REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2277 OF 2014

BAKERY, CONFECTIONARY,

MANUFACTURING & ALLIED

WORKERS UNION (K)……...CLAIMANT/RESPONDENT

VERSUS

KENAFRIC INDUSTRIES LTD…....RESPONDENT/OBJECTOR

RULING

1. The Respondent/Objector through the preliminary objection dated 19th March 2014 seeks striking out of the suit as it offended the provisions of Section 90 of the Employment Act and was statute barred and filed out of time. The parties agreed to canvass the objection by way of written submissions. The Respondent/Objector's preliminary objection filed on 26th March 2015 was to the effect that the Claimant who was a former employee was dismissed on 6th December 2008 and that the filing of the suit on 19th December 2014 more than 6 years after the termination was in violation of Section 90 of the Employment Act. The Respondent/Objector submitted that the suit would deny the Respondent protection of the law. The Respondent relied on the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** for the submission that a plea of limitation was covered in the remit of a preliminary objection. The Respondent also relied on the case of **Tailors** & **Textile Workers Union v Moi University and Rivatex EA Ltd Cause No. 1981 of 2011 consolidated with Cause 1996 of 2011** (unreported) and **Peter Musembi v Barclays Bank of Kenya Limited Cause 1686 of 2011** (unreported) where Mbaru J. held that time limitation is not a technicality that can be cured by invoking any authority or any part of the Constitution. The Respondent further relied on the case of **Maria Machocho v Total Kenya Limited [2013] eKLR** which cited the decision in **Divecon v Samani** a Court of Appeal decision on limitation of actions. The Respondent submitted that the Claimant had not moved the Court in accordance with the law and the suit should be dismissed with costs to the Respondent/Objector.

2. The Claimant/Respondent filed submissions on 5th June 2015 and submitted that the matter was referred to the Minister for Labour on 17th June 2010 and a conciliator was duly appointed. The Claimant/Respondent submitted that the admission of the dispute for conciliation suspended the time that was to run from the date of reference in terms of the provisions of section 90 of the Employment Act. It was submitted that the findings were made on 22nd November 2010 and the matter was to be referred to the Industrial Court for adjudication. The Claimant/Respondent relied on the cases of **Kenya Petroleum Workers Union v Kenya Pipeline Company Limited [2014] eKLR** and **Kenya**

Plantation Workers Union v Mununga Leaf Base [2013] eKLR where the Courts (Ongaya J. and Abuodha J.) had held that on reference to conciliation time stopped running for purposes of limitation. Reliance was also placed on the Court of Appeal decision in **Gatune v The Headmaster Nairobi Technical High School & Another [1998] eKLR** and **Joseph Kamau & 488 others v G4S Security [2015] eKLR**.

3. Limitation of actions is a basis for preliminary objection. The case of **Mukisa Biscuit v West End Distributors Ltd [1969] E.A. 696** cited by the Respondent is the locus classicus on preliminary objection. In the case Law J.A. stated a preliminary objection to be thus:-

> *"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."*

Sir Charles Newbold, President stated thus in the same judgment:-

"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."

4. What was taken is properly a preliminary objection. The objection is that the suit was filed in contravention of Section 90 of the Employment Act. The Respondent asserts the cause of action accrued on dismissal in 2008 while the Claimant asserts that the Claimant's cause of action was a continuing wrong until 2013. The Claimant refers to decisions of the Court in respect of this. The Court is persuaded that where a matter is referred to the dispute mechanism provided for under the law, the time would of necessity cease running and would be suspended until the conciliation process is at an end. The conciliation process was concluded on 22nd November 2010 as stated by the Claimant. This means time began to run from that day.

5. The Court of Appeal held in the case of **Divecon v Samani (1995-1998) EA 48** cited with approval by my brother Radido J. in **Machocho v Total** (supra) stated as follows:-

> *….to us, the meaning of the wording of section 4(1) is clear beyond any doubt. It means that no one shall have the right or 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. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that ''the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked''.*

6. Time ran from 22nd November 2010 and the Employment Act Section 90 provides as follows:-

> *90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based on 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.*

7. Limitation therefore has already set in insofar as his cause of action goes and as the decision in **Divecon v Samani** holds, there is no discretion in the matter. That simply means that there is no room

for extension of time in contracts of service under the law. The suit is dismissed but with no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this **3rd** day of **August** 2015

Nzioki wa Makau

JUDGE