



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 64 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**MARTIN IMBUSI ..... CLAIMANT**

**-Versus-**

**NYAYO TEA ZONES DEVELOPMENT**

**CORPORATION ..... RESPONDENT**

**RULING**

By notice dated 29th March 2016 the Respondent raises preliminary objection to the suit filed by the Claimant on grounds that-

- (a) The suit offends mandatory provisions of sections 27(2) and 31(4) of the Limitation Act.
- (b) The suit offends mandatory provisions of section 90 of the Employment Act, 2007.
- (c) The suit is time barred by dint thereof.

The suit came up for hearing on 9th February 2017 when the court directed that parties dispose of the preliminary objection by way of written submissions.

**Respondent's Submissions**

In the written submissions filed by the Respondent in support of its preliminary objection on 22nd February 2017, through its advocates Magare Musundi & Company Advocates, the Respondent avers that the suit was filed on 23rd February 2015 over a cause of action that arose on 8th March 2010 and 14th January 2011, that the period between 8th March 2010 and 23rd February 2011 is 4 years and 11 months, while the period between 14th January 2011 and the date of filing is 4 years and one month, both being outside the limitation period of 3 years under section 90 of the Employment Act which provides that-

***90. Limitations***

*Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.*

It is submitted that section 90 limited the applicability of Section 4(1) in employment contracts to 3 years. That consequently the suit is time barred. The Respondent relied on the case of **MOMBASA ICC NO.296 OF 2013 – AUGUSTINE ODHIAMBO ABIERO =VS= K.K. SECURITY LIMITED (2014) eKLR** – where the court dismissed the claimants suit which was filed 4 years after the cause of action arose. The Respondent further referred to the case of **NAIROBI ELC NO.13 OF 2013 – HENRY MAINA GATETE =VRS= JANE NJOKI & ANOTHER (2014) eKLR** in which the court held that extension of time applies only to claims made in tort and even then the claims must be in respect of personal injuries arising from negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law). This was confirmed in **Mary Osundwa =vs= Nzoia Sugar Company Limited Civil Appeal No.244 of 2000** where the court of appeal held that section 27(1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the Plaintiff as a result of the tort. The Respondent further relied on **NAIROBI ICC NO.55 (N) OF 2010 – LIVINGSTONE MUTSUNE & ANOTHER =VS= AFRICA TOURS AND HOTELS LIMITED (In receivership and another (2014) eKLR** in which the court stated that the issue of limitation is a matter of law and no promise can suffice to extend the limitation period unless the promise was express that the limitation would not apply.

It was submitted that it is clear that the suit was filed out of time and ought to be struck out.

### **EXTENSION OF TIME**

On extension of time, the Respondent submitted that in rare occasions the law provides for extension of time under Section 27 of the Limitation of Actions Act but it only in strict compliance of Section 27 of the said Act which covers matters founded on Section 4(2) of Limitation of Actions Act. The said Section provides inter alia:

**“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued”**

It is submitted that effectively there can be no extension of time in regard to contract in view of clear provisions of Section 27(2) which relates to material facts having been outside the knowledge of the claimant, constructive or actual until the conditions in 2(a) and (b) are fulfilled. `

It is submitted that section 30 relates to a tort while in this case the dispute relates to a contract of service and no claim was brought before the end of limitation period and no extension was given, thus there was no ground for such an extension. That since no leave has been obtained the suit ought to be dismissed.

The Respondent relied on the following authorities: -

**1. NAIROBI HCC NO.145 OF 2010 – ROSEMARY WANJIRU KUNGO =vrs= ELIJAH MACHARIA GITHINJI & ANOTHER** where Justice Odunga held that extension of time applies only to claims made in tort and even then the claims must be in respect of personal injuries arising from negligence, nuisance or breach of duty (whether the duty exists by virtue of contract or of a written law of independently or a contract or written law). This was confirmed in **Mary Osundwa =vs= Nzoia Sugar Company Limited Civil Appeal No.224 of 2000** where the court of appeal held:

*“Section 27 (1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort.”*

**2.NAIROBI HCC NO.492 OF 2013 – NEMWEL NYASAGARE NYANARO (DCD) THROUGH MAGANO ONKUDI (2014) eKLR** where the court held that:-

*“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other protect a defendant after he had lost evidence of his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”*

## **Claimant’s Submissions**

For the Claimant, Nyairo and Company Advocates filed submissions on 20th March 2017 in which it is submitted that the suit was filed within the statutory period provided by law and is properly before court. It is submitted that the Claimant tendered his resignation on 14th January 2011 and the resignation was accepted by the Respondent by letter dated 4th April 2011. It is submitted that thereafter the parties engaged in correspondence in relation to clearance and computation of the Claimants terminal dues by letters dated 14th January 2011, 4th April 2011, 12th April 2011, 15th October 2012, 7th November 2012 and 2nd April 2013, copies of which are contained in the Claimant's list of documents filed on record. It is submitted that the cause of action arose on 9th April 2013 after expiry of 7 days given in the demand letter dated 2nd April 2013 by the Claimant's advocates addressed to the Respondent as it is on that date the Claimant became aware of the Respondent's intention not to pay his terminal dues when no response to the demand letter was received. It is submitted that the preliminary objection can therefore not stand as there would be need for investigating the facts of the case.

The Claimant relied on the case of **Mukhisa Biscuit Manufacturing Co. Limited v West End Distributors Limited** where the court stated that-

*"A preliminary objection is in the nature of what used to be a demurer. 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....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued, may dispose of the suit."*

In the alternative and without prejudice, it is submitted for the Claimant that on 3rd March 2015 the Claimant filed an application by way of Ex-parte Originating Summons seeking to enlarge time for filing of his claim and/or validate the claim, that subsequently the Respondent filed a replying affidavit on 19th April 2015 and the application was fixed for hearing on 9th June 2015. It is submitted that it is on record that the application was compromised on 9th June 2015 when the application was by consent withdrawn, that the Respondent conceded to the existence of the suit by the Claimant and agreed to canvass the matter on its merits and agreed not to raise the issue of limitation. That the parties thereafter fixed the main suit for hearing on 30th September 2015.

It is submitted that the preliminary objection was filed much later after acknowledgment by the Respondent and that the filing of the preliminary objection was in bad taste, was an afterthought intended to ambush the Claimant and is an abuse of court process since it is aimed at delaying the hearing of the substantive suit. It is submitted that the Respondent waived its right and opportunity to raise the preliminary objection when it consented to the withdrawal of the application and the listing of the suit for hearing. It is submitted that the Respondent is barred by promissory estoppel from pursuing the preliminary objection.

The Claimant further relies on Article 159 of the Constitution which provides that the court shall administer justice without undue regard to procedural technicalities and urged the court to ignore the preliminary objection as it is merely a technicality. The Claimant relied on the decision of the Court in the case of **Benjamin Aino Shirka v Fauzia Mohamed HCCC No. 272 of 2011** in which **Havelock J.** citing **Lord Denning in Combe v Combe** held that where one party has by his words or conduct made to the other a promise which was intended to affect their legal relations to be acted on, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations once the promise or assurance has been acted on.

It was further submitted that the Employment Act does not tie the hands of the judge or limit the judge in any way in making a decision to achieve justice or oust the jurisdiction of the court.

The Claimant further relied on the case of **Lucia Wambui Ngugi v Kenya Railways Corporation & Another** where **Mbitio J.** held that section 27 of the Limitation of Actions Act provides that limitation period under section 4(2) of the Act can be extended in certain circumstances and further that section 31 provides that limitation periods provided for under other written law can be extended by section 27.

### **Determination**

I have carefully considered the grounds of preliminary objection, the submissions filed on behalf of the parties and the authorities cited therein. The issues arising therefrom for determination are the following-

1. When the limitation period started running,
2. Whether the Respondent is estopped by promissory estoppel from raising the preliminary objection, and,
3. Whether the preliminary objection herein has been raised prematurely.

### **When limitation period started running**

According to the pleadings in the Statement of Claim, the Claimant was suspended from employment on 8th March 2010 and resigned on 14th January 2011. His Claim is for "**dues for the period between 8th March 2010 to 14th January 2011**". This means that the limitation period started running on 14th January 2011. The Claimant's argument that the limitation period started running upon the failure of the Respondent to pay is not pleaded in the Claim and neither can a demand letter raise a cause of action. The Claimant was aware that the limitation period had lapsed as pleaded in his application for leave to enlarge time filed on 3rd March 2015, just one week after filing the Claim. In the affidavit in support of the application the Claimant deposes at paragraphs 7 and 8 that-

*7. That on visiting my advocates' office, I was informed that suit ought to have been filed within three(3) years, nonetheless this suit was filed on 23rd February 2015 after the limitation period.*

*8. That I am advised by Advocate on record which information I verily believe to be true and correct that leave of this court is necessary to validate the already filed suit before it proceeds to hearing.*

Based on the Claimant's own averments above, he cannot by any guile or ingenuity purport that his claim was not statute barred. Such arguments must be rejected as being an atrocious attack on this court's intellect and qualifies to be considered an abuse of the court process.

### **Promissory Estoppel**

Promissory estoppel is defined in Blacks Law Dictionary to mean.....

*The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment. – Also termed (inaccurately) equitable estoppel. [Cases: Estoppel 85]*

*“The doctrine of promissory estoppel is equitable in origin and nature and arose to provide a remedy through the enforcement of a gratuitous promise. Promissory is distinct from equitable estoppel in that the representation at issue is promissory rather than a representation of fact. ‘Promissory estoppel and estoppel by conduct are two entirely distinct theories. The latter does not require a promise.’”*

*Ann Taylor Schwing, California Affirmative Defenses & 34:16, at 35 (2d ed. 1996) (quoting Division of Labour Law Enforcement v. Transpacific Transp. Co., 88 Cal App. 3d 823, 829 (Cal.*

*Ct. App. 1979)).”*

The Claimant's arguments that the Respondent is estopped by promissory estoppel from pleading limitation is not borne out of the court record. The record shows that the Respondent pleaded at paragraph 10 of its Reply Memorandum filed on 25th March 2015 that-

*10. It is the Respondent's Submission that the Claimant's Suit herein be dismissed since it was not filed within the required period according to Section 90 of the Employment Act, 2007.*

The Respondent followed this up by filing the notice of preliminary objection after the Claimant withdrew the application for extension of time for filing suit. The fact that the Claimant did not object to the withdrawal of the Claimant's application cannot amount to a promise not to pursue the issue of limitation either expressly or by implication.

### **Was the Preliminary Objection raised prematurely?**

The Claimant argues that the preliminary objection cannot stand as the facts giving rise thereto require investigation to ascertain when the cause of action arose and therefore does not fall within the definition of a preliminary objection as set in the case of **Mukhisa Biscuit**. As I have pointed out above, the facts setting out the cause of action are pleaded in the Statement of Claim as well as in the affidavit of the Claimant sworn on 28th February 2015, which are on record. I therefore find the arguments by the Claimant to be merely academic but without substance.

The Claimant's argument that section 28 of the Limitation of Actions Act allows the court to entertain applications for extension of time or his invocation of Article 159 must also fail. Section 28 of the Limitation of Actions Act allows for extension of time in respect of actions founded on tort only and only in the specific circumstances as set out therein. In the case of **Divecon v Samani** quoted in **E.Torgbor v Ladislaus Odongo Ojuok** which the Claimant relied on, the Court of Appeal stated that "***A perusal of Part III shows that its provisions do not apply to actions based on contract***" and further that "***In light of the clear statutory provisions, it would be unacceptable to imply as the learned judge of the superior court did that the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked***". In that case the Court of Appeal held that "***...no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action...***". More recently, the Supreme Court in the case of **In Re The Matter of the Interim Independent Electoral Commission S.C. Constitutional Application No. 2 of 2011; [2011]eKLR** and in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012]eKLR** stated that jurisdiction is a matter regulated by the Constitution, statute law and judicial precedent.

In the present case neither the Constitution, nor statute or precedent give this court jurisdiction to entertain a suit that has been filed after the lapse of the limitation period of 3 years in the case of employment claims. On the contrary, section 90 of the Employment Act takes away that jurisdiction.

### **Conclusion**

Having established that the cause of action arose on 14th January 2011 when the Claimant resigned, the Claim ought to have been filed on or before 14th January 2014 when the limitation period of 3 years provided for under section 90 of the Employment Act lapsed. The claim having been filed on 23rd January 2015, it was time barred by more than one year. Section 90 of the Employment Act expressly provides that no action may be brought after the lapse of the limitation period of three years. The Act does not provide for extension of the period and neither does section 4(2) of the Limitation of Actions Act which deals with limitation period for contracts generally, or section 31 which provides that

*31. Where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III were incorporated in it.*

Section 90 of the Employment Act is one of the legislation contemplated under section 31 of the Limitation of Actions Act and is applicable only in cases of disability, acknowledgment and part payment, and in cases of fraud, mistake and ignorance of material facts, all of which are not the case in the present suit.

The foregoing being the case, this case must suffer the same fate as similar cases which have been determined before it. The preliminary objection is upheld and I accordingly strike out the entire suit. Each party shall bear its costs.

I must however acknowledge the spirited effort of the Claimant's counsel that is evident in the very elaborate submissions filed as well as the equally detailed submissions of the Respondent. As the saying goes, the Claimant went down fighting.

**Dated, Signed and Delivered this 22<sup>nd</sup> day of September, 2017**

**MAUREEN ONYANGO**

**JUDGE**