REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

SUIT NO. 293 OF 2017

JOHN MATHU NDUNG'U.....CLAIMANT

VERSUS

B.O.M IHWA SECONDARY SCHOOL.....RESPONDENT

RULING

1. Before me is the preliminary objection by the Respondent to the effect that the suit is statutorily time barred as it was instituted outside the 3 years limitation period prescribed under Section 90 of the Employment Act, 2007. The Objection was canvassed by way of written submissions. The Respondent submitted that the case is statute barred thus fatal and incurably defective. The action it is asserted was not filed in compliance with statutory requirements under the law. The Respondent argues that no statutory notice was issued against the Respondent as required under Section 3(2) of the Public Authorities Act, Cap. 39 Laws of Kenya. The Respondent cited various cases on the issues of limitation and extension of time and produced copies of the decisions in the cases of **Maria Machocho *v* Total Kenya Limited [2013] eKLR**, **Peter Nyamai & 7 Others *v* M. J. Clarke Limited [2013] eKLR**, **John Michael Wanjau *v* Municipal Council of Eldoret [2013] eKLR**, **Samuel Waweru *v* Geoffrey Muhoro Mwangi [2014] eKLR** and **Attorney General & Another *v* Andrew Maina Githinji & Another [2016] eKLR** to bolster it arguments despite not providing an analysis of these 5 cases. The limitation of actions is prescribed in the Employment Act Section 90 and this was stated with finality in the Court of Appeal in **Attorney General & Another *v* Andrew Maina Githinji & Another** (*supra*) where Waki JA held that limitation is meant *to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable*. In the case before me, other than the assertion that limitation set in, there is no clarity on the issue.

2. In the case of **Mukisa Biscuit Manufacturing Co. Ltd *v* West End Distributors (1969) EA 696** Law JA held that *so far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.* (Underline mine) Sir Charles Newbold in the same decision stated thus: *The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is 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 what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs, and on occasion, confuse the issue. The improper practice should stop.* (underline mine) In the *locus classicus* on the issue of preliminary objection, the two learned judges acquitted themselves as indicated above. Their words ring so true in this case. The Respondent has not filed any pleadings and therefore the preliminary objection hangs in the air. The preliminary objection does not arise from pleadings and indeed what is raised is a point no doubt but one that is not properly raised. Aspects of the point will require facts to be ascertained regarding the taking of leave or the absconding from duty. The foregoing amply demonstrates that the 'preliminary objection' raised falls for dismissal with costs to the Claimant.

It is so ordered.

Dated and delivered at Nyeri this 2nd day of February 2018

Nzioki wa Makau

JUDGE