



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 689 OF 2019**

**CHRISTINE KALUME.....CLAIMANT/RESPONDENT**

**VERSUS**

**ACTION AFRICA HELP INTERNATIONAL.....RESPONDENT/APPLICANT**

**RULING**

1. The respondent has filed a Preliminary Objection to the suit in the following terms:

(i) The claimant's claim is time barred in so far as it relates to the cause of action that occurred between 2016 and 2019.

(ii) The claimant's rights to sue have since lapsed and she therefore lacks capacity to urge any cause of action against the Respondent.

(iii) The Memorandum of Claim dated 16/10/2019 is otherwise an abuse of **process**.

2. The parties filed written submissions and the only issue for determination is whether the suit is time barred by dint of Section 90 of the Employment Act, 2007 which provides: -

“[90] 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 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 thereof.**”

3. In terms of **Mukisa Biscuit Manufacturing Company Limited –vs- West End Distributors Limited (1969) E.A. 696.**

**“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.”

4. Furthermore as was stated by Sir Charles Nbold P in the same case-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a 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.”

5. This suit was filed on 16/10/2019.

6. As per paragraph 14 of the Statement of Claim the claimant avers that: -

“In line with the letter dated 18<sup>th</sup> August, 2016 titled **“Redundancy”** she was unfairly terminated on 30<sup>th</sup> September, 2016 from her employment by the Respondent on the grounds of redundancy.”

7. This is the cause of action in this suit.

8. The respondent in the Memorandum of Response has pleaded as follows in paragraphs 5 and 6: -

**[5] The contents of paragraphs 8, 9, 10, 11, 12, 13 and 14 are denied and the claimant put to strict proof thereof.**

**[6] The respondent denies knowledge of the content in paragraph 15 and maintains that it did not terminate the claimant's employment on account of redundancy."**

9. From the foregoing the time and manner of termination of employment of the claimant is in dispute.

10. This Court cannot therefore presume that all the facts pleaded by the claimant as to the time and manner of termination are correct.

11. The respondent has not stated with specificity, in the Preliminary Objection dated 12/11/2019, why it states the suit by the claimant is time barred.

12. The lack of clarity in its Preliminary Objection is exacerbated by the denial by the respondent in the Statement of response of the particulars of termination raised by the claimant in paragraphs 5 and 6 of the statement of claim aforesaid.

13. It is beyond per adventure that the manner and time of termination of employment of the claimant being subject of dispute may only be determined upon hearing of the suit on the merits.

14. Accordingly, the Preliminary Objection raised by the respondent is not a pure point of Law and same is left for determination upon full hearing of the suit.

15. Costs in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances:-**

M/s Baire for Respondent/Objector

Mr. Lumallas for Claimant

Ekale – Court Assistant