



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 116 OF 2016**

**RODGERS SIMIYU INGATI.....CLAIMANT**

**VS**

**DOSHI COMPANY (HARDWARES) LIMITED.....1<sup>ST</sup> RESPONDENT**

**DOSHI ENTERPRISES LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is with respect to a Preliminary Objection raised by the Respondent by notice dated 25<sup>th</sup> January 2017.
2. The objection is based on the ground that the Claimant's claim is statute barred by dint of Section 90 of the Employment Act, 2007.
3. The Respondent states that the cause of action herein arose on 30<sup>th</sup> May 2012 and the claim ought to have been filed on or before 29<sup>th</sup> May 2015.
4. The Claimant filed Grounds of Opposition on 13<sup>th</sup> February 2017 stating:
  - a) That the cause of action arose in July 2013;
  - b) That the claim filed on 15<sup>th</sup> February 2016 is within the limitation period;
  - c) That the Respondent's Preliminary Objection is based on contested matters;
  - d) That the issue of limitation of time in this suit is a matter of evidence as opposed to law.
5. This Preliminary Objection turns on the effective date of the Claimant's separation from the Respondent's employment.
6. In his Memorandum of Claim dated 11<sup>th</sup> February 2016 and filed in court on 15<sup>th</sup> February 2016, the Claimant states that his employment was unlawfully terminated in late July 2013.
7. Conversely, in its Response dated 4<sup>th</sup> April 2016 and filed in court on 14<sup>th</sup> April 2016, the Respondent states that the Claimant deserted work on 31<sup>st</sup> May 2012.
8. It is evident therefore that the mode and date of the Claimant's exit from the Respondent's employment are contested matters of fact. As held in the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v Westend Distributors (1969) EA 696* a Preliminary Objection is one which raises a pure point of law and is argued on the assumption that all the pleaded facts are uncontested.
9. In the present case, the parties have taken divergent positions with regard to the mode and date of the Claimant's separation from the Respondent's employment. The Court will therefore need to take evidence on this crucial set of facts.
10. For this reason, the Court finds the Respondent's Preliminary Objection ill-advised and proceeds to overrule it with costs to the Claimant.
11. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY FEBRUARY 2020**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mbuya for the Claimant

Mr. Gor for the Respondent