



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 12 OF 2017

(Formerly Nyeri ELRC No. 399 of 2017)

LUCY KIRIMI MUGAMBI.....CLAIMANT

VERSUS

MAUA METHODIST HOSPITAL.....RESPONDENT

RULING

1. The Respondent's preliminary objection dated 9th November 2017 is that the Claimant's claim is time barred under the provisions of the Employment Act, that the amended claim is bad in law as it is supported by an amended affidavit, and that the whole claim is bad in law, frivolous and vexatious. The Respondent and Claimant opted to file written submissions to urge and oppose the preliminary objection. The Respondent filed submissions on 22nd March 2018 while the Claimant filed submissions on 11th April 2018. The Respondent submitted that the Claimant averred in her memo of claim that she was dismissed on 12th October 2012 and the suit was filed on 27th September 2017 which is 5 years after the time of dismissal. The Respondent argued the claim should have been made within 3 years in terms of Section 90 of the Employment Act. Regarding the amended affidavit, the Respondent submitted that an affidavit is not a pleading and cannot therefore be amended and if amended it becomes fatally defective. The Respondent cited the case of **Greenhills Investment Limited v China National Complete Plant Export Corporation (Compliant) t/a COVEC [2001] 1 KLR 384** where Ringera J. held that an affidavit is evidence and it cannot be amended. The Respondent's last point was that purpose of the withdrawal of the criminal case was clear. It did not exonerate the Claimant from the theft and therefore her claim was frivolous and vexatious. The Respondent referred to the proceedings of the criminal case which were annexed to the claim.

2. The Claimant was opposed and in her submissions urged that the question as to whether her claim was time barred was not purely a question of fact or law but a combination of both and the relief she sought was one which was ongoing and cannot be time barred. The Claimant submitted that preliminary objections are not provided for in the 2010 Civil Procedure Rules. Order XIV Rule 2 was cited for the proposition that issues of law and fact which comprised the said Rule under the Civil Procedure Rules were deleted under Legal Notice 151 of 2010 and Order 54 Rules 1 and 2 revoked the previous Civil Procedure Rules. It was submitted that under the new rules, there was no procedure similar to the one under Order XIV Rule 2 and there is therefore no provision for a preliminary objection. The Claimant submitted that the provisions of Article 159(2)(d) of the Constitution and Order 1 Rule 9 the suit should not be defeated by reason of misjoinder or non-joinder, or undue technicalities. The Claimant cited the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** quoted by Aboud J. of the Labour Division of the High Court of Tanzania in his Ruling dated 16th May 2014 in Misc. Labour Application No. 212 of 2013 **National Oil v Aloyce Hobokela** (unreported). The Claimant asserted that the facts of this case are yet to be ascertained. She relied on the case of **Registered Trustees of Catholic Archdiocese of Nyeri & Another v The Standard Limited & Another [2003] 1 E.A. 253** where Juma J. (as he then was) held that preliminary points are to be raised at the beginning of the hearing and not at the end of the hearing. The Claimant submitted that on the strength of this authority, the preliminary objection should have been raised immediately after the institution of the case and having failed to raise it then, the court should not entertain it. The Claimant argued that it is only after the full hearing that the facts shall be ascertained. The Claimant urged that the preliminary objection be dismissed with costs to her.

3. I think it is well settled what preliminary objections are on about. In the **Mukisa Biscuits** case cited by the Claimant, it set clearly what a preliminary objection is. **In that case, Law JA held as follows:-**

"So far as I am aware, a preliminary objection consists of a point of Law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection 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."

Sir Newbold P. stated in the same decision as follows:-

"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 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, on occasion, confuse the issues. This improper practice should stop."

4. This has stood the test of time and was cited in the case of Jotham Mulati Welamondi v The Chairman Electoral Commission of Kenya [2002] eKLR where Ringera J. (as he then was) eloquently stated thus:

I am also of the opinion that the only objections which could not be so taken are those predicated on disputed facts or which called upon the court to exercise its discretion. In the latter regard I would invoke the authority of *Mukisa Biscuits Ltd v West End Distributors Ltd (1969) E.A 696* on the scope and meaning of preliminary objections.(underline mine)

5. The Claimant is correct in the surmise that matters of fact must abide a full hearing so that the court may be able to make a determination on it. In regard to the third limb of the Respondent's preliminary objection, that fails as it seeks the ascertainment of fact which is outside the purview of a preliminary objection. On the issue of the limitation, Section 90 of the Employment Act, 2007 states as follows:-

Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act (cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

6. The Claimant who was dismissed by the Respondent on 19th October 2012, was required per this section to file a suit on or before the 18th October 2015. The scope of a preliminary objection extends to a plea of limitation as the first limb of the Respondent's objection holds. The suit was filed on 27th September 2017 outside the limitation period. The objection was thus well founded on this ground and the court upholds the same as there is no scope to extend time under Section 90. Order 1 Rule 9 of the Civil Procedure Rules and Article 159(2)(d) of the Constitution of Kenya do not aid a party in light of clear limitation as provided for under Section 90. It is not a mere technicality which these salutary provisions can cure. The suit is hopelessly out of time and is struck out with costs to the Respondent.

It is so ordered.

Dated and delivered at Meru this 11th day of May 2018

Nzioki wa Makau

JUDGE