



**Magati v Kiatu Co-operative Savings and Credit Society Limited (Cause
818 of 2018) [2022] KEELRC 1389 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1389 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 818 OF 2018**

**JK GAKERI, J
JULY 5, 2022**

BETWEEN

JOHN OGACHI MAGATI CLAIMANT

AND

**KIATU CO-OPERATIVE SAVINGS AND CREDIT SOCIETY
LIMITED RESPONDENT**

RULING

1. Before me for determination is a preliminary objection dated July 30, 2018 filed on August 2, 2018. The respondent's counsel urges that the suit herein is ex-facie incompetent as the same is statutorily time barred.
2. The claimant filed his grounds of opposition on June 14, 2019 almost a year later stating that the application is capricious void of merit scandalous, frivolous, vexatious and an abuse of court process and an obstruction of justice.
3. The Claimant contends that the grounds relied upon by the respondent are unnecessary, controversial and baseless.
4. It is the claimant's case that the respondent instituted criminal proceedings against the claimant accusing him of theft but the claimant was eventually acquitted on March 18, 2015. That the running of time commenced after the acquittal and the time to file an equitable claim for having lapses on March 18, 2021.
5. When the matter came up for hearing on May 10, 2022, the Claimant's counsel was absent. Although the Respondent's counsel applied to have the suit dismissed with costs for non-attendance, which date the Claimant's counsel had fixed and served upon the Respondent, the court fixed the hearing of the preliminary objection on June 2, 2022 and directed the Respondent's counsel to serve hearing notice.



On June 2, 2022, Mr. Nyando held brief for Mr. Owaga for the Claimant's counsel and Mr. Kabue appeared for the Respondent.

6. While Mr. Kabue wanted to prosecute the preliminary objection orally, Mr. Nyando was not ready and proposed that the same be disposed of by use of written submissions.
7. As a middle-ground, the Court directed the parties to file a one and half page written submissions within 7 days of the directions and a ruling was reserved for July 5, 2022.

Claimant's Submissions

8. The file did not file submissions.

Analysis and determination

9. The issues for determination are;
 - (i) Whether the preliminary objection meets the legal threshold;
 - (ii) Whether the suit herein is statute barred.
10. As to whether the preliminary objection meets the legal threshold the home part is the articulation by the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696 and as explained in regions of decision such as *Charles Onchari Ogoti v Safaricom Limited* [2020] eKLR, *Hassan Ali Jobo & another v Sulciman Said Shabal and 2 others* [2014] eKLR and *Nibin Properties Ltd v Singh Kalsi and another* [1995] eKLR.
11. In the Mukisa Biscuits Manufacturing Co. Ltd case (supra), Law JA stated:

“So far as I am aware, a preliminary objection consists of a pure point of law which had 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 objection on 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 to the dispute to arbitration.”
12. Newbold P. had this to say

“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 of the facts has 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 issues. This improper practice should stop.”
13. Since a preliminary objection is a threshold question, it must be determined as soon as it is raised. But more fundamentally, if a preliminary objection is merited, its effect is in many instances to dispose the suit without affording the parties the opportunity to prosecute their cases. While caution is essential, the Court is duty bound to protect its processes from abuse.
14. In the instant case since the Respondent/Applicant raises the question of limitation, the court is satisfied that the preliminary objection meets the test in the Mukisa Biscuits case.
15. As to whether the action or suit herein is statute barred, the starting point are the averments by the parties and in particular the Claimant as well as the documents on record.



16. The Claimant avers that he was employed by the Respondent' in 1995 and performed his duties diligently as a Manager/Accountant until 2008 when his employment was unlawfully terminated by the Respondent. His monthly salary was Kshs.42,682/- as at the date of termination.
17. That he was painfully put through a trial for 8 years.
18. That he sought a loan from the employer sometime in 2008 but the request was declined and he was accused of misappropriation.
19. In its response dated August 2, 2018, the Respondent denies liability and avers that the claim is ex-facie incompetent and fatally defective as it is time barred as the Claimant resigned from employment on June 3, 2008 by a written notice of even date signed by hand and dated. The judgement in Criminal Case No. 944 of 2008 Republic v John Magati Ogachi confirms the date of resignation of the Claimant as June 3, 2008.
20. The letter was handed over to PW3 with instructions to hand it over to PW1, the Factory Manager of Bata Shoe Company Ltd where the Sacco drew its membership.
21. Strangely, the Claimant makes no allegations of when and how his employment was terminated by the Respondent.
22. There are no allegations of what transpired after the Claimant was acquitted on March 18, 2015.
23. According to the Claimant's counsel time started running on March 18, 2015 when the Claimant was acquitted in the criminal case.
24. What begs the question is whether the Claimant was still an employee of the Respondent' from June 3, 2008 when he actually resigned from the Respondent's employment to March 18, 2015.
25. The resignation letter cites "personal reasons and circumstances" and the resignation was "with immediate effect" and also states in part "Kindly offset the required notice period against my final dues".
26. Section 90 of the *Employment Act* 2007 provides
Notwithstanding the provisions of section 4 (1) of the Limitation of Action 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 hereof.
27. Disconcertingly, even assuming that the Claimant's employment was terminated March 18, 2015 as the Claimant's counsel is persuading the Court to find, which would be overstretching imagination, the three years prescribed by the Act lapsed in March 2018. The suit was filed on May 29, 2018.
28. Contrary to the Claimant's counsel assertions that the preliminary objection is capricious, void of merit, scandalous, frivolous, vexatious and an abuse of Court process and an obstruction of justice, this is the case with regard to the Claimants case.
29. The Court is guided by the sentiments in *Trust Bank Limited v HS Amin & Company Ltd & another* [2000] KLR 164} as follows;

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bonafides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which



states immaterial matters and raises irrelevant issues which may involve expense which will prejudice the fair trial of the action.”

30. For the foregoing reasons, it is the finding of the Court that the suit herein is unnecessary and an abuse of the Court process. The Claimant was aware that it had no legs to stand on. It is groundless, if not fanciful.
31. The court is satisfied that the preliminary objection dated July 30, 2008 is merit and the suit herein is struck out for being statute barred.
32. There shall be no order as to costs.
33. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH 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 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.

DR. JACOB GAKERI

JUDGE

