**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**CAUSE NO. 6 OF 2019**

**(FORMERLY NYERI ELRC 196 OF 2017)**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION (K.P.A.W.U)................................CLAIMANT**

**VERSUS**

**KIONYO TEA FACTORY.....................................RESPONDENT**

**RULING**

1. The claim herein was dismissed on 28th June 2019 at Meru upon a reserved Ruling being delivered in respect of the Respondent's preliminary objection that the claim that was statute barred. The Claimant/Applicant moved court seeking through the Notice of Motion application dated 26th August 2019 for a review of the orders of the court. It was supported by the affidavit of Thomas Kipkemboi the Claimant/Applicant's Deputy Secretary General. The brief grounds upon which the motion was premised was that the matter was to be heard on 1st April 2019 and that the suit was dismissed on 24th June 2019. It was deponed that the matter was scheduled for 6th May 2019 and that the Claimant's Deputy General was unavailable to 6th May 2019 and drafted a letter to that effect and upon presenting the letter at the Meru ELRC Registry was advised the matter had been scheduled for hearing on the first week of July and the hearing notice would be served upon them. The deponent deposed that no notice was in fact served and that they enquired on the matter at Nyeri in July to enquire about the matter when they were informed that the matter had been set for hearing on 24th June 2019 and notices served. The Claimant/Applicant asserted that the motion was for grant.

2. The Respondent was opposed and filed a replying affidavit sworn by Dr. John Kennedy Omanga the Group Company Secretary of the Respondent. He deponed that the application was misconceived as the preliminary objection was raised on a date the court had served parties to attend court but the Claimant was absent and upon being satisfied that parties had been served the court permitted the Respondent to preliminary objection to be raised and a Ruling delivered on 28th June 2019 dismissing the suit with no order as to costs. The Respondent submitted that the dismissal was not account of want of prosecution but for being filed out of time.

3. Parties filed submissions to support and oppose the motion. For the Applicant, it was asserted that the Claimant was not served with a hearing notice by the court and that the preliminary objection was heard *ex parte* without hearing the Claimant. The Claimant argued that it followed the procedure set out under the Labour Relations Act, cap 234. The Claimant argued that after conciliation if there is no resolution the matter can be brought to the industrial court within 3 years as Section 73 of the Labour Relations Act and Section 87 of the Employment Act read together then it can be presumed that if a matter is not resolved after conciliation (which procedure is recognized under the Employment Act) then the suit can be brought to the court within 3 years from the date of the conciliator's decision. The Claimant argues that it tis trite law the suit can be reinstated at the discretion of the court and she implored the court to reinstate the suit pursuant to Article 159(2)(d) of the Constitution.

4. For the Respondent it was argued that the suit was not dismissed for want of prosecution though the Claimant/Applicant was absent. The Respondent submitted that the preliminary objection was heard and the Ruling was that the action was filed outside the limitation under the law. From the foregoing, it was argued, the application lacks merit and is supported by invalid and irrelevant reasons. The Respondent submitted that the claim was determined on a point of law and the revival of the suit for whatever reasons shall not validate a claim that is time barred. The Respondent urged the dismissal of the motion with costs to it.

5. The Claimant/Applicant's motion is premised on the apprehension that the dismissal was for want of prosecution. The suit was dismissed as the same was filed out of time in terms of Section 90 of the Employment Act. The Section does not permit for the extension of time and no matter how one slices it the suit was a non-starter and void *ab initio*. As held variously by the Court of Appeal time does not stop running and it matters not what other process was ongoing. The motion is based on lies and half truths as the Court Bailiff swore an affidavit confirming the service to the Claimant/Applicant. Having perused the evidence of service there was no reason advanced or shown to permit the reopening of the matter which in any event cannot be reopened as the dismissal of the suit was on account of limitation which cannot be altered as time ran out prior to institution of the claim. As the Claimant argued that Section 73 of the Labour Relations Act and Section 87 of the Employment Act read together permit the filing of the suit after the conciliation process, it is clear there is a misapprehension of the law. If the 2 sections are read together or alone, none confers any power to extend time to either the conciliator or the court. Section 90 is crystal clear and the Claimant/Applicant should familiarize itself with the said section and the plethora of case law on it. Application is devoid of merit and is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nyeri this 3rd day of December 2019**

**Nzioki wa Makau**

**JUDGE**