



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 108 OF 2015**

***(Before D. K. N. Marete)***

**DAVID CHEMWOR.....CLAIMANT**

**VERSUS**

**S.B.I INTERNATIONAL HOLDING (AG) LTD.....RESPONDENT**

**RULING**

This is an application by way of Preliminary Objection dated 30th March, 2017 as follows;

*The Amended Memorandum of Claim is time barred according to Section 90 of the Employment Act, No.11 of 2007.*

The respondent's case in support of the preliminary objection is that this matter was instituted by the Kenya Building, Construction, Timber and Furniture Industries Employee Union as the Claimant vide a Memorandum of Claim dated 20th March, 2015 and filed on 26th instant. All necessary nuptials including the response were filed by the respondent.

On 13th February, 2017 the claimant served the advocates on record for the respondent with a Notice of intention to act in person dated 26th February, 2017. Thereon, he sought leave of court to amend the memorandum of claim and on 22nd February, filed the same substituting himself for the union. And this is the basis for this preliminary objection.

It is the respondent's submission that the action by the claimant caused a transgression of section 90 of Employment Act, 2007 and also section 4 (1) of the

Limitation of Actions Act, Chapter 22, Laws of Kenya thereby subjecting this suit

to time bar paradigms established by statute aforesaid. On this she sought to rely on the authority of **Fredrick M. Waweru and anor vs Peter Ngure Kimingi (2007) eKLR** where Alanshir Visram, J. in his judgement whilst relying on the authority of **Davis v Elsby Bros Ltd [1960] 3 All ER 672, [1960] 1 WLR 170** where Pearce LJ, having referred to Mabro's case said this ([1960] 3 All ER 672 at 674, [1961] 1 WLR 170 at 173) observed as follows;

*'In my opinion the addition of a defendant is governed by the same considerations as the addition of a plaintiff .....That principle also applies to the substitution of a party, since substitution involves the addition of a party in replacement of the party that is removed. Moreover, if*

*contrary to that principle, a party were added or substituted, then the final words or R.S.C., Ord. 16, 11, would defeat the purpose of the addition or substitution since the new defendant could still rely on the statute against the party so added. Those words are: "... and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice.'*

Further, In the authority of **Gulamabbas v Ebrahimji & Others (1971) EA 22 (CAK)** in the East African Court of Appeal in Uganda before Justice Duffus P, Spry V-P and Mustafa JA where Mustafa JA had this to say in agreement with the other Judges held thus;

*"the order substituting the present appellant as respondent for the minister in the High Court was made after the period of limitation had expired in terms of sub-r of O.1, r.10 of the civil procedure code in such an event **Faud, J .., could not exercise his inherent powers, as he purported to do, to override the period of limitation laid down by statute the order of substitution was clearly made outside the period of limitation and cannot stand. Indeed I very much doubt if there was any appeal in the existence before Faud, J., When he made the order of substitution.***

The Claimant/Respondent in his written submissions dated 16th August, 2017 opposes the preliminary objection and argues that the respondent having not objected from the application for leave to substitute the parties is now debarred from raising any objections.

It is his further submissions that litigation is essentially the art of affording the parties an opportunity to litigate their grievances and the court holds the necessary mechanisms for facilitating the same. These include but are not limited to amendment of proceedings like in the present case. It is his submission that the amendment did not touch on the subject matter of the suit and only effected the name of the claimant and therefore the preliminary objection must fail. This is because no new party or circumstances changed in the proceedings.

The Claimant/Respondent also brings in the limb the dispute having been instituted before a conciliator who issued a certificate to proceed to court on 30th April, 2014 which time clocked in the running of limitation of actions timelines.

The submissions by the Claimant/Respondent sound viable and plausible. Unfortunately, this ends at that. The art of litigation is guided by law and processes that delineate that which is doable and agreeable and that which is not. The parties must at all times be cautious of the repercussions of their actions or in actions and the resultant consequences: like in this case.

I am persuaded that the law on time bar as relates to amendment to pleadings is well set out the case of **Fredrick M. Waweru & others** as cited above. The amendment in issue was initiated and effected out of the limitation period and is therefore not sustainable. This application must therefore fail.

I am therefore inclined to dismiss this application with orders that each party bears their own costs.

Delivered, dated and signed this 17th day of October 2017

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Mwitwa holding brief for Mr. Kamande instructed by Professor Albert Muma & Company Advocates for the Respondent/Applicant.
2. Mr. Miruka instructed by Enoch Anyona Miruka & Company Advocates for the Claimant/Respondent.