



**REPUBLIC OF KENYA**

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

**CAUSE NO. E6557 OF 2020**

**PHILIP KIPRONO MARITIM.....CLAIMANT**

**VERSUS**

**KENYATTA NATIONAL HOSPITAL.....RESPONDENT**

**RULING**

1. The respondent filed a Notice of Preliminary Objection dated 22<sup>nd</sup> February, 2021 to wit that the claim is time barred as it offends the mandatory provisions of Section 90 of the Employment Act, 2007 in that it was filed more than 3 years from the date the cause of action arose.
2. The Memorandum of Claim dated 17<sup>th</sup> December, 2020 was filed on 22<sup>nd</sup> December, 2020.
3. From the pleadings set out in the Statement of Claim, the claimant has pleaded that he is employed by the Respondent as a Supply Chain Management Officer earning a monthly gross salary of 134,354,00.
4. That by a letter dated 12<sup>th</sup> June, 2012, the respondent surcharged the claimant, Kshs.964,415 being shortage of stocks incurred by the respondent under the supervision of the claimant.
5. That the respondent started deducting the said surcharge from the salary of the claimant in monthly instalments of Kshs.4,200. That as from June, 2012 up to December, 2020, Kshs.424,200 has been deducted from the salary of the claimant and the monthly deductions continue to-date.
6. The claimant has challenged the surcharge and subsequent deductions as arbitrary, unlawful and unfair and instituted without giving him a hearing at all.
7. The claimant prays for stoppage of the continued deductions and refund of the sums already deducted.
8. The Court on 21<sup>st</sup> December, 2020, issued a temporary injunction restraining the respondent from effecting a surcharge against the claimant pending the hearing and determination of an interlocutory application dated 23<sup>rd</sup> December, 2020 which is still pending hearing and determination.
9. The respondent having raised the Preliminary Objection it was imperative that the Court determines it first following the Principle espoused in **Mukisa Biscuit Manufacturing Co. Limited –vs- West End Distributors Limited [1969] E.A. 969**, where the Court of Appeal held:-

“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.”
10. The issue raised here falls within the definition of a Preliminary Objection that must be disposed of at the first instance to engender proper utilization of Court’s time.
11. The respondent/objector and the claimant have filed written submissions which the Court has carefully considered.
12. The facts set out in the Statement of Claim regarding the cause of action are not in dispute.

13. Section 90 of the Employment Act, 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.” (*Emphasis mine*).

14. It is not in dispute that the impugned surcharge and deduction of the sum of Kshs.964,415 which commenced in June, 2012 continues in monthly instalments todate.

15. This is a classic example of continuing injury or damages within the meaning of Section 90 of the Employment Act.

16. The said injury having not ceased, the suit is not time barred within the meaning of Section 90 of the employment Act, 2007.

17. The Preliminary Objection therefore lacks merit and is dismissed with costs in the cause.

**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. Nyachoti for the Respondent/Objector

Mr. Mzinzi for Claimant

Ekale - Court clerk