

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 61 OF 2018

STEPHEN RUKUNGA JULIUS.....CLAIMANT

VERSUS

MASTERMIND TOBACCO KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd May, 2019)

RULING

The claimant filed on 27.02.2019 the notice of motion seeking to amend the memorandum of claim and if successful, NMG Company would be enjoined as the 2nd respondent. Namada & Company Advocates appeared for the claimant.

The proposed 2nd respondent has filed a preliminary objection on 19.03.2019 through Ataka, Kimori & Okoth Advocates. The objection is that the cause of action against the proposed 2nd respondent arose on 08.06.2015 which is currently over 3 years and the cause of action would be time barred under the 3 years of limitation in section 90 of the Employment Act, 2007.

The claimant has filed the replying affidavit of Namada Simoni Advocate and submissions to oppose the preliminary Objection. The claimant's case is that the suit was filed on 01.10.2015 being 5 days from the date of the cause of action being 08.06.2015. The claimant's further case is that the respondent has pleaded that the proposed 2nd respondent was the main employer and it is therefore necessary to enjoin the proposed 2nd respondent in terms of Order 1 Rule 10(2) of the Civil Procedure Rules for the effectual and complete adjudication of the suit.

The Court has perused the proposed amended claim and it seeks to make substantive claims and prayers against the proposed 2nd respondent for the cause of action which undisputedly accrued on 08.06.2015. The Court returns that as submitted for the proposed 2nd respondent, an amendment to introduce a time barred cause of action against the proposed 2nd respondent would be irreparably irregular as the Court would lack jurisdiction to entertain such time barred action. The preliminary objection will therefore succeed.

The Court has considered the respondent's claim that the real employer was the proposed 2nd respondent and considers that third party proceedings would in that case be available to meet ends of justice and in that view, each party will bear own costs of the preliminary objection.

In conclusion the preliminary objection is upheld with the consequence that the notice of motion dated 22.02.2019 and filed 27.02.2019 is determined accordingly and with orders:

- a) each party to bear own costs of the objection and the motion; and
- b) parties to take directions towards the expeditious hearing and determination of the suit.

Signed, dated and delivered in court at Nairobi this Friday 3rd May, 2019.

BYRAM ONGAYA

JUDGE