



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 89 OF 2016

(Before D. K. N. Marete)

KIPLANGAT CHEPKWONY.....CLAIMANT

VERSUS

KABIANGA HIGH SCHOOL.....1ST RESPONDENT

BOARD OF GOVERNORS KABIANGA HIGH SCHOOL.....2ND RESPONDENT

RULING

This is a Preliminary Objection dated 20th April, 2016 and raises the following issues for determination at this stage. These are as follows;

1. THAT the Claim herein is incompetent, fatally defective and an abuse of the court's process as the same is statutorily time barred and offends the provisions of Section 90 of the Employment Act No. 11 of 2007.

2. THAT the Claim was filed without leave of court on 15th May, 2013 by the Claimant which is more than four (4) years after the dispute arose on 9th October, 2008.

This matter has been in court variously and on 30th June, 2016 agreed on a disposal by way of written submissions.

The respondents in his submissions on the preliminary objection dated 4th July, 2016 submit that the cause of action as brought out by the claimant is a termination of employment on 9th October, 2008. This action is therefore brought out of time and offends Section 90 of the Employment Act, 2007 which provides as follows;

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, 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 respondent further sought to rely on the authority of **Fred Mudave Gogo v G4S Security Services (K) Ltd (2014)** eKLR in which Mbaru, J. **stated** as follows;

“It cannot be denied that the cause of action herein is based on a contract of employment. The claimant's employment was terminated on 8th August, 2008, a period over three years from the date of filing this claim in the Industrial court on the 5th June, 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay to cause the claimant/applicant from filing the claim in good time. This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims.”

It is the respondent's submissions that this suit having been filed four years after the onset of the termination is offensive to the law on limitation and should be struck out with costs.

The claimant in his written submissions dated 8th December, 2016 opines that this suit is not time barred in that the claimant was dismissed on 11th September, 2009 but continued to engage the respondents in negotiations with a view to an amicable solution of the issues in dispute. This went on to the labour office at Kericho and when this failed, the claimant was advised to resort to court.

The claimant further submits as follows;

“ that the preliminary objection raised by the respondents is not in good faith. The claimant filed his claim in May 2015, and in September, 2015, the principal to the 1st respondent called the claimant requesting him to withdraw the case so that they could settle the claim amicably and reinstate him to work. The claimant indicated to the principal that he would only resume work if the respondents admitted that they had dismissed him summarily and compensate him. The principal said he would get back to him which he did not. The respondents raised the preliminary objection almost a year after the claim was filed. This clearly illustrates that the same was not done in good faith.”

I would agree with the claimant's submissions and reliance on the authority of **Hawkins Wagunza Musonye Versus Rift Valley Railways Kenya Limited Miscellaneous Civil Application Number 11 of 2014** where it was held *inter alia*:-

“This is not judicial craft or innovation, but a conscious and deliberate decision on the part of the Court, to do justice. Parties should avoid legal jargon-mongering and look at the human face of the law. Labour and employment disputes are resolved through a multiplicity of adjudicatory and non-adjudicatory mechanisms. The Labour Relations Act 2007 Section 62 (3) for instance limits the formal report of termination disputes to the Labour Minister to 90 days from the date of dismissal, or any longer period the Minister on good cause, permits. It is recognized labour and employment disputes go through a multiplicity of dispute resolution mechanisms, during which time may be deemed to be frozen. The respondent has not said anything of the negotiations it held with the applicant employee, which culminated in a lapsed and therefore abortive settlement. All the respondent is doing is looking at the law and the clock impersonally. The result in the event the court endorses such an approach would be this: the employee is forced into accepting the abysmally low amount of money offered as an out of court settlement; or reject that amount and leave employment after years of service, with nothing.”

The claimant further seeks to rely on the authority of **Kenya Union of Commercial, Food and Allied Workers Versus Water Resource Management Authority and Attorney General Cause No.1 of 2015** where it was held *inter alia*;

“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.”

“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 the judicial discretion.”

It is my finding that the issues of law raised by counsel do not come out clearly to support a preliminary objection. Further, these would require further investigation of facts and therefore do not stand out as adoptable points of preliminary objection.

I have dutifully followed the issues raised by the objectors in support of their preliminary objections and do not find any feasible ground in support of the objections....

*I find a lot of similarity between the situation in this case and the preliminary objection and the authority above cited. This arises in the sense that the preliminary objection raised does not entirely fall within the confines of the **Mukhisa Biscuits** authority as above cited. All limbs of the preliminary objection would, in my finding require further interrogation and enquiry and therefore not feasible to sustain the preliminary objection....*

This is not a suitable case for determination by way of preliminary objection. This is because, like is submitted by the claimant, it does not fall within the ambit of the rule in **Mukhisa Biscuits** afore referenced. A determination of the preliminary objection would require further interrogation to ascertain its veracity. Again, we should take into account that the issues of conciliation raised are issues of fact and would call for evidence to establish. This *in toto* demeans the sustainability and authority of the preliminary objection as raised.

I am therefore inclined to dismiss the preliminary objection with an order that each party bear their own costs of the application.

Delivered, dated and signed this 31st day of January 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Otieno instructed by Geoffrey Otieno & Company Advocates for the Respondent/Objector.
2. M/s Mitey instructed by Mitey & Company Advocates for the Claimant/Respondent.