



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO 1428 OF 2011**

(Before Hon. Lady Justice Maureen Onyango)

**ISAAC KAMITHA MWANGI.....CLAIMANT**

*VERSUS*

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**RULING**

The Notice of Preliminary Objection before the court is dated 9<sup>th</sup> November 2018, premised on the grounds:

1. The Claim offends the Provisions of Section 87(a) and (b) of Cap 397
2. The Claim offends the Provisions of the Limitations of Actions Act Cap 22 Laws of Kenya
3. That the substitution which brought in the Respondent offends the Provisions of Order 1 Rule 10 of the Civil Procedure Rules.

In support of the Preliminary Objection it is submitted that The Claimant amended his pleadings by substituting Rift Valley Railways with Kenya Railways Corporation as the respondent which is a Corporation governed by the Act. That in substituting the Respondent the Claimant did not file a notice neither did he provide the required 30 days' notice before filing the Suit contrary to section 87(a) and (b) of the Kenya Railways Corporation Act Cap 397.

It is further contended that the Claim offends the provisions of the Limitations of Actions Act, Cap 22 for the reason that the claimant was terminated in October, 2008, and the suit was filed in August 2011 and Kenya Railways Corporation was enjoined in the suit on 30<sup>th</sup> January, 2018 which in the Respondent's view is time barred.

That the Claimant is on a wild goose chase as his employment contract was with Rift Valley Railways until the same was terminated in 2008. That he filed suit against RVR, which ceased to exist in 2017 when a concession was entered into with Kenya Railways Corporation. That on realising that the original Respondent did not exist the Claimant decided to substitute parties contrary to Order 1 Rule 10(4), which provides:

**Where a defendant is added or substituted, the Plaintiff shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the Plaintiff shall be served on the new Defendant and, if the court thinks fit, on the original defendants.**

That the Claimant did not satisfy the Court that a cause of action existed before the amendment was allowed and for that reason the preliminary objection ought to be allowed.

The Claimant on the other hand submits that issues raised in the Preliminary objection do not constitute pure points of law.

It is submitted that Kenya Railways Corporation was served with the application to be enjoined as a party which they conceded to and are as such estopped from pleading section 87(a) and (b) of the Kenya Railways Corporation Act Cap 397.

That the issue of limitation has been held to be a matter of fact to be dealt with in the trial and not through a preliminary objection as was held in the case of *Kenya Power and Lighting Corporation Vs Collins Agumba (2016) eKLR*.

## **Determination**

Three issues have been framed for determination by the Court which can be summed up as whether the preliminary objection meets the threshold set in the *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors Limited [1969] EA 696*.

The case of *Mukisa Biscuits* defined a preliminary objection to be one that raises a pure point of law, which if argued on the assumption that all the facts pleaded by the other side are correct would determine the entire suit.

The Respondent's Preliminary Objection is grounded on the claims that the claim against it is time barred, no statutory notice was issued against it and that it was wrongly enjoined as no cause of action has been disclosed against it.

In the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger and 2 others [2015] eKLR*; it was held:

“A true preliminary objection serves two purposes of merit:

firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

I find that the issues raised in the preliminary objection are matters that would require investigation by the court. I further find that the claim was filed in August 2011 following termination of employment in October 2008 and is on the face of it not time barred. The issue of the rights of the claimant against the respondent upon revocation or termination of the concession agreement is for determination by the court after hearing the parties, as is the issue of substitution of the applicant with Rift Valley Railways.

For these reasons I find that this is not a matter that can be disposed of by way of preliminary objection. The same is accordingly dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**