



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E010 OF 2021

(Before D.K.N.Marete)

KENYA UNION OF PRE-PRIMARY EDUCATION TEACHERS.....CLAIMANT

VERSUS

SECRETARY, THARAKA NITHI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

CHIEF OFFICER, DEPARTMENT OF EDUCATION THARAKA NITHI COUNTY GOVERNMENT...2ND RESPONDENT

CHIEF OFFICER, FINANCE, THARAKA NITHI COUNTY GOVERNMENT.....3RD RESPONDENT

COUNTY SECRETARY, THARAKA NITHI COUNTY GOVERNMENT.....4TH RESPONDENT

RULING

This is an application by way of preliminary objection dated 9th March, 2021 and comes out as follows;

1. The Claimant's suit offends Section 90 of the Employment Act, 2007 Laws of Kenya, and it is thus statute-time barred.
2. The Claimant's suit is incompetent, fatally defective and an abuse of court process.

The Claimant/Respondent in her written submissions dated 10th May, 2021 opposes the preliminary objection and prays that this be dismissed with costs.

The Respondents/Applicants' in their written submissions dated 10th May 2021 submits as follows;

- a.. That the Claimant's members were employed by the 3rd Respondent vide contracts of service dated 21st March 2016.
- b.. The contracts of service provided for a fixed term of two (2) years from 1st January 2016 to 30th December 2017 with no provision for its renewal or extension.
- c. The contracts lapsed automatically by effluxion of time on 30th December 2017.
- d. The Claimant filed a suit in the Chief Magistrate's Court at Meru in ELRC No.E004 of 2020 withdrew it on 4th March 2021 for want of jurisdiction.

The Respondent's case and submissions comes out thus,

5. The claim herein is instituted in violation of Section 90 of the Employment Act, 2007 which provides that:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions 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 thereof.

6. The cardinal principle of law as enunciated under Section 90 of the Employment Act, 2007 is that proceedings arising out of the Employment act or contract of services should be commenced within three (3) years after the cause of action.

7. It's evident that the Claimant's members' contracts of service lapsed automatically by effluxion of time in 2017. Any action related to that contract of service was supposed to be filed within three years. That is to say by 30th December 2020. Assuming that the Claimant's members worked for the 3rd Respondent for two more months as alleged, the Claimant would still be required to institute the herein suit by 28th February 2021. This position is fortified by the decision of the Court of Appeal in the case of Attorney General & Another v Andrew Maina Githinji and another (2016) eKLR where in upholding a Preliminary Objection based on Section 90 of the Employment Act, the Court held as follows;

“...The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 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 1st February 2013, and I so hold.”

8. ...Section 90 of the Employment Act, 2007 is couched in mandatory terms. This means that there is no room for this Honourable Court to exercise discretion by way of an order of enlargement of time. The Claimant's failure to institute the herein claim within the time is not a mere technicality. The effect of limitation goes to the root of the case, to the cause of action and compromises the Claimant's members right to pursue their claim, if any.

They therefore pray that the preliminary objection be allowed and the suit be dismissed with costs.

The Claimant/Respondent rebuffs the preliminary objection virulently. It is her submission that the grievants were employed vide the letter of appointment dated 28th February, 2018 which was effective on 1st March 2018. This was to run for two years ending on 28th February, 2021 at which time this suit was filed and in place.

The preliminary objection is therefore baseless, ungrounded and an abuse of the process of court.

The Claimant/Respondent also cites default of the applicant's prosecution of their preliminary objection by her refusal to adhere to this courts direction on filing of written submissions. This was occasioned by inexcusable dalliance on her part.

She in the penultimate urges and submits a case of dismissal of the preliminary objection.

Available data and evidence of the Claimant brings out the case in favour of an ouster of the preliminary objection. This is because a scrutiny of a information available brings out a case of being within the limitation period envisaged by Section 90 of the Employment Act, 2007 now complained of breach.

Again, the preliminary objection falls without the ambit of the authority of **Mukhisa Biscuits Manufacturing Company Ltd Vs West End Distributors Limited (1969) EA 696** which provides a mandatory basis that a preliminary objection must be on a pure point of law. This is;

“...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 off the suit.

The circumstances of the preliminary objection herein would entail an establishment of data and evidence to ascertain its veracity. This is not permissible, or at all.

I am therefore inclined to dismiss the preliminary objection with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2021

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Samuel Opiyo for the Claimant Union/Respondent

2. Mr.Saluny instructed by Saluny Advocates for the Respondent/Objector