



Ng'ang'a v Kenya National Examination Council & 2 others (Petition E197 of 2021) [2022] KEELRC 4054 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4054 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E197 OF 2021
SC RUTTO, J
SEPTEMBER 30, 2022**

BETWEEN

MONICA NG'ENDO NG'ANG'A PETITIONER

AND

KENYA NATIONAL EXAMINATION COUNCIL 1ST RESPONDENT

**KENYA UNIVERSITIES AND COLLEGES CENTRAL PLACEMENT
SERVICE 2ND RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The 1st and 3rd respondents have raised a preliminary objection dated January 21, 2022.
2. The preliminary objection is premised on the following grounds: -
 - a. The Petitioner's suit is time barred contrary to section 3(2) of the *Public Authority Limitations Act*, cap 39.
 - b. The Petition is also in contravention of section 90 of the *Employment Act*, 20027.
 - c. The cause of action, that is the dismissal of the Petitioner took place on the November 30, 2017 vide the 1st respondent's letter and the appellants never preferred any appeal against her dismissal to date.
 - d. Four years have lapsed since the course of action took place vis a vis the time of filing the petition.



- e. The honourable court therefore lacks the requisite jurisdiction to hear and determine the matter in light of the provisions of the law mentioned above.
 - f. Therefore, the petitioner's Petition as filed herein is a waste of the court's time and abuse of the due process of the law.
3. The parties agreed to canvass the preliminary objection through written submissions.

Submissions

4. In support of the preliminary objection, the 1st and 3rd respondents contend that the suit by the petitioner is time barred as the cause of action arose on November 30, 2017. That as such, 3 years 11 months, had lapsed from the date the cause of action arose and by the time the petitioner filed the suit. To support this argument, the respondents placed reliance on the provisions of section 90 of the Employment Act and case of Beatrice Kabai Adagala v Postal Corporation of Kenya (2015) eKLR.
5. It was the respondents' further submission that the Court lacks jurisdiction to determine the suit as the same is time barred. Citing the determination in Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v Embakasi Girls Secondary School, Nairobi ELRC MISC APPL NO 93 of 2017, the respondents further argued that the court lacks jurisdiction to extend time and hear the Petition.
6. The respondents further submitted that the petitioner is circumventing the Employment Act by relying on constitutional provisions having realised that the matter is statute barred. On this issue, the court was invited to consider the decisions in the case of Josephat Ndirangu v Henkel Chemicals (EA) Ltd (2013) eKLR and Francis Atonya Ateka v the Kenya Police Service & another (2017) eKLR. The respondents further argued that there are no constitutional issues in the Petition and that the petitioner is merely using the same as a means of escaping the time limit. To this end, the respondents urged the Court to strike out the Petition with costs.
7. Relying on the case of Mukisa Biscuit Manufacturing Co Ltd v West end Distributors Ltd (1969) EA 696, the petitioner on the other hand, submitted that the grounds raised in support of the preliminary objection does not consist of pure points of law and hence the same has been improperly raised. It was further submitted by the petitioner that a preliminary objection can only be premised on undisputed facts and must raise pure points of law. To buttress its arguments, the petitioner further cited the cases of Avtar Singh Bhara & another vs Oriental Commercial Bank HCCC No. 53 of 2004 and Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999.
8. The petitioner further submitted that the cause of action arose on 6th January, 2019 which is the date she received the letter of termination and not when it was not written. The petitioner relied on the case of Alice Njambi Mutura v Principal Secretary, Ministry of Health & another (2021) eKLR. Consequently, the petitioner urged the court to strike out the preliminary objection with costs.

Analysis and Determination

9. As per the determination in the celebrated case of Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696, "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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop." Emphasis mine



10. Essentially, for a preliminary objection to pass muster, the following elements ought to be satisfied: -
 - a. It should raise a pure point of law;
 - b. It is argued on the assumption that all the facts pleaded by the other side are correct; and
 - c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
11. Accordingly, this court must now consider whether the issues raised in the instant preliminary objection are matters of law, with the assumption that the facts as pleaded, are correct.
12. I have perused the preliminary objection as well as the petition and it is clear to me that the crux of the dispute at this juncture is in regards to the effective date of termination of the petitioner's employment. Notably, this is an issue that has been hotly contested by both parties, with the petitioner alleging that she received the letter of termination on January 6, 2019, while the same is dated November 30, 2017. She thus maintains that the cause of action arose on the date she received the said letter of termination.
13. As a matter of fact, the preliminary objection turns on the date the cause of action arose and regrettably, the same is not clear as at now. It is a question that can only be ascertained by evidence.
14. I am fortified by the determination in *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR where Ringera J (as he then was) held that: -

“What is forbidden is for counsel to take, and the court to purport to determine, a point of preliminary objection on contested facts or in the exercise of a judicial discretion.”
15. I further find guidance in the case of *Oraro v Mbaja* [2005] eKLR where Ojwang J (as he then was), reckoned thus: -

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.”
16. As it is in the instant case, the question as to whether the suit is time barred cannot be determined by merely looking at the pleadings. The court will need to undertake a factual evaluation of the evidentiary material presented, in order to determine exactly when the cause of action arose hence, whether the suit is time barred.
17. Needless to say, the preliminary objection cannot be determined without revisiting the factual issues which entails examination of evidence, thus it falls outside the threshold of what constitutes a preliminary objection.
18. For the reasons set out above, the preliminary objection dated January 21, 2022, cannot be sustained hence it is overruled with no orders as to costs.



DATED, SIGNED and DELIVERED at NAIROBI this 30th day of September 2022

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STELLA RUTTO

JUDGE

Appearance:

For the Petitioner Mr. Kiroko

For the 1st and 3rd Respondents Ms. Oyugi

For the 2nd respondent No appearance

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

3

