

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CASE NO. 1039 OF 2013

STEPHEN MUGWE.....1ST CLAIMANT

BERNARD MUTHATHI.....2ND CLAIMANT

VERSUS

SAMEER GROUP OF COMPANIES.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. The 1st Respondent herein has raised a preliminary objection, to wit, that the Claimant's suit herein is expressly barred by statute and should therefore be dismissed for being incompetent and an abuse of the court process. The 1st Respondent's objection is opposed by the Claimants who filed submissions in opposition thereto. The preliminary objection was argued by Miss Mochama for the 1st Respondent who argued that the suit is statute barred as the dismissal was on 21st August 2002 and the filing on 11th November 2008 was 6 years and 3 months later. She submitted that the criminal proceedings did not stop time running and that the court does not have the discretion to enlarge time as the statute expressly limits the period for filing suit at 6 years under the Limitation of Action Act. She relied on the cases of **Benjamin Wachira Ndiithi v Public Service Commission & Another [2014] eKLR** and **E. Torghbor v Ladislaus Odongo Ojuok [2015] eKLR** where it was held that time barred suits are untenable and there is no room for extension of time. Miss Mochama argued that there is no room to exercise discretion to extend time and cited the case of **Francis Atonya Ayieka v Kenya Police Service & Another [2017] eKLR** as well as the case of **G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR**. She urged the court to dismiss the suit as the same was filed out of time.

2. The Claimant's counsel Mr. Rono opposed the preliminary objection raised by the 1st Respondent. He relied on the submissions filed by the Claimants and argued that the suit is not statutorily time barred. He cited the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited (1969) EA 696** for the proposition that a preliminary objection should be based only on law. He stated that the time only begun to run after the lower court made a pronouncement on the matter pending before the criminal court as that was when the cause of action crystallized. He relied on the case of **David Nyamai & 7 Others v Del Monte Kenya Limited [2015] eKLR** where Ongaya J. held that the cessation of the criminal trial is what crystallized the rights of the claimants in that case and therefore the time begins to run after the conclusion of the criminal trial. Mr. Rono urged the court to be similarly persuaded as Ongaya J. was, by the decision of **Mbowa v East Menjo Administration (1972) E.A. 352** where the Court held that for the time to run the validity of the termination would have to be settled first and thus time would not run until the time of acquittal of the criminal charges. He also relied on the case of **Attorney General & Another v Andrew Maina Githinji & Another [2017] eKLR** for support in his arguments. The Claimants thus urged the court to find in their favour and dismiss the preliminary objection as they were ready to proceed save for the objection that was taken by the 1st Respondent. He submitted that the preliminary objection was an afterthought as the parties were to proceed to hearing.

3. In brief reply, Miss Mochama for the 1st Respondent submitted that the preliminary objection was not an afterthought and indication had been given that it would be raised after which directions were given by the court that the same could be raised during the hearing. She submitted that the case cited by Mr. Rono being **Attorney General & Another v Andrew Maina Githinji & Another (supra)** supported the position taken by the 1st Respondent.

4. It is settled that a matter relating to limitation goes to the root of the cause and being a question of the jurisdiction of the court, can be raised *in limine* and determined first. The 1st Respondent raised an objection in the defence filed on 4th February 2010 and when the matter appeared before me on 30th November 2018, I directed the 1st Respondent to file a formal preliminary objection when counsel for the 1st Respondent indicated that she intended to raise a preliminary objection before the hearing. This is what was argued before me on 17th December 2018.

5. The objection taken by the 1st Respondent is on limitation of action and is based on the surmise that the cause of action accrued on 21st August 2002 whereas the suit was filed in November 2008 some 6 years and 3 months after this date. In **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited (supra)** the Court of Appeal for East Africa held 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. Objections can be to the jurisdiction of the court, 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. The issue of limitation raised by the 1st Respondent herein therefore fits within the paradigm in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited (supra)**.

6. In his arguments before me yesterday, Counsel for the Claimants asserted that in line with the decision of Ongaya J. in **David Nyamai & 7 Others v Del Monte Kenya Limited** (*supra*) the cessation of the criminal trial is what crystalized the cause of action the Claimants could articulate before the court. He was right to an extent regarding an aspect of the claim as will be seen shortly. Counsel for the 1st Respondent was of a contrary view. In the case of **Benjamin Wachira Ndiithi v Public Service Commission & Another** (*supra*) the learned judge (Ndolo J.) held that there is no discretion to enlarge time. This position resonates with the decision of the Court of Appeal in **Attorney General & Another v Andrew Maina Githinji & Another** (*supra*) where the learned Judges of Appeal (Waki, Nambuye, Kiage JJA) held that the cause of action accrues upon termination. In the cases of **Francis Atonya Ayieka v Kenya Police Service & Another** (*supra*) and **G4S Security Services (K) Limited v Joseph Kamau & 468 Others** (*supra*) are equally clear that once limitation sets in, there is no room to extend time. In the case of **Mbowa v East Meno Administration** (*supra*) the Court of Appeal for East Africa held that the period of limitation in that case would only arise after the conclusion of the trial. That case is distinguishable as the charges in that case related solely to the malicious prosecution matrix. The cause of action herein in relation to the employment issue was 3 months late. The suit in that regard was time barred as the suit was filed after the lapse of 6 years. The claim for malicious prosecution is a tort. Time in respect of the limitation runs from the date of acquittal or when the case is otherwise terminated in favour of the accused. In this regard, Counsel for the Claimants was right on when the cause of action accrues. The Claimants were acquitted vide a Ruling delivered by Hon. T. Wamae Principal Magistrate on 28th April 2009. The period for limitation for a suit for malicious prosecution is one year. This suit was filed on 11th November 2011 over 2 years 7 months later and this was clearly out of time. There is no discretion to extend time for either the claim under tort or the employment issue. The suit is only fit for dismissal. Suit dismissed but each party is to bear their own costs.

It is so ordered.

Dated and delivered at Nairobi this 18th day of December 2018

Nzioki wa Makau

JUDGE