



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 257 OF 2016**

**GODFREY SHIMOLI WINJILA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**RADAR LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. The suit was commenced by a Statement of Claim dated 15<sup>th</sup> February, 2016 and filed on 23<sup>rd</sup> February, 2016.
2. The cause of action is set out in paragraphs 3 to 5 of the Statement of Claim in which the claimant has pleaded that he was employed by the respondent as a security guard on 2<sup>nd</sup> July, 1998 and worked continuously until the 26<sup>th</sup> November, 2012 when his employment was terminated.
3. The claimant has attached the letter of summary dismissal dated 26<sup>th</sup> November, 2012 marked Appendix '3' to the Statement of Claim.
4. The claimant prays the Court to declare that the summary dismissal was unlawful and unfair and award maximum compensation for the unlawful dismissal equivalent to 12 months salary to the claimant.
5. The Claimant also prays for payment of terminal benefits including one month salary in lieu of notice, house allowance at 15% of the basic pay from 177 months' service, severance pay; costs and interest.
6. The respondent raised a preliminary objection filed on 6<sup>th</sup> September 2016, to the effect that the suit is time barred by dint of Section 90 of the Employment Act, No. 11 of 2007 and so the Court lacks jurisdiction to entertain the same.
7. Following the Court of Appeal decision in **Mukisa Biscuits Manufacturing Co. Limited –vs- West End Distributors Ltd. (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. 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 for arbitration.”
8. The Preliminary Objection raised here is on limitation of the suit and is a pure point of law, the facts as pleaded regarding when cause of action arose and date of filing suit not being in dispute.
9. From the said facts, the cause of action arose on 26<sup>th</sup> November, 2012, the date the claimant was summarily dismissed and the suit was filed on 23<sup>rd</sup> February, 2016 which is three (3) years and three months from the date the cause of action arose.
10. Section 90 of the Employment Act, 2007 prohibits a suit founded on a contract of Employment from being filed upon expiry of three years period. This point has been a subject of plethora of Employment and Labour

## Relations Court and Court of Appeal decisions.

11. In the case of **Muiru Mwangi Muita –vs- Green Park Water Services Limited [2016] eKLR**, Justice Radido stated as follows:-

“In my view, the Court of Appeal decision in Divecon Limited -vs- Simani (supra) is still good law and no Court has the power to extend time or grant leave to commence legal action in contractual claims outside the prescribed timelines. I can do no better than repeat the words of the Court that no Court may or shall have the right or power to entertain what cannot be done namely an action to extend such time for that bringing of the action in employment claims, the period is now 3 and not 6 years. Sections 27 and 28 of the Limitation of Actions Act do not grant the Courts any power to extend time in case of action arising out of contracts.”

12. In the present case, no application for extension of time in which to file the suit was filed by the claimant so the issue of extension of time does not arise.

13. The suit is therefore time barred by dint of the limitation placed on suits based on employment contracts by Section 90 of the Employment Act, 2007.

14. The Court finds that it has no jurisdiction to entertain this suit and the same is struck out for want of jurisdiction to hear and determine the suit.

15. There will be no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 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:-**

Mr. Kittony for Respondent/Objector

Diro and Company Advocates for the claimant

Ekale – Court Assistant 2023721808