



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1687 OF 2011

KENYA UNION OF COMMERCIAL, FOOD AND

ALLIED WORKERSCLAIMANT

VERSUS

KYAUME FARMERS CO-OPERATIVE

SOCIETY LIMITED.....RESPONDENT

RULING

1. The Respondents in this claim raised several objections which they deemed as preliminary and in respect of which they required determination in limine. The objections were in the main that:-

- (a) the claim is statute barred
- (b) the claim herein is resjudicata
- (c) there is misjoinder of parties

2. Prior to delving into the merit or otherwise of the preliminary objections, it is important to draw attention to the essence of a preliminary objection as was well stated by *Sir Charles Newbold P in the case of Mukisa Biscuit Co. v. West End Distributors (1969) E.A. 696 at Page 701*. The learned Judge observed as follows:-

“A preliminary objection is in nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts as 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.”

3. Taking this succinct explanation of what constitutes a preliminary objection into account and applying the same to the case before me, I am of the view that the question of limitation is a factual matter and may require the ascertainment of when the cause of action actually accrued.

4. According to the Respondents, the cause of action accrued in 1996 but the Claimants argue that the cause of action accrued in 2010 when the Ministry of Labour communicated its recommendation on how to resolve the dispute between the Claimant’s members and the Respondents’ predecessor. This being the position it may require leading evidence and examining facts and documents in order to ascertain when

the cause of action actually accrued. Besides, this Court has held in the case of **Kenya Plantation and Agricultural Workers Union Vs. Mununga Leaf Base (2013) eKLR** that resolution of Labour and employment disputes is a process with the Court in most cases being the final arbiter.

5. What this means is that once a disputant invokes the prescribed dispute resolution mechanisms, the accrued cause of action becomes suspended until the outcome of the conciliation is known.

6. Concerning the question of *res judicata*, this again would require ascertainment of the issues and the parties in the Kangundo case. These were not made available to the Court. On the question of misjoinder, the Court is not persuaded that this would constitute a preliminary objection, going to the root of the case since misjoinders are curable by amendment to the extent and including striking out from the suit, the party wrongfully joined.

7. As observed by **Newbold P** in the **Mukisa Biscuit** case cited earlier in the ruling, a preliminary objection proceeds on the premise that all facts as pleaded by the other side are correct save for the legal defect or question which goes to the root of the claim.

8. In the matter before me, most facts as pleaded by the Claimant are disputed and would require a trial to resolve. To this extent this may not be a proper case for a preliminary objection.

9. As further observed by Newbold P in the **Mukisa Biscuits** case, the improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues.

10. In conclusion, the Court overrules the preliminary objection and directs that the case proceeds to full trial on merit.

11. It is so ordered.

Dated at Nairobi this 15th day of January 2015

Abuodha J. N.

Judge

Delivered this 15th day of January 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge