



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 204 OF 2011

1. KENNETH KIPKEMBOI SETTIM
2. JOSSY M. KIOKO.....**CLAIMANTS/RESPONDENTS**

versus

NATIONAL SOCIAL SECURITY FUND

THE BOARD OF TRUSTEES.....**RESPONDENT/OBJECTOR**

RULING

1. The Respondent raised a preliminary objection to the suit. Miss Oyombe appeared for the Respondent/Objector while Mr. Arusei appeared for the Claimants/Respondents.
2. The objection raised was that the suit offends Section 4 of the Limitation of Actions Act and is fatally defective. Miss Oyombe submitted that the suit also offends the provisions of Section 4(4) of the Trade Disputes Act. She submitted that the claim was filed on 16th February 2011 after the expiry of employment in 2003. The issue to be determined is whether the preliminary objection meets the threshold for preliminary objection and whether the suit violates Sections 4(1) of the Limitation of Actions Act and Section 4(4) of the Trade Disputes Act. These go to the root of the cause and that the Court has no power to take any more step as it has no jurisdiction. She relied on the case of **Mukisa Biscuits Manufacturing Co. v West End Distributors** and **Peter Musembi v Barclays Bank**. The Respondent's counsel submitted that the law provided that in any action founded on contract the time limit was 6 years from date of accrual. She submitted that the Claimant was dismissed on 9th July 2003 and the cause of action therefore arose on 9th July 2003 7^{1/2} years before the suit was filed on 16th February 2011. She submitted further that if a suit violates the law of limitation the Court has no jurisdiction to entertain that suit. She relied on all the authorities in her bundle of authorities but placed special emphasis on the following cases specifically – **DT Dobie & Co. Ltd v Muchina [1982] KLR 1**, **Scotsca v Tswapong Civil Engineering & Another 1989 BLR 35 (HC)**, **Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935** and **Republic v The Institute of Certified Public Accountants of Kenya ex parte Joy Vipinchandra Bhatt t/s JV Bhatt & Co Misc. Application No 285 of 2006** for the proposition that the Court has no jurisdiction and the suit should be dismissed with costs.
3. The Claimant/Respondent through Mr. Arusei submitted that what is raised does not meet the

threshold in **Mukisa Biscuits v West End** (citation above). He stated that a preliminary objection is a pure point of law. The facts should not be in dispute. It should not be an issue which calls for judicial discretion. He relied on the case of **Kandara Investments v Attorney General Civil Appeal No 249 of 2003** where the Court of Appeal was faced with a similar issue stated that the issues do not qualify as issue of law. He submitted that the parties are not in agreement on the date of dismissal and that if facts are controverted and contested the same must be determined after hearing.

4. In her brief reprise Miss Oyombe submitted that what was in dispute was legitimacy of the dismissal and the suit is defective and cannot be cured by Article 159 of the Constitution and prayed that the Court upholds the preliminary objection.
5. I deferred the Ruling to today. In the objection raised by Miss Oyombe for the Respondent, the central focus has been the issue of non compliance with Sections of the law particularly Section 4(1) of the Limitation of Actions Act and Section 4(4) of the Trade Disputes Act all relating to the dismissal of the Claimants from their employ. In the **Mukisa Biscuits** case the Court held that a preliminary objection must be one that arises by clear implication from the pleadings. The learned Judges of the Court of Appeal for East Africa had this to say:

Law JA stated: "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 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."

6. It is not in disagreement that the preliminary objection must arise from the pleadings. In the Respondent's Memorandum of Defence filed on 20th July 2011 the Respondent averred as follows in paragraph 4 thereof.

4. During the hearing of this matter, the Respondent shall raise a preliminary objection on grounds:-

4.1 That the suit offends the provisions of Section 90 of the Employment Act 2007.

4.2 The action of the claimants which is founded on Contract of employment was filed at the Honourable Court in 16th February, 2011 contrary to section 4(1) of Limitation of Actions Act, cap 22 of the laws of Kenya.....

4.3 That the suit offends the provisions of Section 4(4) of the Trade Disputes Act cap 234 (now repealed) of the laws of Kenya.

4.4 That the claimants have come to Court too late in the day as they had not filed any claim since their services were terminated through dismissal on 9th July 2003.

7. The preliminary objection raised thus arises from pleadings. In the case before me the Respondent submits that the termination was effective 9th July 2003 while the Claimants submits the Claimants appealed on 16th March 2007 and the appeal was rejected on 8th August 2007. On the other hand the Respondent through letters dated 9th December 2002 addressed to the claimants reduced the suspension to interdiction. The letters provided that the suspension had been reduced to interdiction with effect from 6th November 2002 pending the outcome of the criminal

proceedings. What was the effect of this? Was there a promise held out to the claimants? In my view the objection raised is not a pure point of law in so far as I have to ascertain facts from the evidence that will be adduced. I have to interrogate the facts to ascertain if indeed there was a promise which was to the effect that the Claimants could not be dismissed before the termination of the criminal process or whether indeed the time begun to run from 9th July 2003 or whether time was to run from 8th August 2007 when the appeal sought in March 2007 was rejected. In addition there is the matter of the Trade Disputes Act. Were the Claimants bound by these provisions? Did Section 4(4) of the repealed Trade Disputes Act apply to the employment of the Claimants? Section 4(4) of the Trade Disputes Act provided for the manner of reporting of a trade dispute. In the case a dispute was referred for conciliation by consent of parties on 26th March 2012.

8. The case law cited is not on all fours with the scenario before the Court. There are marked distinctions between the cases cited by the Respondent in support of the preliminary objection. I agree that if I have no jurisdiction to entertain a suit any order I would make would be a nullity.
9. Regarding jurisdiction a Ruling was delivered by the Court on 12th March 2013 dismissing an objection raised by the Respondent on jurisdiction. Issue estoppel applies and the matter of jurisdiction is *res judicata*. It is not available for the Respondent to raise.
10. Should the Respondent part with their papers and do away with their lawyer? I think not. The suit shall proceed to hearing on a date to be agreed by parties after the Ruling. The sum total of the foregoing is that the preliminary objection fails and is dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of July 2014

Nzioki wa Makau

JUDGE