



**REPUBLIC OF KENYA**

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

**CAUSE 1998 OF 2015**

**(Before Hon. Lady Justice Maureen Onyango)**

**DAVID MWANGALA.....CLAIMANT**

**VERSUS**

**DODHIA PACKAGING LIMITED.....RESPONDENT**

**RULING**

By notice of Preliminary Objection dated 1<sup>st</sup> April, 2019 the Respondent objects to the Claimant's Memorandum of Claim filed on 5<sup>th</sup> November, 2015 on grounds that the same is statute barred pursuant to Section 90 of the Employment Act and is therefore unsustainable and should be struck out and dismissed with costs to the Respondent.

In its submissions in support of the Preliminary Objection the Respondent averred that the instant case falls within the ambits of a proper Preliminary Objection as it exhibits ingredients of a Preliminary Objection as highlighted in the celebrated case of ***Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) E.A. 696.***

The Respondent contends that the Claimant in his Memorandum of

Claim and Witness statement filed in this matter averred that he ceased working for the Respondent in June 2011 following his arrest and institution of criminal charges against him for the offence of stealing by servant.

The Respondent further contends that the instant cause of action is statute barred the same having been filed more than 3 years after the cause of action arose contrary to the mandatory provisions of Section 90 of the Employment Act, 2007. The Respondent urged this Court to strike out the suit on this ground relying on the decision in ***Dhanesvar Mehta Vs Manila M. Shah (1965) E.A. 321 and Rawal Vs Rawal (1990) KLR 275.***

The Respondent further relies on the case of ***Fred Mudave Gogo Vs G4S Security Services (K) Ltd (2014) eKLR*** in which the Court upheld a Preliminary Objection where a claim had been filed outside the mandatory period of 3 years.

The Respondent further contends that the question of limitation goes to the substance of the dispute and not even the invocation of Article 159(2)(d) of the Constitution would aid the Claimant. The Respondent cited and relied on the Authority of ***James Muriithi Ngotho and 4 Others Vs Judicial Service Commission (2012) eKLR.***

The Respondent submits that the Court has no jurisdiction to extend or allow for extension of limitation period in an employment matter as the Employment Act does not provide for the same. The Respondent relied on the cases of ***Josephat Ndirangu Vs Henkel Chemicals (EA) Ltd (2013) eKLR*** and the Court of Appeal decisions in the cases of ***Divecon Vs Samani (1995-1998) E.A. 48 and Beatrice Kahai Adagala Vs Postal Corporation of Kenya (2015) eKLR*** to further buttress the position that the Court has got no choice but to strike out this suit for being time barred.

In conclusion the Respondent urged the Court to be guided by the cited authorities and similarly uphold the Preliminary Objection filed and strike out the Memorandum of Claim for being statute barred by dint of Section 90 of the Employment Act, 2007.

For the claimant it is submitted that he did not at any time indicate that his employment ceased in June 2011 but rather that at the said time criminal charges were preferred against him. He contends that during the said period he was still under the Respondent's employment. He further contends that he never received any oral or written official termination or suspension letter from his employment with the Respondent. To fortify this argument the Claimant relied on the case of ***Cyrus Maina Njoroge Vs The Attorney General and Another (2017) eKLR.***

The Claimant further contends that the cause of action arose when the Respondent refused to reinstate him to his position of employment after the criminal case was withdrawn and he was discharged on 10<sup>th</sup> April, 2015. To fortify this argument the Claimant relied on the Court's findings in the case of **Ezekiel Okemwa Vs Kenya Marine & Fisheries Research Institute (2016) eKLR**.

The Claimant therefore urged the Court to dismiss the Preliminary Objection raised by the Respondent and that the Court proceeds to order the Respondent to pay costs as this is an attempt by the Respondent to delay the hearing of this matter having failed to file a response to the Memorandum of Claim.

### **Analysis and Determination**

Having considered the Preliminary Objection on record, arguments and submissions filed by the parties, there is only one issue for determination which is whether or not the preliminary objection raised meets the threshold set in the **Mukhisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696** that –

*“A preliminary objection is in the nature of what used to be a demure. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and occasion confuse the issues. This improper practice must stop.”*

As stated above, the respondent did not file a response to the claim herein. The facts as pleaded in the Memorandum of claim are thus uncontested. A perusal of the memorandum of the claim will disclose that the claimant had pleaded at paragraphs 4, 5, 6 and 7 that –

4. *“That the criminal case against the claimant was withdrawn and he was discharged on the 10<sup>th</sup> day of April 2015.*

5. *That the claimant was not paid any salary from the time the criminal case was instituted against him up to date.*

6. *The Respondent has never officially terminated the Claimant and it has failed to re-instate him.*

7. *The Claimant has made several attempts to address the Chief Executive Officer of the Respondent of his predicament so as to be re-instated to his position of employment in vain.”*

I agree with the submissions of the claimant that he did not plead that he ceased working for the respondent in 2011 when he was arrested but rather that he has not been paid since. I further agree with the claimant's submission that the issue of the date of termination is for determination as he has pleaded that he was never issued with a letter of termination of employment. Indeed he has prayed for –

1) The Claimant prays for his re-instatement without loss of benefits as provided for the Employment and Labour Relations Court Act

2) Alternatively the Claimant seeks 12 months' gross salary compensation for the wrongful dismissal and loss of employment as follows:

a) Full salary for the period between the time of salary suspension (June 2011) to the day when the Claimant was discharged from the criminal case and sought re-instatement by the Respondent amounting to Kshs.1,411,200/=.

b) 12 months' salary for wrongful termination at Kshs.382,800/=.

c) Service Pay at 15 days for every year worked amounting to Kshs.4,851,000/=.

d) A certificate of service as provided for in Section 51 of the Employment Act, 2007

e) Costs of the Claim.

f) Interest on (a), (b), (c), (d) and (e) above

I find that the date of termination of employment has not been admitted in the pleadings and is a matter for determination after hearing evidence. This being the case and in light of the fact that the respondent has not filed any defence to rebut the averments of fact in the Memorandum of Claim, this is not a case fit for a preliminary objection as defined in **Mukhisa Biscuit Manufacturing Company Limited - V- West End Distributors Company Limited (1969) E.A 696**.

The preliminary objection is therefore without merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**