



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

**AT NAIROBI**

**Cause 923 of 2012**

**KENYA PLANTATION & AGRICULTURAL WORKERS  
 UNION.....CLAIMANT**

**Vs**

**UNILEVER TEA (K)**

**LTD.....RESPONDENT**

**RULING**

The matter before me is a Preliminary Objection taken by the Respondent. A preliminary objection is stated to be a point which if taken would resolve the dispute *in limine*.

Ms. Kashindi for the Respondent holds that under Section 90 of the Employment Act the Claim herein ought to have been brought within 3 years of the act complained of. She submitted that this Court therefore lacks jurisdiction. In her aid she cited 3 decisions of my learned brother Justice Rika sitting in the former Industrial Court. In opposition, Mr. Wafula for the Claimant's submitted that the dispute was referred to the Minister and conciliation was ordered thus accounting for the delay. He relied on the provisions of the Labour Relations Act which grant this Court the power to hear any matter before it. He saw the Preliminary objection as a malicious design to deny the Claimants their dues under the Constitution and other enabling provisions.

The two issues which lend themselves for consideration are

- 0. what is a Preliminary objection
- 1. does this court have jurisdiction in light of time limitation?

The points for consideration in a preliminary objection are almost cast in iron. In a dispute recently before this Court being Cause No. 1040 of 2010 I held in a Ruling delivered on 23rd August 2012 thus :

*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law. A preliminary objection consists of a point of law which has been pleaded or which arises by very clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the matter. Examples are an objection to the jurisdiction of the court, or a plea of res judicata, 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 and the like.*

*The aim of a preliminary objection is to save the court time and ensure the parties do not needlessly go*

*into the merits of an application because there is a point of law that will dispose of the matter in limine (at the start). It cannot be raised if any fact has to be ascertained or if the exercise of judicial discretion is sought.*

*A preliminary objection must raise pure points of law and not general grounds raised to oppose the application on its merits. I am emboldened by the finding in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd***

I can only add that under English law a preliminary objection is what was formerly called a “demurrer” (from the French word *demorer* “to wait or stay”). The Respondent has made what fits the definition of a preliminary objection.

In the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. Law J.A. stated a preliminary objection to be thus:-

*“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 P. stated in the same judgment:-

*“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.”*

*Looking across the border at the current East African Court of Justice the issue of preliminary objection came up recently in two cases being the Serengeti case and an appeal pitting IMLU and the Attorney-General of Kenya. The Hon. Judges of the East Africa Court of Appeal Nsekela, P., Kayitesi and Ogoola, JJA in **Appeal No. 3 of 2011 The Honourable Attorney General of The United Republic of Tanzania And African Network For Animal Welfare (ANAW) famously known as the Serengeti Case upheld the decision in Attorney General of Kenya v Independent Medical Legal Unit EACJ, Appeal No. 1 of 2011**. In that case the Judges of the East Africa Court of Justice (Busingye, PJ; Arach Amoko, DPJ; Mkwawa, Butasi and Kubo, JJ) dealt with the issue by reverting to the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** (supra)*

*In this case a submissions have been made by the Respondent's Counsel that this Court lacks jurisdiction to entertain this Claim due to limitation. The issue of jurisdiction goes to the root of any claim and must be determined because without jurisdiction a Court is impotent.*

*This issue is one Courts have had to grapple with from time immemorial. In Kenya our own Court of Appeal did tackle this in the locus classicus on jurisdiction. Nyarangi, Masime & Kwach JJ A in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** dealt squarely with the issue of jurisdiction. The bench comprised of nascent talent and the sages. The presiding judge was Justice Nyarangi. The decision was unanimous and each judge gave reasons for the findings on jurisdiction but none captured it as succinctly as Nyarangi JA.*

*Per Nyarangi JA at page 14:-*

*'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'*

The Court proceeded to order the release of the Motor Vessel Lilian 'S'.

The authority for this holding is found in **Words and Phrases Legally defined** by John Beecroft Saunders – Volume 3: I – N which at page 113 states the following about jurisdiction:-

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”*

To borrow from these words, by jurisdiction is meant the authority which this court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way such as plaint, claim, notice or motion etc for its decision. The limits of this authority are imposed by the statute, charter, or commission under which this court is constituted, and may be extended or restricted by the like means.

The law is clear at Section 90 of the Employment Act -

*90. Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, 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. (emphasis mine)*

*The jurisdictional limit imposed by the law cannot be ignored. It is not merely there to decorate the statute books. It has to have a bearing on cases before Court. In the circumstances and considering all that has been stated above, I am minded to strike out the Claim as it is time barred and cannot survive for even one more day. The Claimants should have filed a cause as soon as the deal fell through.*

*The Claim is therefore struck out but on account of the suffering each party has had to bear as a consequence of this Claim, I order that each party shall bear its own costs.*

*It is so ordered.*

**Delivered at Nairobi this 25th day of September, 2012**

**Nzioki Wa Makau**

**JUDGE**