



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO 2196 OF 2015**

**KENNETH KIBIMIRU KIGALO.....CLAIMANT**

**VERSUS**

**MASTERMIND TOBACCO (K) LIMITED.....1<sup>ST</sup> RESPONDENT**

**NGM COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The claimant brought this suit on 10.12.2015 seeking compensation for unfair termination of his employment plus terminal benefits. The 1<sup>st</sup> respondent filed defence on 25.1.2017 denying any employment relationship with the claimant and contended that the claimant was employed by the 2<sup>nd</sup> respondent, a sister company. As result of the said defence, the claimant filed the Amended Memorandum of Claim on 25.7.2018 enjoining the 2<sup>nd</sup> respondent as a respondent in the suit.

2. In response to amended claim, the 2<sup>nd</sup> respondent filed the Notice of Preliminary Objection dated 22.7.2019 seeking for the striking out of the Amended Memorandum of Claim on the following grounds:

- a) The amended pleading was filed without the leave of the court.
- b) The cause of action against the 2<sup>nd</sup> respondent is time barred.
- c) The court lacks jurisdiction to determine the time barred claim.

3. The objection was disposed of by written submissions which were filed on 5.3.2020.

**Respondents submissions**

4. The 2<sup>nd</sup> respondent submitted that the amended pleading was filed without the leave of the court and the claim against her is statute barred and should be dismissed with costs because it was filed after the lapse of the 3 years' limitation period provided under Section 90 of the Employment Act. She contended that the cause of action arose on 19.7.2015 and the amended pleading was filed on 25.7.2018. To fortify her case, she relied on **David Nderitu Mwangi v Tusker Mattresses limited [2017] eKLR** where Ndolo J held that under section 90 of the Employment Act this court does not have jurisdiction to extend the time for filing claims under the Act.

5. She further relied on **Attorney General & Another v Andrew Githinji & Another [2016] eKLR** where the Court of Appeal held that section 90 of the Act is mandatory and justifiable because it was intended to protect both the employer and the employee from the prejudice that can be occasioned by delayed claims.

6. In view of the fact that claim against him was filed after the lapse of 3 years, the 2<sup>nd</sup> respondent urged that the court lacks jurisdiction to determine the time barred claim. She contended that the 1<sup>st</sup> respondent and her are separate legal entities capable of being sued in their individual names and a suit against her is only competent if commenced within the mandatory timelines.

**Claimant's Submissions**

7. The claimant opposed the preliminary objection and denied that his claim against the 2<sup>nd</sup> respondent is statute barred. He submitted that the respondents herein are one and the same company save that the 1<sup>st</sup> respondent was the mother company. He further submitted that the

initial suit was filed within the limitation period while the amended pleading was filed only 11 months after. According to him the objection raises factual issues which should be canvassed at the trial. Finally, he contended that the suit is properly before the court and it should be heard on the merit. She relied on **Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited [1969] EA 696** where the Court held that a Preliminary objection must be a pure point of law and it cannot be raised if evidence is required to prove it.

### **Issues for Determination and analysis**

8. There is no dispute that the claimant's employment by the respondents was terminated on 19.1.2015. There cannot be any doubt that the issues raised by the objection are pure points of law with the potential of evading the proceedings against the objector. The issues for determination arising from the preliminary objection and the rival submissions are:

- a) Whether the amended Memorandum of Claim was filed without leave of the court.
- b) Whether the suit against the 2<sup>nd</sup> respondent is statute barred.
- c) Whether the court lacks jurisdiction to determine the claim against the 2<sup>nd</sup> respondent.

### **Whether the amended claim was filed without leave**

9. The claimant did not contest the fact allegation that the amended pleading was filed without obtaining prior leave of the court. I have carefully considered the court record and found that it is true the amended Memorandum of Claim dated 11.7.2018 was filed in court on 25.7.2018 without any leave of the court. under **Rule 14 (6) of the ELRC Procedure Rules**, a party can amend his pleadings without leave of the court before service or before the close of pleadings but thereafter, leave must be obtained before amending the pleadings. Under **Rule 13(4)** Pleadings in a suit closes 14 after service of defence to the claim. In this case the defence was filed on 25.1.2017 and the suit was mentioned for pretrial conference on 18.1.2018 after the exchange of pleadings. I therefore return that the amended pleading is incompetent for being filed without leave of the court.

### **Whether the suit against the 2<sup>nd</sup> respondent is statute barred.**

10. The claim herein is founded on a contract of employment and as such it is governed by Employment Act. Section 90 of the Employment Act provides that: -

***“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap 22), no civil action or proceedings based or arising out of this Act or contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”***

11. A cause of action is an act or omission on the part of a defendant that gives right of an aggrieved person to seek remedy in court against another person and it arises from the moment the aggrieved person becomes entitled to seek remedy in court. In **Drummond Jackson v Britain Medical Association [1970] 2 WLR 688**, Pearson J defined a cause of action as follow: -

***“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”***

12. In this case, it is common ground that the cause of action arose on 19.1.2015 and the suit was filed on 10.12.2015. It is also common ground that the amended claim was filed on 25.7.2018 to enjoin the 2<sup>nd</sup> respondent. The time taken before commencing the claim against the 2<sup>nd</sup> respondent was 3 years 6 months and therefore the claim is time barred by dint of section 90 of the Employment Act.

13. Even if the claimant was to seek leave to file the amended Claim, the court would not enlarge the time for filing the time barred claim against the 2<sup>nd</sup> respondent. I gather support from **Attorney General & Another v Andrew Githinji & Another [2016] eKLR**, where the Court of Appeal expressed itself as follows concerning section 90 of the Act:

***“... the intention Parliament ... must have been to protect the both the employer and the employee from irredeemable prejudice if they have to meet claims and counterclaims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the section preemptorily limits actions by the use of the word 'shall'...”***

14. I gather more support from **David Nderitu Mwangi v Tusker Mattresses limited [2017] eKLR** where Ndolo J held that:

***“in reference to section 90 of the Employment Act, 2007, the law is that the Court has no jurisdiction to extend time for filing of claims falling under the Act...”***

### **Whether the court lacks Jurisdiction**

15. In view of the finding herein above that the suit against the 2<sup>nd</sup> respondent is time barred, it is obvious that the court has been divested of the jurisdiction to entertain the same.

**Conclusion**

16. I have found that the amended claim is incompetent for having been filed without leave of the court. I have further found that the claim against the 2<sup>nd</sup> respondent is time barred and therefore the court lacks jurisdiction to entertain the same. Consequently, the amended Memorandum of Claim is struck out for being filed without leave of the court. Each party to bear his/her own costs.

**Dated, signed and Delivered in Open Court at Nairobi this 23<sup>rd</sup> day of July 2020**

**ONESMUS N. MAKAU**

**JUDGE**