



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 269 OF 2013

BERNARD MWANGI MURAI.....CLAIMANT

VERSUS

RWATHIA DISTRIBUTORS LIMITED.....RESPONDENT

RULING

1. What is before the Court for determination is the Preliminary Objection dated 8th January 2014. The Respondent through its counsel Miss Ndirangu sought the dismissal of the suit as it was in contravention of Section 90 of the Employment Act. She submitted that under that section, no civil action or proceedings based on contract shall be instituted after 3 years. She stated that from the Claimant's Memorandum of Claim on record dated 20th February 2013 and filed on 27th February 2013 clearly states that the Claimant was an employee of the Respondent from October 2002 till 18th December 2005 when allegedly his services were terminated. Relying on the case of **Maria Machocho v. Total (K) Ltd [2013] eKLR** the court has no jurisdiction to entertain the Claim. She submitted that the jurisprudence developed so far is persuasive and Section 90 of the Employment Act does not envisage enlargement of time. She thus urged that the preliminary objection be allowed.
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 *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

6. The authority for this holding by the learned Judge of Appeal is to be found in the writings of John Beecroft Saunders in a treatise which is no longer published headed **Words and Phrases Legally defined – Volume 3: I – N** and it states at page 113 the following about jurisdiction:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

7. The Respondent has averred that the cause of action accrued in 2005 and the suit should have been filed in 2008 at the latest. Under Section 90 of the Employment Act 2007, the suit would have been time barred in 2008. However, at the time the dispute arose the law applicable was the Employment Act cap 226. Under that statute which was repealed by the Employment Act 2007, there was no provision for limitation. The fallback was to Section 4(1) of the Limitation of Actions Act cap 22 Laws of Kenya. Section which provides as follows:-

4.(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued -

(a) actions founded on contract;

8. In the case before me, the Claimant’s services were terminated in 2005. Limitation would have set in under the repealed Employment Act in 2011 and not 2008 as submitted by Miss Ndirangu.
9. No suit was filed before the time ran out per the Limitation of Actions Act. The law does not provide for extension of time and thus there is no way to save the case. The Preliminary objection succeeds and is allowed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of March 2014

NZIOKI WA MAKAU

JUDGE