



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1937 OF 2012

(Before D.K.N. Marete)

DAVID KIHITI MBUGUACLAIMANT

Versus

TUSKER MATTRESSES LIMITEDRESPONDENT

RULING

The matter came to court vide a memorandum of claim dated 19th September, 2012 and filed on 21st instant.

The respondent opposes the claim in a defense dated 11th April, 2013 and in so doing raised a Notice of Preliminary Objection as follows;-

3. *During the hearing of this matter, the Respondent shall raise a preliminary objection on grounds that:*

- i. *The suit offends the provisions of Section 90 of the Employment Act, 2007.*
- ii. *The Claimant has come to this Honourable Court too late in the day as the Claimant failed to file his claim in time since his termination 4 years after absconding work on 1st September, 2008.*

Grounds of Preliminary Objection

4. *The Claimant's case is misconceived, incompetent and bad in law and ought to be dismissed for reasons that:*

- (i) ***The Dispute is time barred;*** *The claim violates the provisions of Section 90 of the Employment Act, 2007 which provides in mandatory terms without any discretion to the Court as follows: "Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based 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." The Claimant's action is based on a contract of employment terminated by the Claimant on 1st September, 2008, over 4 years before the Claimant brought this claim.*

(ii) *The Claimant's action would deny the Respondent the protection of the law against unreasonable delay in bringing legal action. The claimant's action is unreasonable and lacks due diligence. The law obliges litigants to exercise due diligence and to take reasonable steps in instituting legal actions.*

5. *That from the contents of paragraph 4 herein it is apparent that the Claimant is time barred from filing this claim and the Respondent prays that the suit be dismissed with costs to the Respondent for reasons above.*

The matter variously came for hearing until the 3rd July, 2012 when the parties agreed to dispose of the matter by a disposal of the preliminary objection through written submission that are now the subject matter of today's ruling.

The gist of the preliminary objection is that the claim is misconceived, bad in law and ought to be dismissed for being time barred and offensive to the provisions of Section 90, Employment Act, 2007 and also S.4(1) of the Limitations of Actions Act Chapter 22, Laws of Kenya both of which bar the inception of suits on employment or contract three and six years respectively after the occurrence of the event.

The respondent in his written submissions contends that the claimant's action is based on a contract of employment terminated on 9th June, 2009, well over four years before the institution of this claim. This is not in dispute.

On preliminary objections, courts have held as follows;

*That a preliminary objection is a point of law if taken would dispose of the suit **in limine**. It is what was formerly known as a "demurrer" (from the French word demorrrer "to wait or stay". The leading case on the issue is the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd – Vs – West end Distributors Ltd [1969] E.A. 696 attached herein as appendix A wherein Law J.A. stated a preliminary objection to be thus; "So far as I am aware, a preliminary objection consists 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."***

This point was the subject of consideration very recently by **Justice Nzioki wa Makau in Industrial Cause No. 1981 of 2011 as consolidated with in Industrial Cause No. 1996 of 2011 Tailors & Textile workers Union – Vs – Moi University and Rivatex E.A. Ltd attached herewith as Appendix B – where the Court reiterated the principles for preliminary objection as:**

- a. *A preliminary objection raises a point of law.*
- b. *A preliminary objection 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.*
- c. *It cannot be raised if what is sought is the exercise of judicial discretion.*

Section 90 of the Employment Act, 2007 is earnest on the issue of limitation in employment practices and law;

Section 90,

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted un less 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.

Section 4(1) of the Limitation of Actions Act, Chapter 22, Laws of Kenya stipulates a limitation period of six years in cases of contract;

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;

(b) ...

(c) ...

(d) ...

(e) ...

I hold that this is now overtaken by Section 90, Employment Act, 2007 which provides for limitation in employment contracts.

In the circumstances of this breach, the preliminary objection subsists and I hold as such. I am therefore inclined to dismiss the claim with costs to the respondent.

Dated, delivered and signed the 4th day of March, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Waiganjo instructed by Waiganjo Wachira & Company Advocates for the claimant.
2. Mr. Njiru instructed by the Federation of Kenya Employees for the Respondent.