



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 32 OF 2013

(Before D.K.N. Marete)

**KENYA UNION OF EMPLOYERS OF VOLUNTARY
AND CHARITABLE ORGANIZATION,(KUEVCO)CLAIMANT**

Versus

BOARD OF GOVERNORS

PUMWANI SECONDARY SCHOOL.....RESPONDENT

RULING

This matter came to court vide a Statement of Claim dated the 9th January, 2013. The issue in dispute is therein cited as;

“Mr. David Lawrence Kiongaa’s Retirement; Terminal Benefits and Dues”.

The respondents in their Respondents Replying Memorandum oppose the claim and pray that the same be struck out/dismissed with costs. At paragraph 24 of this response, the respondent raises a preliminary objection as follows;

24. *The Respondent avers that pursuant to the provisions of Section 90 of the Employment Act, 2007 the Grievant’s claim herein is time barred, the Grievant having failed to institute the same before the end of 3 years from 31st December, 2001.*

25. *In the alternative and without prejudice to Paragraph 24 herein, the Respondent avers that pursuant to Section 4(1) of the Limitation of Actions Act, Cap 22 Laws of Kenya, the Claimant’s claim against it is time barred having not been instituted before the end of 6 years from 31st December 2001.*

The matter came to court variously until the 7th April, 2014 when the parties agreed to dispose of the matter by way of written submissions.

In their written submissions, the respondents forment a case of employment of the claimant with effect from 1st January, 1993 vide a letter of appointment dated 12th January, 1993. He retired on 31st December, 2011 on acquiring the mandatory retirement age of 55 years. This claim was filed in 2013 and

is from the onset denied.

The respondent's case is that the suit is instituted out of the limitation period and should therefore be struck out with costs.

The claimant in opposition notes and appreciates the time lapse but submits that the issue of limitation does not arise as the suit was filed one week after the collapse of the dispute registration process with the Minister for Labour as the law provided;

9.05

c) *Under Section (4) of the repealed Trade Disputes Act which was then applicable, any dispute involving termination of the employment was to be reported to the Minister within twenty eight days of dismissal or termination. This dispute was reported to the Minister on 21st May 1997 well beyond the prescribed twenty eight days prescribed under the repealed Trade Disputes Act. The Act however had a proviso that the Minister could where circumstances of a particular case warrant, accept the report of a trade dispute concerning a case of dismissal not so reported to him within twenty eight days.*"

d) *"In this particular case, the Minister admitted the dispute outside the prescribed twenty eight days presumably on the bases that the circumstances of the case warranted such admission. In any event the exercise of the Ministerial discretion is not the subject of the preliminary objection.*

e) *"From the foregoing, the cause of action as it were accrued in 2006 when it became clear to the Claimant that the Respondent would not honour the conciliator's recommendations. Therefore by filing the claim on 9th July, 2012, the Claimant was still within the six year rule prescribed under Section 4(1) of the Limitation of Actions Act. To this extent preliminary objection fails and is dismissed with costs.*

21. *THAT, as per Sir Charles Newbold, P. in the C.A. civil appeal No. 9 of 1969 at Nairobi on the issue of Preliminary Objection at paragraph A-B on page 701 of The East African Law Reports, 1969, Index Page 46 of the Claimant's List of authorities dated 28th October, 2013: "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 ACT HAS TO BE ASCERTAINED OF 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 ISSUES. THIS IMPROPER PRACTICE SHOULD STOP. The Respondent's preliminary objection IS NOT PROPER; IT IS FRIVOLOUS DEFENCE, THENCE IT SHOULD BE DISMISSED WITH COSTS.*

37. *THAT, the Respondent having raised the preliminary objection without the Authorised Representative's affidavit and the Board of Governors' resolution therefore, without being favoured by verse in the Holy Scriptures (Bible and Qur-an); without being favoured by any Articles of the Bill of Right in the Constitution of Kenya 2010; without being favoured by the Statutes, the repealed Trade Disputes Act, Cap. 234 and the Labour Relations Act, 2007; and, without support by any of her listed Authorities, the raised PRELIMINARY OBJECTION IS AN ABOMINATION UNTO THE LORD GOD OF HOSTS: IT IS UNCONSTITUTIONAL; IT IS UNLAWFUL; IT IS SHAM OBJECTION; AND, "IT IS A FRIVOLOUS DEFENCE THAT SHOULD BE DISMISSED AND A SUMMARY JUDGMENT ENTERED IN FAVOUR OF THE CLAIMANT WITH COSTS AGAINST THE RESPONDENT".*

The claimant further sought to rely on the Court of Appeal's authority of **Board of Trustees, National Social Security Fund & 6 others vs. Meshack Owino Onyango (suing as Legal Representative of the**

Estate of Silas Ochieng Onyango (Deceased) Civil Appeal (Application) No.87 of 2007 where the Court of Appeal dismissed an application to strike out an appeal on grounds that the documents contained the record of appeal were not certified as required. It was as follows;

This was an application under Rule 1(3) and 80 of the Court of Appeal Rules for an order that a notice of appeal and the appeal be struck out on the grounds that; the notice of appeal was filed outside the prescribed time; the decree included in the record of appeal was irregular and invalid in the sense that it was not extracted, obtained or issued pursuant to the procedure set out in the provision of Order XX Rule 7 sub-Rules 2, 3, 4 and 6 of the Civil Procedure Rules; the record of appeal contained an invalid Decree and the same did not therefore meet the mandatory requirements of Rule 85 (1) of the Court of Appeal Rules; the Record of Appeal did not contain a valid, duly signed and certified judgment and it also contained proceedings which had not been certified as the correct proceedings of the case before the superior court.

It was held;

1. *By article 159 (2) (d) of the new Constitution of Kenya, the courts are now required to administer justice without undue regard to procedural technicalities. In addition, the Court is required to give effect to the overriding objective of civil litigation enshrined in the Appellate Jurisdiction Act (Cap 9 of Laws of Kenya) which is, among other things, to facilitate the just and expeditious resolution of appeals (section 3A (1) and (2) of the Act). Thus, it would be against the policy of the law to strike out the appeal on a mere technicality raised in support of the application.*
2.

The Respondent objects the claim and posits that it is time barred and should be struck out,

The Grievant thereafter filed this suit in the year 2013 claiming that the Respondent had terminated the Grievant's employment in an irregular or unlawful manner and that he had been retired without payment of his terminal dues and benefits. The Grievant's allegations are strenuously denied and it is the Respondent's submission that it is in fact the Grievant who is indebted to the Respondent having admitted to taking a loan from the Respondent, which loan the Grievant has failed and/or neglected to repay to the Respondent to date.

The Law

My Lord, it is the Respondent's humble submission that the facts of the matter clearly demonstrate that this suit has been institute well beyond the prescribed period of limitation and accordingly ought to be struck out with costs to the Respondent.

*My Lord, it is submitted that the question of limitation is a substantive matter of law (sic) jurisdictional issue that goes to the foundation of the claim and is not merely a technicality or procedural issue. This position was upheld by the Industrial Court in rulings in **Charles Onganya Okulo and 3 Others v Sweetie Sweets Limited [2013] eKLR and Peter Nyamai & 7 Others v M.J. Clarke Limited [2013] eKLR.***

It is not in dispute that the Grievant's employment with the Respondent came to an end on 31st December 2013. It is the Grievant's contract of employment and his retirement with effect from 31st December 2001 that constitute the Grievant's cause of action herein.

A close scrutiny at the pleadings and case for the claimant discloses some disputed facts and material relating to the substance of this cause. It is not even clear as to when the matter was filed in court. It would therefore require further enquiry and evidence to come out clean as to the merits and demerits of this preliminary objection. It therefore falls short of the requirements of a preliminary objection as established in the celebrated case of ***Mukhisa Biscuits & Co. Ltd . (1969) EA 696*** as cited by the Claimant.

This position is also replicated in the authority of **Kenya Scientific Research International Technical and Allied Institutions Workers Union Vs. Rainald Schumchers & Another eKLR 2012** also cited and relied on by the claimant where my learned sister Wasilwa, J. posited as follows;

“in view of the fact that conciliation process was on going, the limitation period could not run until the same had been exhausted.”

This court has in the past established that on the issue of limitation of action on grounds of time, there a times arises cases of law and fact. The factual basis therefore has to be proven through evidence. This frustrates the well established principle that a preliminary objection should prima facie be a matter of law and not dwell on evidence as was set out in the well known authority of **Mukhisa Biscuits Co. Ltd. v. West End Distributors Ltd**, supra, where 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.”

The preliminary objection in the circumstances of this case does not conform to the law as set out in precedent. As above illustrated, there are issues that require further scrutiny before a ruling in favour of the objection can be made. This therefore is not a proper or meritorious case for upholding the preliminary objection. I am therefore inclined to dismiss this preliminary objection with costs to the claimant.

Delivered, dated and signed this 5th day of December 2014.

D.K.Njagi Marete

JUDGE

Appearances.

1. Mr. Janitor Odin Boaz Otieno for the Union.
2. Mr. Muhindi instructed by Kimondo, Gachoka & Company Advocates for the Respondents/Objectors.