



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.2 OF 2014

(Before D. K. N. Marete)

JOSEAH KIPRONO LANGAT.....CLAIMANT

VERSUS

KONONIN TEA GROWERS SACCO

SOCIETY LIMITED.....RESPONDENT

RULING

This is a Preliminary Objection dated 19th May, 2016 brought out by the respondent as follows;

1. *That the claim herein is incompetent, fatally defective as the same is statutory time barred and offends the provisions of both section 90 of the Employment Act 2007 and section 4 (1) of the Limitations 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.*

The respond in her written submissions in support of the preliminary objection raises the following as issues for determination in the circumstances;

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

She moves on to argue and submit that the claimant's services were terminated on 29th September, 2009 after he sought another employment at Silbwet FSA (now Midland Sacco) while on suspension to pave way for fraudulent deals in the respondent sacco. This being the case, limitation started running from the date of the dismissal and therefore filing of a claim as is in the instant case is time barred and contrary to the provisions of limitation as stipulated under Section 4 (1) of the Limitations of Actions Act under Section 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...*

.....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 contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default or in the case of continuing injury or damage within twelve months next after the cessation thereof.

The respondent seeks to rely on the authority of **Ben Kiplagat Runduny versus Standard Chartered Bank [2015] 20 eKLR** where the court held that time starts running from the date of accrual of the cause of action and pray for striking out the claimant's case.

The respondent further submits that this matter was even referred to African Dispute Resolution or negotiation for settlement on dismissal of the claimant and therefore the claim is an afterthought intended to vex the respondent. She further sought to rely on the maxim of equity that the law aids the vigilant and not the indolent thus further imploring the court to dismiss the claim with costs. Again, reliance was sought in the authority of **Divecon V Samani (1995-1998) EA 48 As Cited in Kenya Electrical Trades & Allied Workers Union V Kenya Power & Lighting Company Ltd (2015) eKLR** where it was held as follows;

“it is clear that extension of time in a cause of action founded in contract is untenable in law.”

The respondent further submits that this action is an abuse of the process of court and is brought to court with unclean hands as espoused in the authority of

Board of Governors Moi High School, Kabarak V Malcolm Bell (2013) eKLR where the Supreme Court of Kenya, M.K. Ibrahim, J. and J.B Ojwang, J, observed as follows;

“cited sup CT APP NO 1 of 2012 THE Case of the International Commission of Justice V The Attorney General and the Others, and held that the abuse of the process of the court has to do with the motives behind the guilty parties action; and with a perceived attempt to maneuver the court's jurisdiction in a manner that it is incompatible with the goals of justice. Therefore my lord it is our submission that the claimant has the intent to mislead this honorable court an act that will occasion the respondent to suffer great loss and damage thus an abuse of this honourable courts process.”

She prays that that the preliminary objection be upheld with costs to herself.

The claimant/respondent opposes the preliminary objection and posits that the same is wrongly brought out on the premise that the claimant's services were terminated on a specific time and date but there is no evidence of this in defense.

8. The claimant avers that prior to the allegations made by the respondent, the respondent issued the claimant with a letter dated 10/12/2004 for compulsory leave which leave was to take effect from that date of the letter.

9. The claimant avers that he took the leave as directed by the respondent and has not received any salary from the date 10/12/2004 to date.

10. The claimant avers that at no particular time has his employment with the respondent been terminated nor has he been issued with any letter terminating his employment with the respondent.

The respondent admits the contents of paragraphs 8,9,10 and 11 of the Statement of Claim but

denies the allegations that the employment has never been terminated and the claimant shall be put to strict proof of the allegations at the hearing thereof.

She submits that this preliminary objection does not in any way fit into the parameters of a preliminary objection as authenticated in the authority of **Mukhisa Biscuits Company Limited vs Westend Distributors Ltd [1969] EA 696 at page 701.**

“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 the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessary increase costs and occasion confuse the issues. This improper practice must stop.”

I agree with the claimant. The preliminary objection as raised by the respondent does not fall within the confines of the authority of **Mukhisa Biscuits** above cited. This is because as it were, the authority upon which the preliminary objection is based would require evidentiary investigation to establish. This would conflict with the law and practice on preliminary objections as laid out. I am therefore inclined to dismiss the preliminary objection with a rider that each party bears their own costs of the preliminary objection.

Delivered, dated and signed this **30th day of June 2016.**

D.K.Njagi Marete

JUDGE

Appearances

Mr. Koko instructed by Obondo Koko & Company Advocates for the Claimant.

Mr. E.M.Orina instructed by E.M.Orina & Company Advocates for the Respondent/Objector.