REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.1 OF 2015

(Before D. K. N. Marete)

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

WATER RESOURCE MANAGEMENT AUTHORITY..... RESPONDENT

AND

ATTORNEY GENERAL.....INTERESTED PARTY

R U L I N G

This matter was brought to court vide a Memorandum of Claim dated 11th November, 2014. The issue in dispute is therein cited as;

"Unfair/unlawful dismissal of Irene Chepkemoi Chesiror."

The Respondent, in response to the claim filed a Respondent's Statement Response dated 22nd January, 2015 denying the claim and also raising a counter-claim.

The matter came to court severally until the 8th June, 2015 when the respondents intimated that they wished to raise a preliminary objection to the claim. The court thereon awarded them leave to file one despite animated protest from the claimant.

The preliminary objection, the subject matter of this ruling is dated 8th June, 2015 and comes out as follows;

1. *That this suit is statute barred pursuant to Section 90 of the Employment Act and is therefore unsustainable and must be struck out with costs; and*
2. *That the claimant herein is a stranger before this court and lacks locus standi since the person in respect of whom the same is filed was never a member of the plaintiff union and as such, all documents filed by the plaintiff are fatally defective and must be struck off with costs to the respondent.*

The claimant, in her Claimant Reply to Notice of Preliminary Objection, dated 24th June, 2015 opposes to the preliminary objection and prays that the same be dismissed with costs to herself.

At the hearing of the preliminary objection on 3rd July, 2015, Mr. Juma, counsel for the Respondent submitted that the preliminary objection raised two main issues, one, limitation of time and the claimant's *locus standi* before this court. He further submitted that the suit is time barred in that the cause of action, the termination of the employment of the grievant was on 12th February, 2010 and this was vide a letter of termination of the same date and took effect thereon. The computation of time therefore starts on this date and in accordance with Section 90, Employment Act, 2007, the grievant had three years from this date to commence proceedings in court. This lapsed on 11th February, 2013 but the suit was filed on 6th January, 2015 two years down the line and without leave of court. The Respondents sought to rely on the authority of **Fred Mudave Gogo vs G4S Security Services (K) Ltd [2014] eKLR** where the preliminary objection was upheld on a time bar basis. The court observed as follows;

> *"It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 8th August 2008, a period over 3 years from the date of filing this claim in the Industrial Court on the 5th June 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in causing the claimant/applicant from filing the claim in good time.*
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> Further, the court had the following to say on the law of limitation on grounds of time bar;
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> *This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims. This time can be extended upon the Court being moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist parties who for good reasons are unable to come to court in good time. This was not the case here."*

The respondent further submitted that this suit is time barred and cannot be salvaged. He also sought to rely on the authority of **Benjamin Wachira Vs. Public Service Commission & Another**, **[2014] eklr** where the court highlighted three issues on the subject of limitation of action on ground of time as follows;

- when time starts running
- whether the matter before court was time barred
- whether the court had discretion to extend time.

This is illustrated in detail as hereunder;

> *15. On the accrual date of the cause of action which has a direct bearing on running of time, the Claimant takes the view that the cause of action in his case did not accrue until 8th August 2006 when he was notified that his employment file had been closed, thus dashing any hopes of his resinstatement to the public service.*
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> *16. This Court has however taken a different view on this matter in the case **Hilarion Mwabolo Vs Kenya Commercial Bank [2013 eKlr** to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee who employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.*
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> *17. In the instance case, the Claimant's termination from the 1st Respondent's employment took effect on 1st October 2000 as communicated by letter dated 29th September 2000. It follows therefore that the cause of action upon which the Claimant's claim is based accrued on 1st October 2000 and that is the date when time began to run as against the Claimant's claim.*

> *20. The Claimant told the Court that limitation is a matter of technicality which can be easily tackled under Article 159 (2) (d) of the Constitution, 2010. I do not think so. As held by the Court of Appeal in the case of* ***Thuranira Karauri Vs Agnes Ncheche [1997] eKLR*** *the issue of limitation goes to jurisdiction and whenever it is raised, the Court must deal with it before proceeding any further. To my mind, even in the current constitutional dispensation, parties come to court in time.*
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> *22. On the question of discretion to extend time, the Respondents submit that the Court has no such power with regard to claims arising from employment contracts. On this point, the Court was referred to the Court of Appeal decision in* ***Divecon Vs Samani [1995-1998] 1 EA 48 at page 54*** *in which the Appellate Court rendered itself thus;*
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> ***"No one shall have the right to power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract."***
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> *23.****Divecon Vs Samani*** *has not been overturned and flowing from the doctrine of stare decis it binds this Court. Moreover, the new employment law does not provide room for discretion to extend time in employment matters.*

In this case, the court found that time started running from the date of termination and that the matter was time barred. Further, the court established that it does not have jurisdiction or discretion to extend time. **Divecon vs Samani** (supra) at paragraph 22 above cited also refers and is applicable and binding herein.

On the limb of *locus standi*, it is the respondent's submission that the claimant does not have the *locus standi* to bring out this matter. This is because she does not have a standing recognition agreement and therefore a Collective Bargaining Agreement with the Respondents and therefore no compliance with Section 54 of the Labour Relations Act, 2007. This provides for the recognition of trade unions for purposes of negotiating Collective Bargaining Agreement's. The claimant is therefore a stranger to these proceedings. On this, the respondent sought to rely on the authority of **Communication Workers Vs. Safaricom [2014] eKLR at paragraphs 17 &18** where the proceedings were found to be defective and struck out as illustrated below;

> *17. The question here with regard to locus standi is that the Claimant union has no recognition with the Respondent and even where such recognition is lacking; there is no CBA between the parties to regulate terms and conditions of work. Without recognition by an employer, a trade union, even where registered as such, becomes a by stander waiting by the road side for instructions. Similar to a lawyer, though having a first class honours lacks a certificate of practice as an advocate of the High Court of Kenya. Such a lawyer though well versed in law and well suited to give legal advice to various citizens, lacks the capacity to stand in Court as an advocate representing a client.*
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> *18. In the instant case, the grievants constitutional right to unionise and associate with the Claimant cannot be curtailed. However beyond such unionisation, the law regulating the recognition of the union of choice must be adhered to. Even where the Claimant heavily relies on the decision in* ***Kenya National Private Security Workers Union versus Lavington Security Limited (2013) eKLR,*** *my reading of the preamble to the Labour Relations Act, section 54 and 59 of the Act make mandatory provisions with regard to recognition of a union by the employer.*

The Respondent in the penultimate urged the court to uphold the objection and strike out the proceedings with costs to themselves.

The claimant in opposition to the preliminary objection submitted that the preliminary objection as presented should have come in before the respondents response to the claim. It was her submission that raising a preliminary objection after the parties have set the matter for hearing raises an issue of bad faith on their part. Again, this matter had been subjected to concilliation, which process had been frustrated by the respondents non attendance and therefore a disregard of this binding nature of concilliation as illustrated by Section 64 (3) of the Labour Relations Act, 2007 and also endorsed by Section 15 of the Industrial Court Act, 2011.

The claimants further submission in opposition is that the documents attached in response to the preliminary objection in annexture A and filed on 25th June, 2015 is a memorandum of the claimant to the concilliator duly served unto the respondent. This requests the concilliator to prevail upon the respondent to release the grievant's letter of dismissal - page 55 of the claimant's documents filed on 15th April, 2015. This is further reiterated in her letter to the Attorney- General dated the 29th August, 2014 where the claimant again calls for a production of the dismissal letter made to the grievant.

It is the claimants submission that the respondent had not released the letter of termination as at the time of filing the suit. Further, the claimant submits that this is a unique situation where a decision for the preliminary objection cannot be had as this would require an enquiry into affidavits and testimonies on the subject. Again, to prove service of the dismissal letter as is required under Section 4 of the Employment Act, 2007 evidence must be adduced. The claimant further cites Appendix 16 and 18 of the Respondent's Reply as a show cause letter and a letter of summary dismissal. These were not served on the claimant at the time of filing the claim and are indeed curious and questionable.

On the issue of *locus standi*, it is the claimant's submission that Section 4 of the Labour Relations Act, 2007 endows workers with a right to joining a union of their choice. Section 52 thereof provides for direct remition of union dues to the union by the subscriber. Unions are not excluded from representation of their members on ground of recognition. It is the claimants further submission that even here, the preliminary objection fails in that it would call for investigations on issues of fact. There is no evidence or proof of a rival union to pre-empt the activity (ies) of the claimant as adduced by the respondent.

The claimant wishes to rely on the authority of **Hawkins Wagunza Musonye vs. Rift Valley Railways Limited, Misc. Civil Application No.11 of 2014** and also derides and distinguishes the authority of **Divecon Vs. Samani** *(supra*) as relied on by the Respondent as discarded practice with no bearing on the current labour laws. This authority comes out as follows;

> *b) What the Court did was to advise the Applicant that his Claim was still within the 3 years granted by Statute. It was explained that where Parties are engaged in concilliation, negotiation and other non adjudicatory dispute settlement mechanisms before coming to Court, the clock stops. These non-adjudicatory mechanisms are commonplace in labour disputes and anchored on Article 159 of the Constitution.*
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> *c) In the case of the Applicant Employee, he demonstrated he was engaged in formal negotiation with his Employer. The parties reached a tentative settlement, where discharge voucher was even prepared for the Applicant to append his signature. The negotiations broke down due to a misunderstanding on the terms of settlement between the Applicant and his then Counsel who represented him in engaging the Employer.*
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> *d) The Court therefore concluded the breakdown in negotiation, restarted the clock.*
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> *e) This is not judicial craft or innovation, but a conscious and deliberate decision on the part of the Court, to do justice. Parties should avoid legal jargon-mongering and look at the human face of the law. Labour and employment disputes are resolved through a multiplicity of adjudicatory and non-adjudicatory mechanisms. The Labour Relations Act 2007 Section 62 (3) for instance limits the formal report of termination disputes to the Labour Minister to 90 days from the date of dismissal, or any longer period the Minister on good cause, permits. It is recognized labour and employment disputes go through a*

multiplicity of disputes resolution mechanisms, during which time may be deemed to be frozen. The Respondent has not said anything of the negotiations it held with the Applicant Employee, which culminated in a lopsided and therefore abortive settlement. All the Respondent is doing is looking at the law and the clock impersonally. The result in event the Court endorses such an approach would be this: the Employee is forced into accepting the abysmally low amount of money offered as an out-of-court settlement; or rejecting that amount and leave employment after years of service, with nothing.

He prayed that the preliminary objection be dismissed and a ruling made in her favour.

There appears to be a differentiated approach on the issue of when time starts running between the authority of **Benjamin Wachira Ndiithi** (supra) at paragraph 16 as relied on by the Respondent and the spirit of the law as expressed in **Hawkins Wagunza Musonye** (supra) at paragraphs b, c, d and e aforecited. What then is the correct position in law on the subject?

This court is bound by its own decisions. It can however depart from the same and come up with an improvement or other analysis of the law on the subject. However, when these are disagreeable like appears in the present situation, the court would be duty bound to distinguish the same for purposes of streamlining the law for the future. In the circumstances, I would like to borrow from the authority in **Hawkins Wagunza Musonye** above and find that there can arise intervening circumstances which would affect limitation of action in employment situations. Conciliation as provided for under the Labour Relations Act, 2007 is one such case. This is the essence of the doctrine of *stare decisis* as well enunciated in the celebrated authority of **Dodhia v National & Grindlays Bank Ltd. And Another [1970] E.A. 195**.

I have had occasion to see and scrutinize the authorities relied on by the parties in support of their respective positions. The Respondent/Objector relies on authorities which bring out situations where the courts in analyzing cases of appropriate application of the time bar and limitation provisions of the law to sustain preliminary objection and therefore oust suits *in toto*. I must also admit that these were selected and tailored in favour of their case for preliminary objection.

However, the circumstances of this case, on an interrogation of the submissions by the claimant/respondent paint a different picture. The claimant submits that as at the time of filing the claim herein, the grievant had not been issued with a letter of termination. Besides, the dispute had been referred to a concilliation process and therefore the issue of the time when the cause of action arose is not clear-cut and would require further investigation to ascertain. This, she submits, goes against the grain of sustainable preliminary objections.

The claimant/respondent further rubbishes the preliminary objection on grounds that to establish the claimants' labour relationship with the respondent would also require further enquiry and investigations. She disagrees with the respondents submission on the law as requiring a recognition agreement and collective bargaining agreement to enable representation of the respondents workers. The claimant insists that the requirement of delving into a further inquiry to ascertain data on the parties labour relationship drowns the respondent's claim in objection. The ground of objection on the basis of lack of jurisdiction therefore also faulters.

Let us explore this further. Is the position taken by this court on jurisdiction in the authority of **Communication Workers Vs Safaricom** (supra) the total and indomitable position and interpretation of the law? Whereas I agree with the preamble to the Labour Relations Act, 2007 and its Sections 54 and 59 on the role of recognition agreements and collective bargaining agreement's in the formulation of organised, democratic, responsible and expeditious labour relations *inter parties*, I do not agree on the finality and totality of these processes in ousting a party (read trade union) from litigation on behalf of its member (s.) Why?

A recognition agreement comes in on the prompting of a trade union on the attainment of a simple majority of the unionisable member of the employer, (call it 50% plus one.) This then opens room and

ground for negotiations with a view to a collective bargaining agreement - the ultimate opener to a contract on the terms of operation and co-operation between the employer and trade union. This would mean that the intervening period before the recognition agreement and subsequent collective bargaining agreement is fraught with trade union activity (ies) that would call for recognition by law. I can almost bet that it was not the intention of the legislature to lock out this period of action from recognition as trade union activity in law. It equally cannot have been the intention of parliament to lock out such recruited membership of trade unions from remedy available in law through the recruiting trade union. Section 52 of the Labour Relations Act, 2007 is a point of reference. The mainstay of trade unionism is basically union membership. It is from this standpoint that one would delve into other competencies necessary for activity or action between a member and the trade union. If the spirit of paragraphs 17 and 18 of the authority of **Communication Workers** (supra) the spirit of ousting members representation by trade unions that have no recognition agreements and or collective bargaining agreements, then the easier option would have been to express this explicitly in black and white. I therefore find it difficult to pursue this analogy *in toto*.

This court traversed this ground in the recent authority of **Kenya Council Of Employment Migration Agencies v Nyamira County Government & 10 others [2015] eKLR** where the court made observations generously cited as hereunder;

> *"The ingredients of a preliminary objection are well established in the celebrated authority of **Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Company Limited, (1969) E.A. 696** as follows;*
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> > *"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 of 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."*
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> *Further,*
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> > *"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 the judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."*
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> *The 1st and 3rd Respondents submission on lack of jurisdiction on grounds of filing suit in the name of the petitioner instead of her trustee (s) falls short of the threshold of the authority of **Mukhisa Biscuits** aforecited.*
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> > *"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."*
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> *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."*
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> *It is my finding that the issues of law raised by counsel do not come out clearly to support*

a preliminary objection. Further, these would require further investigation of facts and therefore do not stand out as adoptable points of preliminary objection.

I have dutifully followed the issues raised by the objectors in support of their preliminary objections and do not find any feasible ground in support of the objections. This matter delves onto issues expressed under Article 162 (2) (a) of the constitution and therefore passes the test on the issue of jurisdiction.

The argument and submission on limitation of time on the subject of prerogative orders does not touch ground in that this is a petition as opposed to a judicial review application. The alleged six (6) months limitation period for application for certiorari, mandamus and prohibition together with an application for leave in such circumstances would not arise. This would also require scrutiny at trial level.

*A close look at the authority of **Mukhisa Biscuits** above establishes the essence of a preliminary objection. It is a point of law apparent out of the pleadings and must meet certain criteria to pass as such. It would, if appropriate and well presented come in to dispose of the suit at a preliminary stage of the proceedings. This is the more reason why its application must be rigorously thrashed to obviate situations whereby litigants would be estopped from pursuing their matters in unclear and uncertain circumstances.*

If unappropriately applied, it can be a dangerous tool of operation. It would lock out deserving litigants out of their causes. On the other hand, it could condemn deserving respondents to undue pressure and costs in pursuing undue litigation. This is a delicate balancing act under all circumstances.

*Following the authority of **Mukhisa Biscuits** (supra) it would appear that the preliminary objections though raising pertinent issues of law do not in the circumstances pass the test of sustainable preliminary objections against the petition. In as much as I agree that the petitioner did not substantially answer or address the issues raised by the objectors, these in themselves are unsustainable and must fail."*

I find a lot of similarity between the situation in this case and the preliminary objection and the authority above cited. This arises in the sense that the preliminary objection raised does not entirely fall within the confines of the **Mukhisa Biscuits** authority as above cited. All limbs of the preliminary objection would, in my finding require further interrogation and enquiry and therefore not feasible to sustain the preliminary objection. I also find that the second limb of the preliminary objection is not as such tenable in law.

I am therefore inclined to dismiss the preliminary objection with costs to the Claimant/Respondent.

Delivered dated and signed this 24 day of July 2015.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Dickens Atela for the Union/Respondent.
2. Mr. Juma and Miss. Kirui instructed by Rachier & Amolo for the Respondent/Objector.