**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1062 OF 2012**

JACKSON GILO……...……..CLAIMANT

VERSUS

COMPUTER PRIDE LIMITED…….……..RESPONDENT

**RULING**

1. Before the Court is a Preliminary Objection by the Respondent dated 2nd August 2012. The objection to the Claimant's suit is on the basis of the law under the Employment Act 2007. The Respondent submitted that the suit offended the mandatory provisions of Section 42(1), 45(3) and 47(6) of the Employment Act 2007.

2. A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a "demurrer". The Respondent's Preliminary Objection fits the definition of a preliminary objection per the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. In the celebrated 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."*

3. Sir Charles Newbold, President stated in the same judgment as follows:-

> *"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. The Respondent does not seek the exercise of judicial discretion. No, what the preliminary objection seeks to do is determine the issue of whether there is a cause of action *in limine.* It is well taken because if it succeeds the Court will be saved the cost of a lengthy trial and attendant expenses on either side.

5. The Claimant's claim is that he was employed by the Respondent on a one year contract and a

three month contract both of which were dated 1st February 2010. The Respondent averred that the 3 month contract ran its course and thus there was no dismissal. The contract for 1 year was terminated during probation and thus did not fit in the class of contracts which could be subject of a suit.

6. Section 42 of the Employment Act provides as follows:-

> *42.(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.*
>
> *(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.*
>
> *(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).*
>
> *(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.*

7. From the foregoing, the Claimant's employment could be terminated during the probation period by giving of notice of not less than 7 days or payment in lieu thereof. In the case before Court, there is an allegation that one contract was terminated during the probationary period while the other contract was served in full thus disentitling the Claimant to any reliefs for the said contracts.

8. It is trite law that no cause of action for dismissal would lie in respect of a contract duly served to its conclusion. By the same token, a contract can be terminated in terms of the contract. In this case, the other contract that was terminated during probation was terminated within the contract terms and was therefore validly and lawfully extinguished by payment of the requisite payment in lieu of notice. On the other hand, the second contract was served to its conclusion. The words of Justice Ngugi in **Joseph Muthama Ndambuki & Others v. Delmonte (K) Ltd [2012] eKLR** bear great weight where he stated thus:-

> *"Even after warning myself of the fact that striking out a suit is a draconian and radical action, even after viewing the pleadings in the light most favourable to the Plaintiffs'; even after trying my level best to inject life into this suit by Plaintiffs, I am unable to save the Plaintiffs' suit. Only one conclusion is warranted, and that is that this suit discloses no reasonable cause of action and it must be struck out with costs. I so order."*

9. It is on similar lines herein. I have warned myself of the fact that striking out is draconian I find that this suit discloses no cause of action and must suffer a similar fate as the case cited above. The Preliminary Objection succeeds and therefore this suit is struck out with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nairobi this 8th day of January 2014**

**Nzioki wa Makau**

**JUDGE**