Employment Act* to buttress the submission.
8. The respondent contends that since the claimant alleges to have been unlawfully terminated from employment in April, 2012, the claim ought to have been filed by April, 2015 when the 3 years lapsed. It is the respondent's submissions that the suit herein was filed out of the time prescribed by statute.
9. The decision in *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* [2018] eKLR is relied upon to urge that the circumstances of this case and those of the instant case apply on all fours.
10. The court is urged to act accordingly and strike out the claim with costs to the respondent.

Determination

11. The first issue for determination is whether the preliminary objection dated September 27, 2021 meets the threshold enunciated in *Mukisa Biscuits Manufacturing Co Ltd V West End Distributors Ltd* (1969) EA 696 where Law, J stated as follows;

“ . . . 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 . . . ”

12. On his part, Sir Charles Newbold P stated as follows;

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

13. The court is bound by these sentiments.
14. Granted that the preliminary objection by the respondent is based on section 90 of the *Employment Act*, 2007, that the claimant's right to sue the respondent had lapsed, the court is satisfied that the preliminary objection meets the test in the *Mukisa* case (supra).
15. The next and final issue for determination is whether the preliminary objection by the respondent is merited.
16. It is the respondent's case that since the claimant did not commence proceedings against the respondent within 3 years, the suit is statute bared.
17. Section 90 of the *Employment Act*, 2007 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, neglects or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”



18. There is no dispute that the claimant's employment was terminated in April, 2012, the month of the year on which this preliminary objection turns.
19. If the claimant's employment was terminated by the respondent in April, 2012 as he alleges in the memorandum of claim, a fact not disputed by the respondent, it requires no belabouring and as the respondent submits, the claim ought to have instituted in April, 2015 but was not.
20. The court is guided by the sentiments of the court in *G4S Security Services (K) Ltd v Joseph Kamau & 468 others* (supra) as follows;

“In the circumstances of this case, we are satisfied that 464 respondents having conceded that their employment was terminated in the years 2008, 2009 and 2010 and filed their claim on January 22, 2014, that they filed their claims outside the limitation period of 3 years. The Employment and Labour Relations Courts therefore erred in holding that it had jurisdiction to hear and determine claims that were filed outside the statutory limitation period.

Accordingly, this appeal has merit and we allow it with costs with effect that the appellants preliminary objection dated November 11, 2014 is upheld and the claims by 464 respondents filed in the years 2008, 2009 and 2010 are hereby struck out as they are statute barred.”

21. Having found that the claimant did not commence this action within the three years statutorily defined limitation period, the action became statute barred and the claimant could not institute the claim in June, 2015 when he purported to do so.
22. Accordingly, the preliminary objection dated September 27, 2015 is merited and the suit herein is struck out for being statute barred.
23. Parties to bear own costs.
24. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF JULY 2022

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 March 15, 2020 and subsequent directions of April 21, 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

