



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 253 OF 2014

ALEX OLUCHILI MILOKO.....CLAIMANT

v

NAKUMATT HOLDINGS LTD..... RESPONDENT

RULING

1. For determination is a Preliminary objection filed by Nakumatt Holdings Ltd (Respondent) on 15 August 2014 to the effect

1. *THAT the suit herein is time barred under section 90 of the Employment Act since it is brought over (3) three years after the termination of the claimant on the 1st March 2010.*
2. *THAT any further proceedings in this suit would be in clear breach of the statutory provision and the constitutional principles of respect for rule of law and separation of powers of the legislature and judiciary.*
3. *THAT this suit is incompetent and should consequently be dismissed with costs to the Respondent employer.*

2. In the Memorandum of Claim filed in Court on 27 June 2014, it is pleaded that the Claimant learnt of his dismissal after his Advocates L.M. Ombete & Co. Advocates wrote to the Respondent on 29 January 2013. The Respondent replied to the Advocate through a letter dated 31 January 2013, stating that the Claimant was dismissed with effect from 1 March 2010. The letter further stated that the dismissal letter was sent to the Claimant through registered post and a copy of a certificate of posting was enclosed.
3. The Claimant further pleaded that the dismissal letter never reached him and that he learnt of his dismissal only after the Respondent replied to his Advocates letter.
4. Those are the facts as presented by the Claimant.
5. The Respondent has not yet filed a Response to place before the Court its version of the facts.
6. The facts as pleaded by the Claimant have placed the question of effective date of dismissal in issue. The dismissal herein was purportedly communicated by letter sent through post and whose receipt is denied. Ancillary issues would include whether an employee can reasonably be expected to commence action before receiving communication of dismissal.
7. In my view, the pleadings as they stand now will require an examination of facts to establish the effective date of dismissal and, therefore it would be precipitate to strike out the Memorandum of Claim at this stage.
8. It is germane to revisit what a true preliminary objection is. In ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*** it was held that **So far as I'm 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..... and

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop

9. The fact that the Respondent has failed to file a Response to state its version only makes it more difficult to accept that the preliminary objection is a true preliminary objection arising out of the Claimant's pleadings.
10. The Court therefore declines to uphold the preliminary objection and dismisses it with costs to the Claimant.

Delivered, dated and signed in open Court in Nakuru on this 21st day of November 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kirwa instructed by Mwakio Kirwa & Co. Advocates

For Respondent Mr. Kali instructed by Nyaberi & Co. Advocates