



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO.434 OF 2014

(Before D.K.N Marete)

RAYMOND MBOYA NDIEGE.....CLAIMANT

Versus

THE HON. ATTORNEY GENERAL..... 1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF

LANDS, HOUSING & URBAN DEVELOPMENT 2ND RESPONDENT

THE CHAIRMAN MINISTRY OF WORKS SPORTS CLUB3RD RESPONDENT

RULING

This matter came to court vide a Memorandum of Claim dated 18th March, 2014 and filed on 20th instant.

The respondent filed a Memorandum of Appearance dated 26th March, 2014 on 31st instant and Grounds of Opposition dated 8th May, 2014 on 12th May, 2014.

This ruling therefore comes in answer to the Preliminary Objection dated 26th March, 2014 and grounded as follows;

1. *That the Claimant's Application dated 5th May, 2014 is meant to circumvent and/or outwit the Respondents Notice of Preliminary Objection dated 26th March, 2014 and filed on 31st March 2014 and as such an abuse of the due process of the law.*
2. *That the orders sought by the claimant are not interim but final and conclusive and if granted, will mean that the claim will have been put to rest, and as such is bad in law.*

The matter variously came for hearing until the 11th June, 2014 when it was agreed on a disposal of the same by way of written submissions. The respondents in their written submissions open up by outlining the basic facts of the claim as follows;

*The claimant alleges that on or about **February, 1998** was engaged and employed as an account's clerk by the third respondent at an agreed salary of Kshs. 25,525.00. He further claims that the said engagement was unilaterally terminated by the third respondent on **27th August, 2008**.*

In pursuit of his rights accruing from the above engagement, the claimant filed this claim on 20th March, 2014 seeking intervention of the court. In response to the claim, the respondent filed a response and a preliminary objection both dated 26th March, 2011 and filed on 31st March 2014.

The Preliminary Objection is therefore based on the grounds that the claim is time barred as it offends the provisions of **Section 3 (2) of the Public Authorities Limitation Act, Chapter 39 Laws of Kenya.**

“3. Limitation of proceedings

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.”

It is also offensive against Section 27 and 28 of the Limitation Actions Act, Chapter 22 laws of Kenya and Section 90 of the Employment Act, 2007 both of which provide timelines by which action of this nature should be filed in court. The respondent further sought to rely on the authority of **Samson O. Nganga vs. PSC & 5 others, 2013 eKLR** where the court in reference to **Iga vs. Makerere University, Civil Application no.51 of 1971** the court observed as follows;

“That limitation does not extinguish a suit or action of itself, but operates to bar the claim or remedy sought for and when the suit is time barred; the court cannot grant the remedy or relief”.

It went on thus;

“The effect is that if a suit brought after the expiration of the period of limitation and this is apparent from the Complaint, and no grounds of exemption are shown on the Complaint, the Complaint must fail”.

She therefore prays that this preliminary objection be upheld.

The claimant defends his position and opines that his application is in order and that it is indeed the inaction of the respondent that has necessitated this action and that the respondent is not likely to suffer any prejudice if the orders sought are granted. He further argues that;

- 7. The absence of a signature in the verifying affidavit has been cured by filing a supplementary affidavit herewith and the claimant undertakes to effect service forthwith together with this response.*
- 8. Further the omission or defect may have been caused by the Claimant's former advocates thus the claimant should not be condemned for a mistake done through an advocate of this court.*
- 9. That the claim is not time barred under the Section 3(2) of the Public Authority Limitation Act cap 39 of Kenya since the Claimant was legally in employment of the 3rd respondent until he was officially discharged from his duties vide a letter dated 25th May, 2012.*

This matter is not clear cut but contested on facts. It does not conform to the legal principles on Preliminary Objection as enunciated in **Mukhisa Biscuits Co. Ltd. v. West End Distributors Ltd, [1969] EA 698**, 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.”

It would call for further data and evidence to effectively determine the veracity of the preliminary objection and claim. This should not be the case.

I am therefore inclined to dismiss the preliminary objection with orders that costs be on cause.

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

D.K.Njagi Marete

JUDGE

Appearances

1. Claimant in person
2. M/s C. Kassim instructed by the Attorney General for the respondent