



**Maiyo v Kenya Power & Lighting Company Limited (Cause
107 of 2021) [2022] KEELRC 1344 (KLR) (1 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1344 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 107 OF 2021**

**B ONGAYA, J
JULY 1, 2022**

BETWEEN

DAVID MAIYO CLAIMANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

RULING

1. The claimants filed the statement of claim on December 30, 2021 through Munyaga Githaiga Advocates LLP. The claimant pleaded that he had served the respondent with loyalty, dutifully and diligently until March 8, 2017, when he was unlawfully, un-procedurally and unfairly terminated from employment vide a dismissal letter dated March 8, 2017. That he pursued the internal appeal processes which culminated into a decision communicated vide a letter dated November 17, 2020 upholding the dismissal. That the decision was unlawful and irregular.
2. The respondent filed on February 17, 2022 a notice of preliminary objection through Irene Walala Advocate on a point of law to the entire suit and the claimant's statement of claim on the following grounds:
 1. The claim is defective and is an abuse of court process.
 2. The claimant's employment was terminated on March 8, 2017. Any course of action intended to be asserted herein is accordingly barred by dint of the provision of section 90 of the *Employment Act* and section 3(2) of the *Public Authorities Limitations Act*.
 3. This honourable court has neither jurisdiction nor discretion to extend time for the filing of any claims predicated upon contracts of employment under the *Employment Act* or any other applicable law
 4. The claim therefore lacks merit and should be dismissed with costs to the respondent.



3. The 1st issue is whether the preliminary objection is proper and whether it passes the test set out in law. It is submitted for claimant that the notice as filed does not meet the threshold of a preliminary objection as it does not raise purely points of law. It is submitted that test was settled in *Mukisa Biscuit Manufacturing Co Ltd –vs- West End Distributors Ltd* (1969) EA 696 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 at Page 701 proceeded 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 ..."

4. It is further submitted that evidence was required to determine when the dismissal actually arose.
5. However, the Court has considered the claimant's pleadings and finds that there is no dispute that the claimant was dismissed on March 8, 2017. He appealed and the administrative appeal was decided by letter dated November 17, 2020 as per the statement of claim. The facts on the date of dismissal and decision on administrative appeal are not in dispute at all.
6. The 2nd issue is whether the suit is time barred. The respondent submits that per section 90 of *Employment Act*, 2007, the suit is time barred. The respondent further submits that the claimant was terminated from employment on March 8, 2017. Any cause of action intended to be asserted herein is accordingly time barred by dint of the provisions of Section 90 of the *Employment Act* which provides:

"Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, 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 3 years after the act, neglect or default complained or in the case of continuing injury or damage within 12 months next after cessation thereof."

7. It is further submitted that the claimant's rights to sue for the alleged unlawful, un-procedural and unfair termination lapsed on March 8, 2020 (3 years from the date of termination) and he therefore lacks capacity to agitate any cause against the respondent. For this reason, it is the respondent's submission that the claim is an abuse of the court process and the court has no jurisdiction to entertain the same.
8. The respondent cites the case of *James Mugeria Igati –vs- Public Service Commission* (2014) eKLR where the court held that:

"the accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination of employment as stated in the letter communicating the same."



9. The respondent further submits that the claimant seeks to rely on the cause of action arising on November 17, 2020 when the respondent issued its appeal decision to dismiss the claimant. In the case of *Hilarion Mwabolo –vs- Kenya Commercial Bank* (2013) eKLR the Court held that:
- "the fact that an employee whose employment has been terminated seeks a review or an appeal or makes demand thereof does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal or a response on the demand is made."
10. It is further submitted for the respondent that time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the *Constitution* or any other law. The respondent cites the case of *Rift Valley Railways (Kenya) Ltd –vs- Hawkins Wagunza Musonye and another* (2016) eKLR where the Court held as follows:
- "It was incumbent upon the respondents to bear in mind the provisions of section 90 of the *Employment Act* even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service."
11. The respondent relies on the decision in *Attorney General and Another v Andrew Main Gitinji and another* (2016) eKLR where the Court of Appeal found that a claim brought outside the limitation period in section 90 of the *Employment Act* was time barred, thus:
- "by expressly inserting section 90, the intention of Parliament, in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word 'shall'.
- Having found that the cause of action arose on February 2, 2010 and that the claim was filed on June 16, 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at February 1, 2013, and I so hold."
12. The respondent further submits that the cause of action arose on March 8, 2017 when the claimant was dismissed from employment. Any claim filed contrary to the provisions of section 90 of the Act and a period after 3 years is time barred.
13. Therefore, the claim is utterly out of time and the respondent prays that the matter be dismissed.
14. It is submitted for the claimant that it would be premature for the claimant to file the suit until the administrative appeal had been determined and conveyed per the letter dated November 17, 2020. It is submitted for the claimant that the pending administrative process operated to postpone judicial consideration of the matter by the Court.
15. The court has considered the submissions and returns that as submitted for the respondent, the pending administrative appeal proceedings did not operate as to delay accrual of the cause of action and did not stop the running of the mandatory time of limitation under section 90 of the *Employment Act*, 2007. It appears that employees are advised that where there are pending internal proceedings challenging a dismissal or other alternative dispute resolution proceedings, a suit must be filed within the time of limitation under section 90 of the Act and stay of suit proceedings may be obtained as necessary pending the outcome of the internal or alternative proceedings. The preliminary objection is therefore upheld. The court has considered the otherwise long time taken to determine the



administrative appeal that contributed to the claimant's predicament and each party to bear own costs of the suit.

16. In conclusion, the preliminary objection is hereby upheld and each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 1ST JULY, 2022.

BYRAM ONGAYA

JUDGE

