



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 323 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**SOLOMON ASENAKA.....CLAIMANT**

VERSUS

**THE CHAIRMAN, BOARD OF GOVERNORS**

**SELENDE HIGH SCHOOL.....RESPONDENT**

**RULING**

By notice of preliminary objection dated 21<sup>st</sup> July 2017 the respondent objects to the claim herein on grounds that the claim is statute barred pursuant to Section 90 of the Employment Act 2007 and is therefore unsustainable and should be struck out and or dismissed with costs.

In the respondent's submissions in support of the preliminary objection, it is urged that the claimant was dismissed by letter dated 22<sup>nd</sup> May 2010 while the claim herein was filed on 2<sup>nd</sup> September 2015, more than 3 years after cause of action arose.

The respondent relies on the case of *Fred Mudave Gogo –V- G4s Security Services (K) Limited (2014) eKLR* in which the court upheld a preliminary objection on similar grounds.

The respondent further relies on the case of *Gathoni –V- Co-Operative Creameries Limited (1982) eKLR* in which the court held “*The Act does not hold persons who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.*”

The respondent submits that whenever a cause of action is statute barred a court has no jurisdiction to deal with the same as the issue of limitation goes to the jurisdiction of the court to entertain the claim, relying on the authority in *Owners of Motor Vessel ‘Lilian S’ –V- Caltex Oil (Kenya) Limited* in which the court held that jurisdiction is everything and without it a court must down its tools.

For the claimant it is submitted that the claimant had good reasons for delay as pleaded in his reply to defence dated 28<sup>th</sup> January 2016 in which he attributes the delay to the respondent. It is submitted that at one time the respondent had admitted to amicable settlement as expressed in the claimant's further list of documents filed on 29<sup>th</sup> January 2016 with the reply to defence. These are a demand letter dated 6<sup>th</sup> August 2012, a reply thereto by the respondent's advocates dated 11<sup>th</sup> September 2012 and a further letter by claimant's advocates dated 11<sup>th</sup> November 2012 where it is clear that there were attempts at amicable settlement. The claimant submits that time therefore started running when the out of court negotiations failed on 11<sup>th</sup> November 2012.

It is submitted that there is need for parties to adduce evidence as in the claimant's opinion there was admission by the respondent. It is submitted that the respondent should not be allowed to run away from its moral and legal duty to pay the claimant his rightful dues.

**Determination**

The claim herein was filed on 2<sup>nd</sup> September 2015. The cause of action, according to paragraph 3 thereof is that the claimant was an employee of the respondent from January 1979 to 22<sup>nd</sup> May 2010.

**Limitation of time**

Out of court negotiations are not an excuse to filing suit beyond the statutory time limit. The Court of Appeal decision in *G4S Security*

**Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR**; held:

*“Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law.”*

This is fortified by the decision of this court in the case of **Rift Valley Railways (Kenya) Ltd V Hawkins Wagonza Musonye and another [2016] eKLR** which held as follows:

*“While there is no doubt that section 15 of the Employment and Labour Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents’ contracts of service.”*

In **Times Newspapers Ltd v O’Regan [1977] I.R.L.R 101** the Court sitting on appeal held that –

*“an employment tribunal had erred in law in finding that it was not reasonably practicable for an employee to make her complaint for unfair dismissal within the requisite period on grounds of her belief that the period to file her claim ran from the end of negotiations between her union and the employer.”*

Radido J. in **Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company Ltd [2015] eKLR** held:

*“In my view, holding that time stops running during conciliation or pending alternative dispute resolution would run counter to the principal objective of the Employment and Labour Relations Court Act and establishment of this Court which is to facilitate just, expeditious and proportionate resolution of employment complaints and trade disputes. The applicant must have been aware of this otherwise it could not have sought leave.”*

Any attempts at alternative dispute resolution and or conciliation should be within and or inside the 3 year provided for under section 90 of the Employment Act, 2007.

### **Without Prejudice Communication**

The letter of 11<sup>th</sup> September 2012 is without prejudice communication. As a general rule communication without prejudice is not admissible in evidence as an admission of liability.

In the case of **Mumias Sugar Co. Ltd & another v Beatrice Akinyi Omondi [2016] eKLR** the court admitted the contents of a without prejudice communication and stated that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it. The court relied on the case of **Walker V Wilsher (1889) 23 QBD 335 at 337** Lindley LJ asked what the meaning of the words "without prejudice" was in a letter written "without prejudice" and answered the question this way -

*"I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."*

In the case of **Lochab Transport Ltd Vs Kenya Arab Orient Insurance Ltd [1986] eKLR**, it was held thus-

*"...if an offer is made "without prejudice", evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of that 'without prejudice' letter."*

In the current case the letter of 11<sup>th</sup> September 2012, invites the Claimant to submit a quantification on gratuity. This can be construed as an invitation to make an offer. The Claimant responds through his advocates vide a letter of 11<sup>th</sup> November 2012, by quantifying his claim to include gratuity, notice pay, severance pay among others. This is now the counter offer to which there seems to be no evidence of acceptance or counter-offer. The contents of this letter remain without prejudice and cannot be construed against the writer.

Had there been an acceptance by the Respondent then a contract would have been formed and it would be said that time began to run from the date of the acceptance of the counter offer as a contract would have been formed which in this case would have been a date after 11<sup>th</sup> September 2012.

The last correspondence between the parties were before the lapse of the limitation period. There was no correspondence between the parties after the letter dated 11<sup>th</sup> November 2012 until the suit was filed on 2<sup>nd</sup> September 2015 well outside the statutory limitation period of three years.

From the foregoing I find that the claim herein is statute barred with the result that the preliminary objection succeeds. I accordingly strike out the claim on grounds of limitation. Each party shall bear its costs.

**DATED AND SIGNED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 21<sup>ST</sup> DAY OF FEBRUARY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**