



**REPUBLIC OF KENYA**

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

**CAUSE NO. 870 OF 2015**

**MARGARET WANJIKU KIMANI.....CLAIMANT**

**- VERSUS -**

**KENYA DEPOSIT INSURANCE CORPORATION.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 18th October, 2019)

**RULING**

The claimant filed an amended memorandum of claim on 14.11.2018 through Koceyo & Company Advocates. By that amendment the claimant introduced the respondent in the place of Chase Bank (Kenya) Limited. At paragraph 3 the claimant pleaded that the respondent employed her effective 20.09.2006 until the respondent wrongfully and unfairly terminated her services on 04.12.2014. The claimant had filed the memorandum of claim against Chase Bank (Kenya) Limited on 21.05.2015.

The respondent filed the memorandum of reply on 04.06.2019 through Muthaura Mugambi Ayugi & Njonjo Advocates. The respondent denied the description in the amended claim to the effect that it is a banking institution licenced under the Banking Act and doing business throughout Kenya. Instead the respondent pleaded that it was a statutory body duly established under the Kenya Deposit Insurance Act, 2012. The respondent further pleaded that the suit was time barred under section 90 of the Employment Act, 2009 and should be dismissed accordingly upon that preliminary point of law. The respondent denied that it had ever employed the claimant, it was a stranger to the claimant's claims and that the suit should be dismissed. The respondent urged that parties are bound by their pleadings and the Court should not redraw the parties' respective cases. The respondent filed the preliminary objection on 04.06.2019 that the suit be dismissed with costs because it was time barred under section 90 of the Employment Act, 2009. Parties filed their respective submissions on that preliminary objection. Section 90 of the Act required that the suit is filed within 3 years from the date of the cause of action being the pleaded date of termination namely 04.12.2014.

The claimant filed grounds to oppose the preliminary objection on 26.06.2019. The claimant stated that the suit was against Chase Bank Kenya which went under receivership and the respondent took up all the Bank's liabilities. The Bank's liability shifted to the respondent and the suit was not time barred as alleged by the respondent. Further by consent of the parties on 08.04.2019 the claim was further amended in presence of the parties to reflect that the respondent was the proper party. The preliminary objection should therefore fail. The respondent's case is that as at the time of substitution as a respondent, the suit was time barred as against the respondent as a new defendant and therefore the suit fails on that account as per the holding in **Fredrick M. Waweru and Another –Versus- Peter Ngure Kimingi [2007]Eklr** which upheld **Davis –Versus- Elsbys Bros Limited [1960]3 All ER 672, [1960]1 WLR 170** that the court declined an amendment for substitution of a defendant where the claim was time barred. The respondent also invoked **Mabro-Versus Eagle Star and British Dominions Insurance Co. Ltd [1932]1 KB 485, [1932] All ER 411** for the holding that the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the statute of limitation would be defeated.

The Court considers that the holding in **Mabro** case is about addition of a party or a cause of action. The present case is about substitution of the respondent as a respondent by reason that the respondent has by operation of law take up the liabilities of the Bank, the previous respondent. The claims against the respondent accrue in right of the previous respondent and not in separate right of the present respondent – essentially a transfer or assignment of alleged liability to the respondent from the previous respondent. The Court finds that such substitution of the respondent in the right of the previous respondent does not thereby amount to addition of a new party or cause of action against the respondent as a new party and the principles as urged for the respondent would clearly not apply. The court considers that in an amendment to substitute a claimant or respondent claiming or defending in the right of the party substituted, it cannot be that the amendment amounts to addition of a new party or cause of action as there is continuity of claims, triable issues and arguable defence in that regard and without a break at all. The Court considers such to be the case including in cases of substitution of deceased parties and like in the instant case of receivers taking over the case as respondents. Accordingly the cause of action would not be time barred.

The claimant submits that on 08.04.2019 the parties by consent recorded that the case continues against Chase Bank (Kenya) Limited in Receivership and a further amended memorandum of claim was filed in that regard. The consent order to that effect has not been exhibited. The record shows that the claimant filed a notice of motion on 26.06.2019 for orders that leave is granted for the claimant to further amend the amended memorandum of claim to introduce the respondent as Chase Bank (Kenya) (In Receivership) as the respondent as per the exhibited further amended memorandum of claim. The application appears not to have been heard and determined. It could be that in any event, the hearing of that application will cure the matters raised in the preliminary objection. Otherwise, the Court would uphold the applicant's submission that parties are bound by their pleadings.

Thus as the pleadings stand, it is clear that the claimant is bound by her pleadings. The pleadings are that she was allegedly employed by the respondent and dismissed by the respondent in circumstances whereby the cause of action would be time barred. However, in view of Article 159 of the Constitution and the pending application to further amend the amended claim, the preliminary objection is hereby determined with orders:

- a) The parties to take steps for expeditious determination of the pending application for further amendment of the amended claim,

without which, the preliminary objection is upheld.

b) The claimant to pay the applicant's costs of the preliminary objection in any event.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 18th October, 2019**.

**BYRAM ONGAYA**

**JUDGE**