

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 112 – 116 OF 2018

GILBERT MURITHI NJAGI & 5 OTHERS.....CLAIMANTS

VERSUS

NJUE NJAGI KAITHUNGU, JUSPER NYAGA M'MUGA

HARON MBAKA, HUMPHREY KABURU KINYUA,

DEDAN RIUNGU (TRADING AS MUTHIRU

DAIRY FARMERS COOPERATIVE SOCIETY).....RESPONDENTS

RULING

1. The Respondent's preliminary objection dated 28th May 2018 seeks a determination that the Respondents were improperly enjoined in the suit as the action should have been against the cooperative society in line with Section 12 of the Co-operative Societies Act Cap 490, Laws of Kenya and also that the suit was time barred in terms of Section 90 of the Employment Act. Prior to the hearing of the preliminary objection the Claimant filed an amended memorandum of claim in which the Cooperative Society was named as the Respondent effectively removing the officials of the society as the Respondents herein. That dealt with the first limb of the preliminary objection and will not therefore be considered in this Ruling. The parties filed submissions in support and opposition of the preliminary objection. The salient aspects of the submissions are that the Claimant's suit was filed out of time and therefore amenable to striking out. The Respondent cited the provisions of Section 90 of the Employment Act and submitted that the Claimant's indolence should not be tolerated as the cause of action arose in 2012 and was thus out of time. The case of **Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & Another [2016] eKLR** was relied upon for the proposition that where a statute limits time for bringing an action, no court has the power to extend that time unless the statute itself allows extension of time. The Respondent sought the grant of the orders sought striking out the suit with costs.

2. The Claimant submitted that misjoinder should not be used to defeat justice and that no valid basis has been laid for the lack of jurisdiction asserted by the Respondent. The Claimant asserts that the claim was brought within time as the cause of action arose on 3rd March 2017. The case of **Kenya Commercial Bank v Titus Kilonzo Mutua t/a Mbwala Agencies & 24 Others [2006] eKLR** on misjoinder and that of **William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others [2016] eKLR** where the Court of Appeal held that the objections raised in the case were not pure points of law.

3. The Claimant's suit is for unlawful and unfair termination of employment and failure to pay terminal dues. The preliminary objection raised is on limitation of time. The Claimant avers that he was an employee of the Respondent for 12 years from 2004 till 2017. His pleadings do not show when he was dismissed though he asserts he was constructively dismissed in 2016. The Respondent asserts that the Claimant's cause of action arose in 2012.

4. In the oft cited case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, Sir Charles Newbold P. stated thus about a preliminary objection:-

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.

5. The words of the learned Judge of Appeal hold true. The variance in the facts before me does not allow for grant of the order sought as the court has to ascertain the facts in the matter. The preliminary objection therefore fails and is dismissed. I will make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 23rd day of November 2018

Nzioki wa Makau

JUDGE