



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. E.001 OF 2021**

**RICHARD MOSES WAMBUGU.....CLAIMANT**

**VERSUS**

**NCBA BANK KENYA PLC.....RESPONDENT**

**RULING**

1. The respondent filed a Notice of Motion application dated 11/3/2021 seeking for an order that the suit be struck out for violating Section 90 of the Employment Act, 2007.
2. The application is supported on grounds set out on the face of the application and buttressed in the supporting affidavit of **Stephen Atenya**, respondent's Legal Counsel, the nub of which is that the claimant was evidently summarily dismissed on 27<sup>th</sup> November, 2017 and that the suit contesting the dismissal as unlawful and unfair was filed on 15<sup>th</sup> January, 2021 when the pleadings dated 27<sup>th</sup> November, 2020 were paid for and a receipt from Court obtained.
3. That the claim was therefore filed 48 days out of time in terms of Section 90 of the Employment Act, 2007 which mandates any claim arising from Employment be filed within 3 years from date the cause of action arose.
4. The application is opposed by the applicant who deposes that his advocate scanned and uploaded the claimant's pleadings on E-filing portal on 27<sup>th</sup> November, 2020 which system subsequently auto-assessed and invoiced for payment of Kshs.800,000 vide customer **Ref. No. EXMN HWCY**.
5. That on the same date, being 27<sup>th</sup> November, 2020, payment was done of the assessed costs of Kshs 800 vide Mpesa Transaction No. **OKRIXD 13QV** which was received and acknowledged by the e-portal system.
6. The claimant has also annexed the Court clerk's Mpesa transaction for the day marked "**SKN-2**." That immediately, the claimant was issued with a receipt of confirmation of payment which is annexed to the Replying Affidavit marked "**GWK 1**"
7. That the payment and the filing was thus successfully done on 27<sup>th</sup> November, 2020.
8. Counsel for the respondent filed a supplementary affidavit in which he joined issue with the deposition by the claimant stating that it is not true that the e-filing system had problems from 27<sup>th</sup> November, 2020 all the way to 15<sup>th</sup> January, 2021.
9. That paragraph 8 of the Electronic Case Management Practice Directions, 2020 requires a litigant experiencing challenges with e-filing system to apply to the Court within five (5) days of experiencing the challenge. That no such application was made by the claimant.
10. The respondent concludes that the case was thus filed in 2021 hence allocation of case number E001 of 2021. The suit was filed out of time and it be struck out.

**Determination**

11. The Court states at the outset that it is a well established principle of law as per the case of **Mukisa Biscuits Manufacturing Co. Limited –vs- West End Distributors Limited (1969) EA 696** that a preliminary objection is to be raised in the 1<sup>st</sup> instant if there are no contested facts regarding the points raised. The Court stated:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleading, and which if argued as a preliminary point may dispose of the suit.”

12. *Sir Charles Newbold elaborated the matter in the case thus:-*

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in a nature of what used to be a demurrer. It raise a **pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.**

**It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasions, confuse the issue. The improper practice should stop.”**

13. From the outset, the Court must state that a Preliminary Objection on time limitation is properly raised not by a notice of motion but by way of a notice of preliminary objection followed by Legal arguments being advanced by the parties on the point.

14. The applicant herein was quite aware that facts, the basis of the objection are not clear and straight forward as discerned from the pleadings. The matters raised are factual in nature and not pure points of law. On this basis alone, the application for striking out the suit by the respondent falls short of a proper preliminary objection and must fail.

15. Furthermore, it is apparent from the contested facts and the documentation before Court that indeed the claimant filed the case vide the E-filing system on 27<sup>th</sup> November, 2020, and was issued with a Court receipt containing the electronic lodgment of the Statement of Claim on the date.

16. E- filing is the process of electronically filing legal paper work into the Court system. As soon as the Legal document filed is received in the system, it is duly filed and becomes a Court record.

17. In terms of rule 7 (4) of Practice Directions on Electronic Case Management

**“(4) For purposes of filing a document using electronic means, a party shall-**

**(a) Log in the Judiciary web portal, as specified in the Judiciary automation guidelines.**

**(b) Sign up by completing an online registration form;**

**(c) Confirm the e-mail address and the user’s Login password and**

**(d) Receive a confirmation of registration.**

18. From a user’s perspective, the above process completes the registration process. Clearly, the claimant filed his case on 27<sup>th</sup> November, 2020 and received an electronic receipt to confirm the registration.

19. The rest of the process including allocation of a case number by the Court registrar is a Court internal process removed from the control of the claimant and cannot thus be used by third parties to the detriment of the user.

20. Considering the above, the applications lacks merit and is dismissed with costs in the cause.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 14TH DAY OF OCTOBER, 2021.**

**Mathews N. Nduma**

**Judge**

**Appearances**

Muriu Mungai & Company Advocates LLP for Respondent

Nyiha Mukoma & Com Advocates for the claimant

Ekale – Court Assistant.