



**REPUBLIC OF KENYA**

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

**CAUSE NO 845 OF 2017**

**WILSON WAGATHIRU MWITUMI.....CLAIMANT**

**VERSUS**

**RAFIKI MICROFINANCE BANK.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The main claim in this matter proceeded for hearing on 21<sup>st</sup> February 2019 and 16<sup>th</sup> December 2019. Thereafter, the Respondent raised a Preliminary Objection by notice dated 28<sup>th</sup> January 2020. This ruling relates to that Objection.
2. The Respondent's Objection is premised on the following grounds:
  - a) That the Court lacks jurisdiction to hear and determine the claim because it is statute barred by dint of Section 90 of the Employment Act;
  - b) That the Memorandum of Claim is incompetent for want of a verifying affidavit as required by law.
3. Because the Preliminary Objection was raised at the tail end of the trial, the Court directed the parties to submit on it as a first issue in final submissions.
4. The 1<sup>st</sup> Respondent submits that the cause of action herein arose on 19<sup>th</sup> August 2014 when the Claimant was summarily dismissed. The 1<sup>st</sup> Respondent therefore maintains that the Claimant had up until 19<sup>th</sup> August 2017 to file his claim, meaning that the current claim filed on 8<sup>th</sup> November 2017 is time barred.
5. On his part, the Claimant denies having received the letter dated 19<sup>th</sup> August 2017 and submits that the actual date of termination is a matter of fact which cannot be determined *in limine*. As held in the celebrated case of ***Mukisa Biscuit Manufacturing Co Ltd v Westend Distributors (1969) EA 696*** a preliminary objection is argued on the basis that all the pleaded facts are uncontested.
6. In its decisions in ***Hilarion Mwabolo v Kenya Commercial Bank [2013] eKLR*** and ***Benjamin Wachira Ndiithi v Public Service Commission [2014] eKLR*** this Court held that in claims arising out of termination of employment, time begins to run when the termination is communicated to the employee.
7. The Claimant denies having received any letter communicating the termination of his employment. The effective date of the termination is therefore a contested fact and no preliminary objection based on it can survive.
8. On the second limb of the Preliminary Objection being that the Claimant's Memorandum of Claim is not supported by a verifying affidavit as required by law, the 1<sup>st</sup> Respondent's contention is that because the Claimant dropped prayers (e) and (f) on malicious prosecution, then he ought to have filed a fresh verifying affidavit in support of the surviving part of the claim.
9. With much respect, I disagree. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules provides for amendment of pleadings generally. In this case, the amendment was allowed orally by consent of both parties.
10. The Court did not find any legal basis for the 1<sup>st</sup> Respondent's proposition that upon dropping the claim for malicious prosecution, the Claimant was required to file a fresh verifying affidavit.

11. On the whole, I find the Respondent's Preliminary Objection raised by notice dated 28<sup>th</sup> January 2020 not well taken and proceed to dismiss it with costs to the Claimant.

12. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY MARCH 2020**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kirui for the Claimant

Ms. Savuli for the 1<sup>st</sup> Respondent