



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.1 OF 2016**

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

**CHARLES KIPNG'ENO KETER.....CLAIMANT**

**VERSUS**

**KIMBILIO DAIMA SACCO LTD.....RESPONDENT**

**RULING**

This is a Preliminary Objection by the respondent dated 4th February, 2016 and comes out as follows;

1. *That the claim herein is incompetent, fatally defective as the same is statutorily time-barred and offends the provisions of both section 90 of the Employment Act 2007 and section 4 (1) of the Limitation of Actions Act (Cap 22 Laws of Kenya).*
2. *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”*

When the matter came for hearing on 11th February 2016, the parties agreed to dispose off the preliminary objection by way of written submissions.

The respondent/applicant in her undated written submissions filed on 19th February 2016 sets out these issues for determination as follows;

- a) *Whether the claimant's statements of claim are statutorily time barred;*
- b) *If the answer to the foregoing is in the affirmative, whether the claims ought to be struck out in the first instance with costs to the respondents; and*
- c) *Whether the claims constitute an abuse of the court process.*

The respondent submits that the claimant avers that his services were terminated in January, 2002. The claim is therefore manifestly time barred for having been filed in contravention of S. 4 (1) of the Limitation of Actions Act and also S.90 of the Employment Act, 2007 as follows;

*“ S. 4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-*

*(a) actions founded on contract;...”*

Section 90 of the Employment Act, 2007 provides as follows;

*...Notwithstanding the provisions of section 4 (1) of the Limitations 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.*

It is the respondent's further case that the claimant's cannot adopt the excuse of close of criminal prosecution as civil proceedings would have been commenced and were always tenable before the close of criminal proceedings.

The claimant's case is that in 2002, he entered in the employment of the respondent. The said respondent caused criminal charges and these charges were dismissed on 30th October, 2015 for lack of evidence. When they reported back to work upon termination of the criminal charges, they were informed that their services had been terminated and therefore the institution of this suit.

It is the claimant/respondent's further case that all this time, the claimant's were on suspension pending investigations into the criminal prosecution/allegations and therefore the suit is sustainable. The cause of action in this matter arose on 30th October, 2015 when the criminal charges were dismissed and the respondent failed to reinstate the claimant. The suit is therefore not time barred.

The issue for determination to me is whether the preliminary objection meets the criteria in the authority of **Mukhisa Biscuits 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** as submitted by the respondent/applicant as follows;

*“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.”*

Again,

*“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.”*

The Respondent/Applicants submits that it does.

I beg to differ with this submission by the respondent/applicant. The suit as set out brings out a case of a disputed date of termination of the employment of the claimant. This is clearly spelt out in the pleadings by the claimant. A preliminary objection founded on the basis of time bar in the circumstances would not suffice. This is because of the obvious fact that to determine this, one would be forced to delve into the issue of date or time of termination which is not ascertained in the circumstances. The preliminary objection therefore collapses with thud.

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

Delivered, dated and signed this 17th day of May 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances:

1. Mr. E. M Orina instructed by E. M. Orina & Company Advocates for the respondent.
2. Mr. Koech instructed by the Mr. Bett & Co. Advocates for the respondent/applicant.