



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.839 OF 2018**

**SIMON WANGAI NDURU.....CLAIMANT**

**- VERSUS -**

**AVENUE SERVICE STATION LTD.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 2<sup>nd</sup> November, 2018)**

**RULING**

The claimant filed the memorandum of claim on 31.05.2018 in person. The claimant later appointed R.W.Chege & Associates to act in the case. The claimant at paragraph 3 of the claim stated that the respondent employed him as a driver from February to 31.05.2015 when he was forced to retire. The notice to retire is dated 01.05.2015 and it states that the claimant would retire effective 31.05.2015.

The respondent filed the notice of preliminary objection on 25.06.2018 through Mumia & Njiru Advocates stating that the suit was time barred under section 90 of the Employment Act, 2007 which states that no civil action or proceedings based or arising out of the 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 respondent stated that the cause of action accrued on the date of retirement on 31.05.2015 and the suit was filed on 31.05.2018 being 3 years and one day after date of the cause of action. Further the respondent as sued, served and indicated did not exist. Thus the suit should be dismissed with costs.

The court has considered the material on record including the submissions filed for the parties and returns as follows:

1. Whether the respondent as named exists or not is contested and is a matter to be established by way of evidence. A preliminary objection being a point of law upon uncontested facts, the point as raised does not qualify as a preliminary objection. The Court finds as much.
2. There is no dispute that the cause of action was on 31.05.2015 and the suit was filed on 31.05.2018. The Court returns that the suit was filed on the last day in the 3<sup>rd</sup> year of the lapsing period of limitation and it was not time barred. Even if the respondent was to urge the case on whether a year has 365 or 366 days, the Court finds that under section 57(a) of the Interpretation and General Provisions Act, Cap.2, a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done. The Court returns that a differential of a day as submitted for the respondent would not render the suit time barred as per section 57(a) of the Act. The Court finds as much.

In conclusion the preliminary objection dated 25.06.2018 and filed for the respondent on the same date is hereby dismissed with costs and parties to take further steps towards expeditious determination of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 2<sup>nd</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**