REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

APPEAL NO.11 OF 2020

NAKURU WAR MEMORIAL HOSPITAL.....APPELLANT

VERSUS

PENVILIA CHEPKEMOI.....RESPONDENT

JUDGEMENT

1. The Appellant herein being dissatisfied with the decision of Hon. J.B Kalo issued on 7th July, 2020 in Nakuru Chief Magistrates Court CMEL Cause Number 25 of 2018 preferred this Appeal by way of Memorandum of Appeal dated 10th August, 2020 and filed through the firm of Aminga,Opiyo,Masese and Company Advocates. The appeal is based on the following grounds;-

> **1) That The Learned Magistrate erred in fact and in law in arriving at the decision against the weight of the evidence on record.**
>
> **2) The learned magistrate failed to consider and or ignored the appellant's submissions on record and hence came to a wrong conclusion in deciding the claim by the respondent herein.**
>
> **3) The learned magistrate erred in law and in fact by failing to appreciate and comprehend the submissions and documentary evidence produced by the Appellant.**
>
> **4) The learned magistrate erred overly in handling of the preliminary objection and the submissions tendered thus failing to appreciate the provisions of the law and more so effect on jurisdiction.**

It prays for Orders That;

> **a) This Honourable Court do set aside the entire lower court ruling/ or interfere with the said ruling dated 7th July, 2020 to the extent that it meets the ends of Justice.**

Brief facts

2. The Respondent/ claimant in the lower court matter filed her memorandum of claim on 23rd July, 2018 following her suspension from the Appellant's employment on 12th May, 2014 which was occasioned by her arrest on 27th April, 2014 as a result of an alleged theft of Kshs. 149, 700/-.Charges were preferred against her in conjunction with another employee, Ruth Awuor Ayamo which they were acquitted from the said charges on 9th June, 2017.

3. According to the letter of suspension, the suspension was to continue till the criminal case was heard and determined. However, when she was acquitted, the Appellant herein failed and or refused to reinstate her back to employment. That the Respondent construed the actions of the Appellant to mean that she had been constructively dismissed from employment leading to the filing of the Memorandum of claim on the 23rd July, 2018.

4. That on 30th August, 2018, the Appellant raised a preliminary objection alleging that the suit is statute time- barred and against section 90 of the Employment Act having been filed after 3 years from the date the cause of action arose.

5. The trial court gave directions on the preliminary objection for the parties to dispose of the same by way of written submissions. The Court heard the preliminary objection and delivered it's ruling on 7th July, 2020 directing that the issues raised in the Preliminary objection be raised in the main suit so as to be determined in the judgment and to save time the said matter being a 2018 matter. Aggrieved by the said findings the Appellant herein preferred this Appeal.

6. This appeal proceeded by way of written submissions with the Respondent filing her submissions on 8th March, 2021 and the Appellant filing on 21st May, 2021.

Appellant's submissions.

7. The Appellant submitted that the Memorandum of claim was filed on 23rd July, 2018 and it immediately raised a preliminary objection on 30th August, 2018 as such the preliminary objection was raised in the earliest opportunity which ought to have decided on its merit and relied on the case of **Teachers service commission –v- Jane Awino Owoko[2020] eklr.**

8. Counsel argued that the suspension subject of the trial court case was effected on 12th May, 2014 and the claimant filed her suit on 20th August, 2018 more than the three (3) years required for limitations of action of employment matters.

9. It was submitted that the trial court erred in directing that the preliminary objection raised be determined together with the main suit and contends that the mode of procedure was an anomaly as the normal practice is that preliminary objection once raised have to dealt with first. In this he cited Justice Kiage's dictum in the case of **Nicholas Kiprop Arap Korir salat-v- IEBC & 6 others[2013] eklr.**

10. Counsel argued that if a suit is barred by limitation of time then there will be no need to probe evidence as such save on the court time as was held in the case of **Mapema Holdings limited –v- Thika Dairies Limited & 4 others [2020] eklr.**

11. In conclusion the appellant urged this Court to uphold the Preliminary objection filed arguing that section 90 of the employment Act was provided for mainly to protect both employer and employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action has arisen when memories have faded, documents lost, witnesses dead or untraceable. He buttressed his argument by citing the court of Appeal case of **Attorney General & another –v- Andrew Maina Githinji and another [2016] eklr.**

Respondent's Submissions

12. The respondent on the other had submitted that the Appellant suspended her from employment by a letter dated 12th May, 2014. That from the said suspension letter it was expressly stated that the suspension was to run till the criminal case was heard and determined, which case was determined on 9th June,2017 and the Appellant failed to reinstate the respondent prompting the respondent to demand to be reinstated within 30 days from the date of the demand letter of 11th June, 2017. Accordingly, counsel argued that the cause of action arose 30 days after the said Demand letter was send as such the suit is properly before Court and is not time –barred as argued by the Appellant.

13. It was further submitted that there is a dispute as to the day the cause of action arose, which dispute awaits to be ascertained by the Court therefore removing the preliminary objection from the purview of grounds contemplated in the celebrated case of **Mukhisa Biscuit**s. He further reinforced his arguments by citing the case of **Joash Mongare Akunga-v- National Oil Corporation of Kenya [2018] eklr**.

14. Counsel further cited the case of **Insight management consultants limited –v- Benard Keago Basweti [2019] eklr** where the court held that;

> **"Limitation of action was taken up by the appellant as a preliminary point and the intention of the objection was to have the suit struck out or dismissed for being time barred. I have been treated to the same invitation before. The law as I understand is that the limitation of actions is a matter for determination at the trial; it cannot be dealt with in a summary manner or as a preliminary objection. The court should therefore formulate limitation as one of the issue for determination and decide it on evidence adduced thereto."**

15. He thus argued that the trial court was correct in finding that the issue of limitation raised in the preliminary objection ought to be determined in the main hearing.

16. Counsel concluded by submitting that the law as established dictates that limitation of action matter are not dealt summarily but that evidence need to be tendered for both parties and urged this Court to dismiss the Appeal.

17. I have examined the averments and submissions of the parties. The main contention by the appellant is that the trial magistrate declined to hear the preliminary objection raised on limitation and directed that the preliminary objection and the main claim be handled together.

18. In considering the preliminary objection raised on limitation, I refer to the celebrated case of **Mukisa Biscuit** cited herein where it was held as follows;-

> ***"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration…."***

19. The gist of this decision is that a preliminary objection should be raised where matters can be resolved through points of law and not facts.

20. In the instant case, there is contention on when the cause of action arose. To resolve this issue evidence would need to be called to enable the trial court determine the same.

21. In the circumstances if factual evidence is needed to resolve the preliminary objection then it goes beyond the ambit of a preliminary objection and against the principals enunciated in the **Mukisa Biscuit case**.

22. I find therefore that the trial magistrate did not error in declining to hear the preliminary objection at the onset and therefore this appeal lacks merit.

23. It is dismissed accordingly with costs to the claimant respondent.

24. I remit this file back to the trial court for hearing of the main claim.

DATED AND DELIVERED IN OPEN COURT THIS 22ND DAY OF JUNE, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kamau for Appellant – present

Kipkoech for respondent

Court Assistants – Fred and Wanyoike