REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1182 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

MONICAH WANJIKU KANYINGI.....CLAIMANT

VERSUS

OUR LADY OF MERCY SECONDARY SCHOOL.....RESPONDENT

RULING

Before me for determination is a notice of preliminary objection filed by the respondent on the following grounds –

1. The claimant's claim against the respondent is barred by limitation in that the claimant's services were terminated on 28/5/13 but the suit was filed on 16th June 2016 more than nineteen (19) days out of limitation.

2. The claimant's services were terminated for leaking pre-mock examinations early in April 2013 to some form IV students which was "*gross misconduct*" justifying summary dismissal and the claimant was subjected to the laid down machinery under the education act 2013 for being heard in her defence by the board of governors and was paid all her terminal dues and leave pay in full on being terminated on 28 th May 2013 and there is nothing she is owned by the respondent arising from the said termination.

3. That the respondent as sued-"*Our Lady of Mercy Secondary School*"-is incapable of being sued as a respondent as it is not suable as an entity and the suit is therefore frivolous incompetent and misconceived.

4. That the claimant is non-suited against the respondent, and she has no claim against her, capable of being entertained against her at all and the same should be struck out from record.

5. That this is a fit case for dismissal outright by reason of the claimant being nonsuited.

When the preliminary objection came up for hearing on 3rd May 2018, parties were granted leave to dispose of the same by way of written submissions.

Respondent's Submissions

In her written submissions, the respondent submits that the claimant's claim is barred by the Limitation of Actions Act Cap 27 of the Laws of Kenya in that the claimant's services were terminated by the respondent on 28th May 2013 but the suit was filed by the claimant on 16th June 2018 more than nineteen days out of limitation.

The claimant's services were terminated for "*Gross Misconduct*" "*for leaking pre-mock examination early in April 2013, to some Form IV Students Justifying a Summary Dismissal,*" and the Claimant was subjected to the required laid down legal machinery under the basic education act, 2013 for being heard in her defence by the respondent's Board of Governors was followed to the dot.

After being heard in her defence, the Board of Governors of the respondent paid the claimant all her terminal dues on 28 th May 2013, which were justly due to her upon her services being terminated.

Accordingly, nothing else is due to the claimant from the respondent, arising from the said termination because the legal machinery for her termination and settlement of all her dues was followed to the letter.

It is submitted further that under the Basic Education Act, 2013, a suit against a school is brought against "*The Chairman of the Board of Governors*" (nee "*Board of Management*" these days)," as the Claimant, and not the school as has been done in this case, wherein the suit is brought against "OUR LADY OF MERCY SECONDARY SCHOOL," instead of against the "BOARD OF GOVERNORS OF OUR LADY OF MERCY SECONDARY SCHOOL,'' which is incapable of being sued as a respondent, as it is not suable as an entity and thus suing the school and not the "BOARD OF GOVERNORS," is fatal, and the suit must therefore fail, for being incompetent and misconceived, frivolous and vexatious'' and is an abuse of the due process of the court, "merely meant to embarrass, scandalise and/or ruin the respondent's good name, and the same should be struck out from record.

It is submitted that all the above issues were raised in the respondent's defence dated 17th August 2016, and filed on 19th August 2016 but the claimant did not file any "*reply to the defence*," "*within fourteen (14) days of 19th August 2016*" that is "*on or before 4th September 2016, and have never filed any reply to the defence up to now, and therefore the issues raised above were joined,*" that the claimant has therefore no defence at all against the issues all which were joined.

It is submitted that the respondent's preliminary objection displays that "this "is a fit and proper case for striking out the suit" for not disclosing any cause of action against the respondent and also for being time barred, and consequently, dismissing the suit" with costs" to the respondent and so prays to this hon. court to dismiss the suit with costs.

Claimant's Submissions

The claimant submits that under Article 159(2)(c) alternative disputes resolution is guaranteed, that this is reinforced by Section 15 of the Employment and Labour Relations Court Act which provides for adoption and implementation by the court on its own motion or at the request of the parties of "any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(20(c) of the Constitution. The claimant submits that the time taken by conciliation process should not be counted towards computing the limitation period of 3 years provided for under Section 90 of the Employment Act.

That it has been held in several judgements of this court that once parties commence conciliation pursuant to sections 62, 67 and 69 of the Labour Relations Act, time stops running. Time starts running only when the Conciliator issues a certificate that the dispute has not been resolved by conciliation or thirty-day period from the appointment of the conciliator in terms of section 69 of the Labour Relations Act.

That a trade dispute was reported vide letter dated 1st August 2014 at page 20 after which a conciliator one P. M Kanyotu was appointed by the Ministry of Labour vide the letter dated 27th August 2014 annexed at page 22 of the Statement of claim.

That the conciliator having been appointed on 27th August 2014, the dispute stood unresolved by 27lh September 2014 pursuant to section 69 (b) of the Labour Relations Act and as such time started running from 27th September 2014.

That in holding in the case of **BANKING INSURANCE & FINANCE UNION (K) V BANK OF INDIA (2014) eKLR,** Nderi Nduma J. held, drawing from the decision of Ndolo J in **FRANCIS MUTHINI MUE V RAKSH AWARD T/A RANWAA RESTAURANT AND ANOTHER** which in turn cited the decision of Wasilwa J in **KENYA SCIENTIFIC RESEARCH INTERNATIONAL TECHNICAL AND ALLIED WORKERS UNION V RAINALD SCHUVERA (2012) eKLR** that once the conciliation process commenced, time stopped to run for purposes of time with respect to labour matters.

A similar jurisprudence was reflected in the case of **KENYA BUILDING CONSTRUCTION TIMBER AND ALLIED INDUSTRIES EMPLOYEE UNION -VS- S.S MEHTA AND SONS (2014) eKLR** where Ndolo J. affirmed the position that once labour disputes are referred to conciliation, time stops to run until conciliation process is brought to a closure.

This position is also reflected under section 73 (1) of the Labour relations Act which provides that: - "***if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the industrial court in accordance with the rules of industrial Court***."

That the dispute herein was deemed unresolved upon the expiry of thirty (30) days after appointment of the conciliator, which was on 27th September 2014.

A similar view was made in **PAULINE WAITHIRA MURAGURI -V- MURANGA FARMERS CO- OPERATIVE UNION LTD (2014) eKLR,** where Abuodha J. again made reference to his decision in the *Mununga* case and rejected a preliminary objection based on limitation because according to him, the cause of action accrued, when the conciliator issued his certificate and was renewed in February, 2012 when the respondent made part payment.

But of particular interest is the Judges reasoning at paragraph 9 that: -

> "*With regard to labour relations and employment disputes, the escalated process which has at its apex, the Industrial Court would be confusing and problematic to maneuver through were it to be conducted against a background of the technicality of limitation. There is a sense in which it seems more just to hold that causes of action in labour relations and employment disputes, where they have been subjected to conciliation process, accrue at the point where conciliation fails and the conciliator issues his certificate in accordance with section 69 of the Labour Relations Act."*

That the Court can depict the jurisprudence that in employment and labour disputes, where parties have opted for conciliation (alternative dispute resolution) time for purposes of limitation stops running until there is a deadlock or the dispute is resolved.

That the conciliation process was beyond the exclusive control of the Claimant and therefore limitation as a question did not arise. Further, the Court is only the final arbiter in the labour dispute resolution mechanisms after the pre-court attempts have failed.

That the Respondent further alleges that the claimant's termination was lawful whereas it flouted all the procedures required before termination.

That the Respondent further alleges that it is incapable of being sued as a respondent as it is not suable as an entity. The Employment and Labour Relations Court (Procedure) Rules (the Rules) define who a *Party* to any proceedings is;

> ***'Party" means a person, a trade union, an employer, employer's organization or any corporate body directly involved or affected by an appeal, or claim to which the Court has taken cognizance or who is a party to a collective agreement referred to Court for registration.***

That in the case of **KIZITO M. LUBANO V KEMRI BOARD OF MANAGEMENT** AND **8 OTHERS [2015] eKLR** Mbaru J. while defining who is a party to any proceedings noted:-

> *"I am keen on the part that such a party includes that person or entity directly involved or affected by an appeal, or a claim to which the Court has taken cognizance. Such a party therefore has to be assessed as one to be included in proceedings before this Court to ensure the ends of justice are achieved. The nature of proceedings before this Court are that in labour relations, the Court should not overly rely on technicalities at the expense of substantive justice. Where the Petitioner has sought for orders against the parties before court, such prayers shall be analysed on their merit and where a party that is crucial to the claim but has not been joined herein, no orders can be made against such an entity as they are not a party to the suit in the first instance. However, where the Court finds it necessary and just to direct the enforcement of orders of the Court and that such an enforcement would only be possible where a particular party named or not named as a Respondent is necessary, nothing stops the course of justice to so direct."*

Determination

I have considered the pleadings, the notice of preliminary objection and the submissions by parties in respect thereto. I have further considered the authorities and legal provisions cited.

There are several issues arising for determination being whether the claimant's suit should be struck out for being time bad, that it discloses no cause of action and that it is fatally defective.

Limitation

Section 90 of the Employment Act provides 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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.**

The claimant does not deny that she filed her claim after the lapse of 3 years. Her argument was that limitation is a matter of procedural technicality and should not be used to strike out her claim as provided under Article 159(2)(c) and Section 15 of the Employment and Labour Relations Court Act.

Limitation is not a technicality. It goes to the jurisdiction of the court and once a court determines that it has no jurisdiction it cannot move a step further, it must down its tools. Refer to **OWNERS OF MOTOR VESSEL LILLIAN S -V- CALTEX; DIVECON -V- SAMANI**.

Article 159(2)(c) cannot therefore avail a lifeline to a case that it statutorily barred as pleaded by the claimant. Once a claim is statutorily barred, the court must strike it out unless there are some other valid grounds such as disability.

On this ground alone, the claimant's suit herein is for striking out. There are however the other grounds that have been raised by both parties.

The claimant referred to the decisions of this court in **BANKING INSURANCE AND FINANCE UNION (K) -V- BANK OF INDIA**, **KENYA BUILDING CONSTRUCTION TIMBER AND ALLIED INDUSTRIES EMPLOYEES UNION -V- SS MENTA AND SONS**, **PAULINE MURAGURI –V- MURANGA FARMERS CO-OPERATIVE UNION LIMITED**. These cases are only valid as far as claims filed under the Trade Disputes Act (now repealed) apply. Under the Trade Disputes Act, a trade dispute was reported to the Minister and it is the Minister who referred it to court once conciliation failed. This was before the Employment Act, 2007 was enacted. Trade Disputes Act was repealed by the Labour Relations Act, which has a completely different process of management of trade disputes.

Under Section 62(3) of the Labour Relations Act, disputes on termination or dismissal must be reported within 90 days unless the Minister for good reason extends the period. Under Section 65(1), a conciliator must be appointed within 21 days and under Section 69, the dispute is deemed to have been unresolved when the conciliator issues a certificate that the dispute has not been resolved or 30 days have lapsed from the date of appointment of a conciliator.

The timelines under the Labour Relations Act are thus much shorted than under the Employment Act. There is nowhere in either the Labour Relations Act or the Employment Act where it is provided that time stops running once a dispute is referred to conciliation.

It is further worth noting that the Labour Relations Act and its predecessor the Trade Disputes Act only apply to trade disputes as defined in Section 2 of the Labour Relations Act as read with Section 62(1).

Section 2

> **"trade dispute" means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union;**

Section 62(1)

> **A trade dispute may be reported to the Minister in the prescribed form and manner –**
>
> > **a) by or on behalf of a trade union, employer or employers' organisation that is a party to the dispute; and**
> >
> > **b) by the authorised representative of an employer, employers' organisation or trade union on whose behalf the trade dispute is reported.**

From the foregoing it is clear that the reference of the claimant's matter to conciliation did not stop time from running and thus does not avail her a defence against a plea of limitation.

The other issue arising for determination is whether the claim does not raise any cause of action against the respondent. This is a matter that would require evidence and does not quality to be dealt with as a matter of preliminary objection as defined in the celebrated case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED -V- WEST END DISTRIBUTORS LIMITED** to the effect that –

> *"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.*
>
> ***…**The first matter related 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 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 unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop."*

The final issue for determination is whether the suit is bad in law for being filed against Our Lady of Mercy Secondary School instead of The Board of Governors of the respondent school. I do not find this fatal to the suit. It is a matter that can rectified easily through an amendment.

Striking out of suits should be a matter of last resort as held in several cases including the Court of Appeal in the case of **DT Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR** enunciated the principles applicable in considering whether or not to strike out pleadings. The Court of Appeal in the above case was categorical, Madan JA (as he then was) adopting the finding of **Sellers LJ** in **Wenlock v Moloney (1965) 1 WLR 1238** where the learned Judge had this to say, while setting out principles to be considered by a court in striking out a pleading:

> *"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."*

Further and in the same case, ***Danckwerts LJ*** *detailed:*

> *"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."*

Madan JA (as he then was) in the said **DT Dobie** case (as above) added his own view as to the matter with striking out of suits:

> *"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it."*

The same should not be resorted to where there is no prejudice to the respondent or where this can be resolved by an amendment as in this case.

I have held before in other cases that an employee cannot be denied access to justice merely because of filing a claim against the employer in the only name by which the employee knows the employer. In this case, the only name by which the claimant knew her employer is that in which it has been sued. Under the Employment Act, an employer is defined as –

> **"employer" means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;**

That definition implies that the employee can file a claim against an employer by reference to the agent, foreman, manager or factor. I find no merit in this argument.

Conclusion

Having found that the claimant was filed out of the 3 year limitation period, this court has no jurisdiction to determine the same. The claim is accordingly struck out. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE