



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. E083 OF 2021

HABEL A. SHILOLI & 16 OTHERS.....APPLICANTS

VERSUS

THE PERMANENT SECRETARY,

STATE DEPARTMENT FOR PLANNING

MINISTRY OF NATIONAL TREASURY & PLANNING.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The Applicant's seek through the Notice of Motion Application dated 23rd April 2021 for the enlargement the time within which they may file their intended claim for unpaid gratuity against the Respondents. In opposing the Application, the Respondents have filed a Notice of Preliminary Objection dated 13th July 2021 raising an objection that:

i. This Honourable Court lacks jurisdiction to hear and determine matter herein as:

a. The same is statute time barred and the Court cannot extend the time;

b. To the extent that the Applicants are raising the same issue between the same parties the matters in issue in Kisumu ELRC Petition 20 of 2013 is Res Judicata;

c. The application is an abuse of the court process, the Applicants are guilty of laches and have made the application in bad faith as ignorance of law is no defence.

ii. That the application is bad in law.

2. The motion was disposed of by way of written submissions. The Respondents submit that the test to be applied in determining whether the Preliminary Objection meets the threshold is as in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** which stated that the preliminary objection raises a pure point of law, there is a demonstration that all the facts pleaded by the other side are correct, and there is no fact that needs to be ascertained. They submit that their preliminary objection is on pure points of law which once determined, can dispose of the matter. The Respondents further submit that from the Motion Application and facts relied upon by the Applicants, it is now over eight (8) years since their employment ceased and the Applicants do admit that the time for filling their suit has since been barred by the operation of Section 90 of the Employment Act, 2007. That the Applicants' application seeks to urge this Court to however enlarge that time for filling of claims arising from the act or a contract of service in general. The Respondents cites the authority of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** and the Court of Appeal case of **G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR** where the Court asserted that the claims were time barred pursuant to Section 90 of the Employment Act, and should have been filed within three years of the termination of employment. They submit that the Honourable Court has no jurisdiction to enlarge time that is clearly stipulated by an Act of Parliament and which position has been upheld in various Court decisions such as in: **Republic v Public Procurement Administrative Review Board & Another Ex parte Teachers Service Commission [2015] eKLR** where Odunga J. (as he then was) declined to extend the time limited by Law Reform Act in making an application for Judicial Review. The Respondent also relies on the case of **Bata Shoe Company (K) Ltd v Laban Chema Libabu [2013] eKLR** where the Court declined to grant leave to extend the three years limitation to file a claim and held that it could not confer jurisdiction upon itself. They cite the case of **Nicodemus Marani v Timsales Limited [2014] eKLR** where Ongaya J. stated that the Court has no power to extend the time of 3 years prescribed in section 90 of the Employment Act and entertain the suit outside the limited period. The

Respondents also rely on the case of **John Kariuki Maina v Attorney General [2021] eKLR** where the Court of Appeal held that limitation of time is a jurisdictional issue which goes to the core of the mandate of the Court to determine the matter before it. That it is a settled principle of law that where a court lacks jurisdiction, it cannot make any further step including amending or enlarging time but to down its tools. They urge this Court to thus hold that it lacks jurisdiction to determine this matter for being statute time barred, that it cannot enlarge time to determine the matter and to subsequently down its tools. The Respondent further submits that Section 7 of the Civil Procedure Act Cap 21 categorically prevents parties to litigation or anybody litigating on their behalf from reopening a matter that had been heard and determine by a court of competent jurisdiction. That the matter before Court is *res judicata* having been filed by the same Applicants against the same Respondents in **Kisumu ELRC Petition No. 20 of 2013**, and which fact is admitted by the Applicants in their pleadings before Court. The Respondents rely on the decision of the Court in the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR** where the Court reiterated that it is now very trite principle of law that parties are bound by their own pleadings. The Respondents cited the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** where the Court of Appeal explained the role of the doctrine of *res judicata* as serving the aim of bringing finality to litigation and affording parties closure. They submit that the issues raised in the application ought to have been discussed in the said Petition and if they were not discussed then the same can only be a ground for review rather than instituting a fresh suit. However, the judgment in the said Petition has never been challenged through appeal or review by the Applicants and that they should not be allowed to have a second bite at the cherry. They further submit that the principle of *res judicata* also goes to jurisdiction as a court is not seized of jurisdiction to reopen a matter that had been heard and determine by a court of competent jurisdiction, unless through appeal or review. It is the Respondents' submission that the Applicants are guilty of laches and are indolent and that justice does not assist the indolent. The Respondent argues that considering the period of time that has lapsed since their employment with the Respondents ceased, there is no reason known in law for the delay to warrant extension of time. They submit that ignorance of law can never be a defence to the Applicants and their Motion application thus must fail.

3. The Applicants are opposed to the preliminary objection. They extensively rely on the case of **Charles Onchari Ogoti v Safaricom Limited & Another [2020] eKLR** where the Court analysed the law on preliminary objections and found that the same arises by clear implication out of pleadings and if argued as a preliminary point, may dispose of the suit. The Applicants cited the case of **Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others [2014] eKLR** a decision from the Supreme Court. They submitted that secondly, a preliminary objection is argued on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion and relied on the case of **Nitin Properties Ltd v Singh Kalsi & Another [1995] eKLR**. Thirdly, a preliminary objection serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement and it is distinctly improper for a party to resort to the Preliminary Objection as a sword for winning a case otherwise destined to be resolved judicially, and on the merits. The Applicants cited the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR** in support of this proposition. The Applicants submit that a perusal of the Notice of Preliminary Objection by the Respondents will establish that the said Notice fails the test of consideration of preliminary objections as stated by the Court of Appeal and Supreme Court in the above referenced cases. The Applicants submit that on the issue of jurisdiction, the authorities cited by the Respondents are distinguishable and not applicable to the instant case before court as such judicial review suits are governed by a different Act of Parliament and are time sensitive matters. They further submit that enlargement of time is an equitable remedy calling on the Court to exercise its discretion and to permit the applicant the opportunity to be heard despite having come to court late. They relied on the case of **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 Others [2014] eKLR**, where the Supreme Court laid out the following under-lying principles that a Court should consider in exercise of such discretion:

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

4. The Applicants submit that the Respondents have deliberately failed to address any of the principles set by the Supreme Court and as such, their purported Notice of Preliminary Objection must fail. The Applicants assert that they have laid a basis for the Application to extend time as they had been misled into believing that the issue of gratuity had been adjudicated upon and determined by the Court. Contrary to this position, they clearly state in the pleadings that the matter filed in court was a Constitutional Petition at the Constitutional Court seeking a declaration that they had been discriminated. They argued that the said Court did not make any finding on the issue of gratuity but dismissed the petition on account of the Applicants not meeting the threshold of discrimination. The Applicants submit that it would be absurd to expect a Constitutional Court to award gratuity to the Applicants which remedy is an exclusive remedy for the Employment and Labour Relations Court. They urge this Court to find that the Applicants/Applicants have satisfied the principles as set by the Supreme Court and to allow them file the intended claim and that this Court has jurisdiction to entertain this matter. On the issue of the suit being *res judicata*, the Applicants submit that in essence, the doctrine implies that the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Applicants submit that the doctrine of *res judicata* is not applicable in their Application and intended Claim because the issue of gratuity was not directly or substantially in issue in the former suit which was a Constitutional Petition in a Constitutional Court relating to discrimination. The Applicants submit that the said former suit was filed at the Kisumu High Court and not ELRC Kisumu and that as the High Court does not have jurisdiction in employment and labour relations matters as under Article 165(5) of the Constitution, the said former court was not a competent court to raise issues of awarding of gratuity. Further, parties are at liberty to file pleadings before the court they feel will

determine their case subject to the law that it is not upon the Respondents to determine what court the matter ought to have been filed or the type of pleadings to file.

5. It is the Applicants' submission that even though they delayed coming to Court, they have adequately explained the delay. They urge this Court to permit them to file the claim out of time because they are retirees scattered throughout the Republic of Kenya and getting consensus on how to proceed takes time. Further, the Applicants are also not persons of means and to get the funds to instruct Counsel to file such a claim took time. The Applicants also urge the Court to dismiss the Notice of Preliminary Objection as filed by the Respondents for being incurably defective and bad in law.

6. The preliminary objection taken by the Respondents is around the issues of *res judicata* and limitation of time. The Applicants concede the motion they filed seeks extension of time. They assert the preliminary objection was not well taken. The test for a preliminary objection is as per the determination in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd** (*supra*). In that case Law JA stated:

So far as I'm aware, 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 to arbitration.

7. From a careful reading of the decision, for the preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit. It is asserted by the Respondents that there is limitation and that the issues raised herein are *res judicata*. The case relates to gratuity claims that became due in 2013. Under Section 90 of the Employment Act, limitation is set at 3 years and the claim ought to have been filed in 2016. Admittedly this was not done. The Applicants filed a Petition No. 20 of 2013 at the Kisumu ELRC Court which found that they had not met the threshold of discrimination as asserted. **Black's Law Dictionary Ninth Edition** defines *res judicata* in the context applicable here as follows:- *an affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit.* The objection taken fits in the classic mould of **Mukisa Biscuit** and to boot the suit intended to be brought on suffers from the malaise of *res judicata*. The suit would be incompetent even if the Court had the jurisdiction to extend time (which it does not). The preliminary objection taken succeeds and the motion by the Applicants is accordingly dismissed with costs to the Respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER 2021

Nzioki wa Makau

JUDGE