



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 89 OF 2018

BONIFACE WACHIRA KARIUKI.....CLAIMANT

VERSUS

NYERI COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT

NYERI PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT

RULING

1. The application before me is the 1<sup>st</sup> Respondent's preliminary objection dated 9<sup>th</sup> April 2018. The objection is that the Claimant's suit is filed out of time contrary to the provisions of Section 90 the Employment Act. The 2<sup>nd</sup> Respondent supports the objection taken by the 1<sup>st</sup> Respondent. The Claimant is opposed to the grant of the order sought in the preliminary objection. The parties filed submissions in support and opposition of the objection.

2. The 1<sup>st</sup> Respondent submitted that the Claimant filed the suit on 21<sup>st</sup> February 2018 whereas the Claimant was dismissed on 4<sup>th</sup> August 2014. It argues that the claim was filed outside the stipulated time. The 1<sup>st</sup> Respondent cites the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** for the parameters of a preliminary objection. The 1<sup>st</sup> Respondent relied on the cases of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** and **G4S Security Services (K) Ltd. v Joseph Kamau & 468 Others [2018] eKLR** where the Court of Appeal pronounced itself on limitation. The 2<sup>nd</sup> Respondent in its submissions associated itself with the thrust of the preliminary objection and submitted that the wording of Section 90 of the Employment Act was mandatory. The 2<sup>nd</sup> Respondent cited the decisions of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** and **Justine S. Sunyai v Judicial Service Commission & Another [2017] eKLR** where the courts have held that a court has no jurisdiction to entertain a suit that is time barred.

3. On his part, the Claimant submitted that the objection was misplaced as the Respondent's had not filed pleadings. The Claimant placed reliance on the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** where the Court of Appeal stated that a preliminary objection consists of a point of law which has been pleaded or which arises out of clear implication out of pleadings. It is raised on pure points of law and is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained. It was argued that the preliminary objection before the court cannot be raised as no pleadings were filed in court. The Claimant relied on the case of **John Mathu Ndung'u v B.O.M Ihwa Secondary School [2018] eKLR** where this court held that in matters where no pleadings are filed such a preliminary objection hangs in the air. The Claimant urged the dismissal of the objection.

4. I agree with the decision in the case of **Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR** where the Court of Appeal stated the law on limitation of time succinctly. There is no room for maneuver in that regard. The threshold for a preliminary objection is as stated in **Mukisa Biscuits**. In that case, the Court of Appeal for East Africa per 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 thus in the same decision:-**

*"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."*

5. The 1<sup>st</sup> Respondent challenges the suit on the basis of the pleadings filed by the Claimant. In the case I decided earlier this year being **John Mathu Ndung'u v B.O.M Ihwa Secondary School (supra)** there were facts that were necessary to ascertain. In this case, the 1<sup>st</sup> Respondent is not challenging the assertions by the Claimant and raises the preliminary objection on the assumption that the fact of dismissal as pleaded by the Claimant is correct. It in fact agrees with the Claimant on the time line hence the objection raised. The case cited therefore is distinguishable from both the Court of Appeal decision and the present case. In this case, the Claimant avers that he was dismissed on 4<sup>th</sup> August 2014. By simple arithmetic, the Claimant was to file suit by 4<sup>th</sup> August 2017 which is within 3 years of the cause of action accruing. He did not file suit till February 2018. The suit therefore is time barred in terms of Section 90 and the same is not viable. It therefore is struck out but I make no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 22<sup>nd</sup> day of November 2018**

**Nzioki wa Makau**

**JUDGE**