



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 393 OF 2014

DAVID JUMA AKITE

CLAIMANT

V

AMOS MAINA MUTERO T/A SUMMERLAND HOTEL

RESPONDENT

RULING

1. David Juma Akite (Claimant) commenced legal proceedings against Amos Maina Mutero t/a Summerland Hotel (Respondent) 25 August 2014 and he stated the issues in dispute as

1. Unfair termination.
2. Notice.
3. Underpayment.
4. Normal overtime.
5. Public holidays.
6. Leave for 12 years 2 months.
7. Half salary for 1 year 3 months.
8. Gratuity.

2. The Memorandum of Claim was served upon the Respondent and he filed a Response on 31 October 2014.
3. On 7 November 2014, the Court directed the parties to attempt conciliation before the County Labour Officer, Nakuru. The Labour Officer filed a report on 10 December 2014.
4. On the same day, the Respondent filed a Notice of Preliminary Objection on the following grounds

1. THAT the Claimant's suit as filed in the Memorandum of Claim dated 4th August, 2014 is fatally defective for the same is Statutorily Barred for being filed outside the limitation of time contrary to the provisions of section 90 of the Employment Act.

2. THAT the Claimant's suit is untenable in law and the same ought to be struck out with costs to the Respondent.

5. The Claimant filed his response to the Preliminary Objection on 22 January 2015, and submissions were taken on 9 March 2015.
6. The Respondent's submissions on the preliminary objection were that the claim was statute barred because the Claimant deserted employment on 7 April 2011, and the claim was filed on 25 August 2014 contrary to the provisions of section 90 of the Employment Act, 2007. The section provides for limitation of 3 years for causes of action arising out of a contract of service.
7. The Claimant did not make any submissions but indicated he would rely on the response filed on 22 January 2015.
8. The Claimant's pleaded case relevant to the time the cause of action for unfair termination of employment accrued are found in the following paragraphs

4. The Claimant was earning a monthly salary of Kshs 2,200/- per month from April 1999 upto the time he was terminated on 1 September 2011. Annexed herein is a copy of his service marked as appendix DJA 2.

8. That sometimes in the month of June 2010, the claimant was given a one year suspension by the respondent and was instructed to report back on 1 June 2011. The reason for his suspension was the issue he raised for a consideration for salary increment, overtime payment, and public holidays to be paid at double rate, leave, NSSF contribution and pay slips. 10. The Claimant reported back to work on 1 June 2011 as instructed but was informed by the manager one Zachary Oduol that there were firm instructions from the respondent enquiring the claimant to reapply for his job. He requested a letter assuring him that his previous years of service will be considered as well but the manager told him that the instruction he had were limited to the letter of application only.

11. The claimant insisted to be given assurance on the previous years of service and also his pay for 12 months at half salary as per the labour laws (on suspension) calculated based on the relevant wages orders for that period. At that point, the manager became very furious and told the claimant to go home on suspension again for 3 months and report back on 1st September 2011. He went further to inform the claimant to forget the issues of payment during suspension and drop the demand for consideration for the previous years of service.

12. The claimant went home empty handed and struggled to cope with life outside employment and reported back to work on 1st September 2011 as was instructed.

13. When he reported to work, he was summoned to meet the manager on behalf of the respondent. He was informed by the manager that his services were no longer required meaning that he had been terminated.

9. It is clear from the Claimant's poorly drafted and incoherent pleading that he is asserting that his employment was terminated effective 1 September 2011.
10. The Respondent on his part, in an inelegantly drafted Response, pleaded, as may be material and relevant to the date the cause of action accrued as follows

7. FURTHER, the Respondent states that the letter marked by the Claimant as DJA 2 is a forgery for it indicates that the Claimant was employed from April 1999 to 1st September, 2011. The Claimant actually deserted employment on the 7th April 2011 when he by himself voluntarily resigned and/or absented himself from duty as from the said of 7th April, 2011....

8. IN view of the foregoing, the Respondent indicates that the annexure DJA 2 suggesting that the Claimant was employed till 1st September 2011 is fake and a forgery whereby the Claimant shall be required to produce the original copy of the same in court for authentication.

11. It is apparent on the papers that the Respondent's case is hinged on the Claimant deserting duty on 7 April 2011.
12. The purported Preliminary Objection therefore in the view of the Court fails to meet the standard set out in the celebrated case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696, where it was held by Law J that

So far as I am aware 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 off the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...

13. In the same case, Sir Charles Newbold, P on his part stated

A preliminary objection is in the 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 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

14. Whether the Claimant's employment was terminated on 1 September 2011 or he deserted duty on 7 April 2011 are issues of fact which can only be ascertained after hearing evidence from both sides.
15. The Preliminary Objection in the view of the Court was a red herring by the Respondent to delay the expeditious disposal of the Cause and it is dismissed with costs to the Claimant.
16. The Court orders that a convenient date for the hearing of the Cause on the merits be fixed when the diary is opened.

Delivered, dated and signed in Nakuru on this 17th day of April 2015.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Muli instructed by M. Korongo & Co. Advocates
For Respondent	Ms. Kibiru instructed by Kanyi Ngure & Co. Advocates
Nixon Raiback	Court Assistant