



**REPUBLIC OF KENYA**

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

**CAUSE NO. 393 OF 2017**

**JARED NYAMWEYA.....CLAIMANT/RESPONDENT**

**VERSUS**

**KENYA SEED COMPANY LIMITED.....RESPONDENT**

**RULING**

1. The Respondent /Applicant has raised preliminary objection to this suit that may be summarized as follows:-

**(a) The suit has been brought by way of a plaint and not a memorandum of Claim and is therefore fatally defective and it be struck out.**

**(b) The suit is time barred having been filed more than 3 years from the date the cause of action arose.**

2. Rule 4(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provide: -

**“A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out.....”**

3. It is manifestly clear that a suit to the Employment and Labour Relations Court ought to be brought by way of a statement of Claim but not a plaint as is the case under the Civil Procedure Rules. This rule is couched in mandatory terms and ought to be followed to the letter for the sake of uniformity, and simplicity at the Employment and Labour Relations Court.

4. The main difference between a plaint and a memorandum of Claim is that in a plaint facts are not pleaded and need not be pleaded at all. However it is a requirement before the Employment and Labour Relations Court that facts be pleaded in detail and documentation elaborating the facts be attached to the Statement of Claim.

4. It is also a common practice at the Employment and Labour Relations Court for parties to include their final submissions in the Statement of Claim.

5. This is a distinction not elaborated in the rules of Employment and Labour Relations Court but is common practice in Industrial and Labour Courts worldwide.

6. Having said that Employment and Labour Relations Court took over many matters hitherto filed in Civil Courts and has determined many matters filed by way of plaints as opposed to Statements of Claim.

7. Though the Court admonishes parties to adhere to the rules of Employment and Labour Relations Court, to the letter, the Court shall also observe the guidance under Article 159(2) (d) of the Constitution of Kenya, 2010 which provides:-

**“In exercising judicial authority, the Courts and tribunals shall be guided by the following principles:-**

**(d) Justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of this**

**(e) Constitution shall be protected and promoted.”**

8. One of the primary purpose of the Constitution is to protect the rights and freedoms of all persons guaranteed under the Constitution which

include unfettered access to justice.

9. For this reason the Court shall not strike out the plaint filed by the plaintiff herein on 22/9/2017 but will instead direct that the plaintiff amend the pleadings appropriately to comply with Section 4 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

10. Regarding the second preliminary objection, the plaint was filed on 22/9/2017. The Plaintiff attached to the plaint letter of summary dismissal dated 16th May, 2012. The Cause of Action clearly arose on 16th May, 2012 when the Plaintiff was dismissed from his employment despite the fact that the claimant had been charged before Kisii Magistrate Court – in Criminal Case No. 649 of 2011. The dismissal took place before the said criminal trial was concluded.

11. Section 90 of the Employment Act, No. 11 of 2007 provides:-

**“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no Civil action or proceedings based or arising out of this Act or a 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 of. In the case of continuing injury or damage within twelve months next after the cessation thereof.”**

12. This provision has been couched in mandatory terms and has been construed as such in many decisions of Employment and Labour Relations Court and confirmed by the Court of Appeal.

13. The Court refers to the Employment and Labour Relations Court cases of **Hilano Mwabolo –vs- Kenya Commercial Bank (2013) eKLR, Nyabuto Anambe Abusa –vs- Kenya Power & Lighting Company Ltd. (2015) eKLR and by the Court of Appeal in Attorney General and Another –vs- Andrew Maina Githinji and Another (2016) eKLR** in which Philip Waki J.A. rendered himself thus:-

**“By expressly inserting Section 90, the intention of Parliament, in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice, if they have to meet claims and counter claims 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. As was held in Nyabuto case supra, a claim that is time barred must be struck out for being fatally defective. In the present case, there was no application for extension of time and therefore no consideration by the Court in this regard. However it is clear as was decided by the Court of Appeal in Devicon Case that a suit founded on contract is not amenable to extension of time in terms of the limitation of Actions Act, Cap. 22 Laws of Kenya.

15. The present suit was filed more than five (5) years from the date the Cause of Action arose. Accordingly, the suit is struck out for being time barred and therefore want of jurisdiction by the Court to entertain the same. Each party to bear their costs of the suit the same having been struck out at an early stage of the proceedings.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of November, 2020.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this Ruling has been delivered to the parties online with their consent. They 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, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**