



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 81 OF 2018

MONICA MWAGHANIA.....CLAIMANT

VS

KOROGA COUNTRY CLUB.....RESPONDENT

RULING

1. On 14th March 2018, the Claimant filed a claim against the Respondent seeking a declaration that the termination of her employment was unlawful. The Claimant further claimed unpaid salary, underpayment, leave pay, public holidays and service gratuity.
2. The Respondent filed a Reply on 14th May 2018 and thereafter raised a Preliminary Objection by notice dated 5th October 2018. This ruling relates to that objection.
3. The substance of the Respondent's Preliminary Objection is that the Claimant's claim is time barred by virtue of Section 90 of the Employment Act.
4. In its written submissions filed in court, the Respondent states that the Claimant's services were allegedly terminated on 17th December 2013 whereas the claim was instituted on 14th March 2018, more than 4 years after the cause of action allegedly accrued.
5. The Respondent further submits that the fact that the dispute had been subjected to conciliation under the Labour Relations Act did not in any way cushion the Claimant against the timelines set under Section 90 of the Employment Act.
6. As defined in the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA, 696* a preliminary objection is one which raises a pure point of law and is argued on the assumption that all pleaded facts are not in dispute.
7. While the Claimant claims that her employment was unlawfully terminated, the Respondent both in its Reply and witness statement, states that the Claimant voluntarily resigned from employment. The mode and date of the Claimant's exit from the Respondent's employment are therefore contested matters of fact upon which the Court would need to take evidence.
8. Moreover, the effect of the conciliation proceedings is a factor meriting consideration at full trial. I hold so because the terms of engagement at conciliation could very well have had an impact on limitation of time.
9. For the foregoing reasons I decline to uphold the Respondent's Preliminary Objection. The issue of limitation of time however remains live and may be raised at the trial.
10. The costs of the objection will be in the cause.
11. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties electronically, with their consent. The parties 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, the Court is guided by Article 159(2) (d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this ruling has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

No appearance for the Claimant

Mr. Mutubia for the Respondent