



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO.2498 OF 2012**

***(BEFORE D.K.N. MARETE)***

**JONATHAN PATRICK ONDIEKI NYANGAU.....CLAIMANT**

**VERSUS**

**NAIROBI CITY WATER & SEWERAGE CO. LTD.....RESPONDENT**

**RULING**

This is a matter coming to court vide a Memorandum of Claim dated the 6th December, 2012. The issue in dispute is therein cited as;

***“The unlawful forced resignation of the claimant.”***

The respondent vide a Respondents written statement of Response dated 1st February, 2013 opposes the claim and prays that the same be dismissed with costs. Various other pleading were exchanged and on 4th November 2013, the respondent filed a notice of preliminary objection dated the 2nd instant. This is as follows;

1. *That the suit is time barred by virtue of Section 90 of the Employment Act Cap 226, Laws of Kenya.*

On 9th July 2014, the parties agreed on a disposal of the preliminary objection by way of written submission and therefore today’s ruling.

The respondents written submissions bring out a mix up of the law upon which the preliminary objection is based. It refers to Section 90 of the Limitation of Actions Act, Chapter 226 of the Laws of Kenya.

*“90. Limitations*

*Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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 respondent submits that any suit arising out of this cause of action should have arisen or commenced three years from 4th October, 2005 when the claimant was issued with a letter of resignation on health grounds.

The claimant is agreeable on the particulars of resignation on 8th May, 2006 but denies the grounds as presented by the respondent. He further submits that on regaining his health, he appealed to the respondents until 7th May, 2012 when a final answer was received from the respondents and limitation on grounds of time does not therefore arise.

I note with concern that the submission of the respondent are mixed up on the law. This weakens the mainstay of this application. It is not clear whether the preliminary objection is based on the Trade Dispute Act, Chapter 226 or the Employment Act, 2007. In any event, the Trade Dispute Act as cited does not contain this provision.

Further, as was observed in the authority of **Mukhisa Biscuits Co. Ltd vs. West End Distributors Ltd. (1969) EA 696** a preliminary objection is primarily a question of law that must be self supporting. It should never require a further interrogation of data and evidence to bring it home. Here, the court observed as follows;

*“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.”*

Further,

*“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 the judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”*

In the instant case, the facts of the case are disputed. The time of actual resignation, the grounds of resignation and date of subsequent appeal and time of finalization of such appeal are all contested. This is therefore not the right circumstances to dispose off a matter by way of preliminary objection. The parties should be allowed to move on and fully ventilate their respective cases at trial or any other stage.

I am therefore inclined to dismiss the preliminary objection with costs to the claimant.

**Delivered, dated and signed this 5<sup>th</sup> day of December, 2014.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Mburu instructed by J.M.Mburu & Co. Advocates for the Respondent.
2. Ms Guserwa instructed by J.A. Guserwa & Co. Advocates for the Claimant.