



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1232 OF 2017**

**BERNARD KAMAU KARIUKI.....1ST CLAIMANT**  
**STANLEY MWITI MWIRICHIA.....2ND CLAIMANT**  
**JOSEPH KAMAU MWANGI .....3RD CLAIMANT**  
**HEZEKIEL NDULA INJENE.....4TH CLAIMANT**  
**GRACE JOY MUNGORI.....5TH CLAIMANT**  
**WALTER KEZENGWA LANOGWA .....6TH CLAIMANT**  
**DAVID BUNDI LYRIA.....7TH CLAIMANT**  
**BERNARD OKUMU SHISIA..... 8TH CLAIMANT**  
**DANIEL MUTHINJA NCEBERE.....9TH CLAIMANT**  
**GIDEON NJEMA IHUGU.....10TH CLAIMANT**  
**MARGARET ACHOLA.....11TH CLAIMANT**  
**JOHN KAHURO WAWERU.....12TH CLAIMANT**  
**JOSEPH KARIUKI KINYANJUI.....13TH CLAIMANT**  
**DAVID OTENO ODERO.....14TH CLAIMANT**  
**ERNEST BROWN KIMORI .....15TH CLAIMANT**  
**JACOB MUSYOKA C NGWIO.....16TH CLAIMANT**  
**JANET NJERI MWANGI.....17TH CLAIMANT**  
**CHARITY THITHU KIRORI.....18TH CLAIMANT**  
**JAMES MWANGI GACHAU.....19TH CLAIMANT**  
**JOSEPH MACHARIA GATHOGO.....20TH CLAIMANT**  
**STANLEY MBITI NKANDIKA.....21ST CLAIMANT**  
**FREDRICK ANTHONY WACHIRA.....22ND CLAIMANT**  
**JAMES MUSHIMBA TUMBO.....23RD CLAIMANT**

JAPHET MUTEKI MUTIGA.....	24TH CLAIMANT
JULIUS MWIKA KAIRUMBI.....	25TH CLAIMANT
JOHN IRUNGU MWERU.....	26TH CLAIMANT
MARY NASIMIYU WANYONYI.....	27TH CLAIMANT
FRANK KINYUA DAVID.....	28TH CLAIMANT
PETER MUNGAI KIRERA.....	29TH CLAIMANT
PENINAH MUKAMI PIUS .....	30TH CLAIMANT
NATHAN WAHORU MURATU.....	31ST CLAIMANT
PETER MBURU MWANGLI.....	32ND CLAIMANT
JANE FAITH MUTHONI MACHAGA.....	33RD CLAIMANT
JULIAH MOKEIRA ONDIEKI.....	34TH CLAIMANT
FRANKLIN GITONGA .....	35TH CLAIMANT
MICHAEL ODAWO OKEYO.....	36TH CLAIMANT
DUNCAN MUTYEIAH KIOKO.....	37TH CLAIMANT
LUCY KAGWIRIA MUTEA.....	38TH CLAIMANT

**VERSUS**

**KENYA PLANTERS CO-OPERATIVE UNION.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The matter before me is the Respondent’s Preliminary Objection (P.O) to the suit herein contained in the Notice dated 16.4.2018. It seeks to have the entire suit dismissed with costs because it is Statute barred by dint of Section 90 of the Employment Act. Under the said section, a claim founded on contract of service like the one herein must be commenced within 3 years after the cause of action arises or in case of a continuous injury, within 12 months after causation thereof.

**Background**

2. The Claimants were employed by the respondent until 19.10.2009 when she was put under Receivership by Kenya Commercial Bank. That while their employer was still under receivership, the Claimants were retrenched and issued with termination letters by the Receiver. The termination was without prior notice or payment of terminal dues.

On 4.7.2014, the Receivership status of the respondent was lifted and she resumed her normal operations. According to the Claimants, that marked the start of their Cause of action herein because during the period of Receivership the respondent had lost her corporate status and identity and no action could be maintained against her. It is the Claimant’s case that after the revival, the respondent had the obligation to settle any debts owed to her creditors including themselves. They therefore brought this suit on 30.7.2017 claiming dues that accrued to them under their respective contracts of service upto the time when the respondent was placed under the Receivership. The dues include gratuity upto September, 2009, salary for October, November and December, 2009, salary in lieu of Notice, severance pay, accrued leave and unremitted loan deductions and Pay As You Earn.

3. The respondent denied knowledge of the alleged wrongfully or illegally withheld dues and any predicaments suffered by the Claimants and denied any liability in the matter. She further raised the Preliminary Objection now before the Court. The Preliminary Objection was disposed of by written submissions.

**Respondent’s submissions**

4. The respondent submitted that her Preliminary Objection on ground of time bar is a pure point of law and qualifies to be raised as a Preliminary plea. She relied on the **Attorney General –vs- Andrew Maina Githinji & Another [2016] eKLR** to support the submission.

5. She further submitted that the suit herein is Statute barred by dint of Section 90 of the Employment Act because it was filed after 8 years from the time the Cause of action arose. She contended that the Cause of action arises at the point of the act, neglect or default complained of.

She further contended that the Cause of action arose on 19.10.2009 and lapsed on 19.10.2012. In her view time to sue was not suspended by her Receivership status and concluded by stating that filing the suit on 3.7.2017 was clearly out of time and it should be dismissed.

### **Claimant's Submissions**

6. The Claimants submitted that the respondent was placed under Receivership on 19.10.2009 and thereby lost her corporate status and identity and as such no action could be maintained against her. That in early, 2010, the Receiver terminated their services but never paid their dues because under Section 311 of the Companies Act (**now repealed**) he had no power to deal with claims beyond those of Preferential nature like their terminal dues which had to wait for the Receivership status to end and then sue the respondent.

7. The Claimants submitted that the Receivership was lifted on 4.6.2014 and the respondent regained her status as a corporate entity and thereafter they commenced this suit on 3.7.2017, which in their view was within the 3 years limitation provided by Section 90 of the Employment Act. They further contended that the Claimants' claim is not in dispute and it is reflected in the respondent's Books of Account.

They relied on *Kamotho Waiganjo –Vs- Dawa Pharmaceuticals Ltd. (under Receivership) and Another [2018] eKLR and Kenya Plantation and Agricultural Workers Union –vs- Karuturi Ltd. (in Receivership) [2016] eKLR* to urge that the Receiver herein was only required to deal with Preferential debts while all the Pre-Receivership liabilities were to be borne by the respondent.

8. They further relied on *Republic –Vs- Kenya Revenue Authority exparte KSC International Ltd. (in Receivership) and 3 others [2016] eKLR* to support their view that during the receivership status, the respondent herein remained dormant until the receivership was lifted on 4.6.2014 when their right to sue the respondent for their dues accrued. They therefore urged the Court to consider the circumstances of the case and dismiss the Preliminary Objection.

### **Analysis and Determination**

9. There is no dispute that the Claimants were employed by the respondent until 19.10.2009 when the employer was placed under receivership and the latter laid them off in early, 2010. There is further no dispute that the claim in the suit relate to the Claimant's dues which accrued before the receivership period. There is further no dispute that the suit herein was filed on 3.7.2017 about 8 years after time when the alleged dues arose. The issues for determination are:-

- (a) Whether the Preliminary Objection herein qualifies to be determined *in limine*.
- (b) Whether the suit is Statute barred.

### **Whether the Respondent has raised Preliminary Objection**

10. Law J. described a Preliminary Objection in *Mukhisa Biscuits Manufacturing Co. Ltd. –vs- West End Distributors Ltd.* [1969] E.A. 696 as follows:-

***“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 barred by the contract giving rise to the suit to refer the dispute to arbitration.”***

The objection in this matter concerns limitation of the period within which to file suit under the Employment Act. It is therefore a competent Preliminary Objection because it arises from the pleadings and it is capable of being determined without requiring any evidence to prove it.

### **Statute barred**

12. The suit was filed 8 years after the dues sought matured in October, 2009. The Claimants blame the delay in filing the suit in 3 years' time, on the receivership status in which the employer was placed from 19.10.2009 to 4.6.2014. In their view the respondent was dormant during that period and had lost her corporate status of being sued. They further contended that they could not claim the dues from the Receiver because the debt was for Pre-Receivership period and not among the Preferential debts which were to be dealt with by the Receiver.

13. The Respondent has however contended that the suit is statute barred, having been filed more than the 3 years provided for by Section 90 of the Employment Act. In her view she was never wound up and as such the Claimants were free to file their suit before the limitation period lapsed on 19.6.2012.

14. It is indeed true that from 2009 when the dues sought herein accrued and 3.7.2017 when the suit was filed is 8 years. Section 90 of the Employment Act provides that:-

***“.....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 or in the case of a continuing injury or damage within twelve months next after the cessation thereof.”***

15. The foregoing provision is couched in mandatory terms and leaves no room for extension of the limitation period. The legislature in its legislative process never imagined or intended to leave any room for enlargement of the limitation period for commencing suits founded on employment contracts. If anything, the intention and decision was to reduce it from the hitherto 6 years period under Section 4 of the Limitation of Actions Act to 3 years under Section 90 of the Employment Act.

16. In addition to the foregoing, I do not agree with the Claimants that the placement of the respondent to receivership status barred them from seeking legal redress against the respondent. The Parliament cannot have closed out the Claimants from their right as alleged by them. They had the right to institute civil proceedings to recover their dues that accrued before the receiverships and prosecute them until the Receiver sought stay under section 223, 228 and 251 of the Companies Act (repealed). For the reason that the suit was filed after the lapse of the limitation period of 3 years allowed by Section 90 of the Employment Act, the Preliminary Objection by the respondent is upheld.

**Conclusion and Disposition.**

17. I have found that the suit herein was filed 8 years after the dues sought accrued on 19.10.2009 when the respondent was placed under receivership and the limitation period of 3 years within which to file suit lapsed on 19.10.2012. I have further found that Section 90 of the Employment Act never left any room for extension of the 3 years limitation period within which to file a suit founded on an employment contract. I therefore allow the Preliminary Objection by the respondent and proceed to strike out the suit for being Statute barred.

Each party to bear his or her own costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 12th day of October 2018**

**ONESMUS N. MAKAU**

**JUDGE**