



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 6 OF 2017**

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

LOICE ANYANGO.....CLAIMANT

VERSUS

JAMES FINLAYS (K) LIMITED .....RESPONDENT

**RULING**

This is an application by way of Preliminary Objection dated 18th September, 2017 as follows;

- i. That the Claims herein are incompetent and fatally defective for being statutorily time barred; having been raised in contravention of both sections 90 of the Employment Act, 2007 and Section 4(1) of the Limitations of Actions Act, CAP 22 Laws of Kenya, and;*
- ii. That in the circumstances, the Claim herein constitutes an abuse of the court process and ought to be struck out in the first instance with costs to the Respondent.*

The respondent submits a case of time bar in that the Statement of Claim clearly states that the claimant’s services were terminated on 26th September, 2013. This essentially denotes a time bar as the filing was done in contravention of section 4 (1) of the Limitation of Actions Act, and section 90 of Employment Act, 2007. In this she seeks to rely on the authorities of **Nicodemus Marani v Timsales Limited (2014) eKLR** and **Ben Kiplagat Tunduny Versus Standard Chartered Bank (2015) eKLR** setting out the subject matter.

It is her further submission that the instant application meets the threshold set

out in **Mukhisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Company Limited, (1969) E.A 696** cited in **Kenya Council of Employment Migration Agencies v Nyamira County Government & 10 others (2015) eKLR** referred to by your ...in **Kenya Union Commercial, Food and Allied Workers v Water Resource Management Authority & another (2015) eKLR** as it is raised on a purely point of law which has been pleaded and/or arises from an implication of the pleadings and does not require any further interrogation of facts as it is specifically pleaded in the Statement of Claim that the Claimant was dismissed in the year 2013. (See paragraphs 4 of the Statement of Claim.)

The Claimant/Respondent opposes the preliminary objection and submits that this is not based on a pure point of law as espoused in the authority of **Mukhisa Biscuit Manufacturing Co.Ltd** above and therefore must fail. This is as follows;

7. The Respondent's objection is premised on a wrong footing that the purported termination took effect on the 26<sup>th</sup> September 2013 without taking into account the supervening period when the matter has been pending pursuant to the provisions of S.62 of the Labour Relations Act, 2007 which had effectively rendered the limitation period static. It is the Claimant's submissions that the issue of limitation of actions involves both a point of law and fact. In some instances evidence ought to be adduced to ascertain whether indeed a matter has been statutorily time barred like the present case it is indeed difficult, without any evidence on record, to ascertain when the termination effectively took effect.

8. In the case of *Mukhisal Biscuit Company versus West end Distribution Limited (1969) EA 696* the court defines what a preliminary objection is;

***“A preliminary Objection is in the nature of what used to be a demure. It raises a pure point of law which if 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 exercise of judicial objection does nothing but unnecessary increase costs and occasionally confuse the issues. This improper practice must stop.”***

9. In the *Janet Syokau Kaswii vs Kathonzweni Financial Service Association (2014)eKLR* this Honourable court made an observation that allowing a preliminary objection would not entirely determine the issue but only change course so that it would resurface in another form. Moreover the refusal to grant the preliminary objection as presented would not prejudice any of the parties or even the Respondent proponent.

The claimant further pleads the protection of section 62 of Labour Relations Acts which she submits takes care of the intervening period that rendered the limitation period static, ostensibly during negotiations for settlement. This is, however, not discernible from her pleadings and therefore the case for this preliminary objection by the applicant. Is section 62 an afterthought and excuse to facilitate ploughing through this application?

I shall grudgingly disallow this application. This is because, like is submitted by the Claimant/respondent, this would not prejudice any of the parties.

I am therefore inclined to dismiss this preliminary objection with orders that each party bears their own cost of the application.

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

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Koech instructed by Bett & Company Advocates for the Respondent/Applicant.
2. Mr. Orina instructed by E.M Orina & Company Advocates for the Claimant/Respondent.