



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Cause 78 of 2012**

**PETER NYAMAI.....1<sup>ST</sup> CLAIMANT**

**ALI MWITU.....2<sup>ND</sup> CLAIMANT**

**RAJAB SAIDI.....3<sup>RD</sup> CLAIMANT**

**MICHAEL MWABURI.....4<sup>TH</sup> CLAIMANT**

**ISAAC KITUTO.....5<sup>TH</sup> CLAIMANT**

**ALBERT AGUSIOMA.....6<sup>TH</sup> CLAIMANT**

**NZAMBA MUTUA.....7<sup>TH</sup> CLAIMANT**

**WYCLIFF MWARUTAH.....8<sup>TH</sup> CLAIMANT**

**versus**

**M. J. CLARKE LIMITED.....RESPONDENT**

**RULING**

1.The Claimants' filed a Memorandum of Claim on 21 November 2012 against M J Clarke Ltd and the issue(s) in dispute were stated as

*Refusal by the Employer (herein referred to as the Respondent) to pay wages as per the registered CBA and unfair termination of Peter Nyamai, Ali Mwituu, Rajab Saidi, Michael Mwamburi, Isaac Kituto, Albert Agusioma, Nzamba Mutua and Wycliff Mwarutah from employment.*

2.The Respondent filed a Response to the Memorandum of Claim on 19 February 2013 together with a Preliminary Objection. The Preliminary Objection was to the effect that the *Claim is bad in law and an abuse of the Court process having been filed after the period stipulated in section 90 of the Employment Act, 2007 and/or pursuant to the provisions of the Employment Act Cap 226 (now repealed) or the Limitation of Action Act, Cap. 22 laws of Kenya.*

3.On the 26 February 2013, the Claimants filed a further Response, in reaction to the Respondent's Statement of Response

4.The Preliminary Objection was argued on 19 March 2013 and after hearing the parties, I reserved my

ruling for 12 April 2013.

5. The Respondent made very brief submissions and it was that the Claimants', according to their own pleadings were dismissed variously between 2 October 2009 and 7 November 2009 and therefore any Claim should have been filed on or before 2 October 2012 for the 2nd Claimant and 7 November 2012 for the 1st, 3rd, 4th, 5th, 6th, 7th and 8<sup>th</sup> Claimants'.

6. The Respondent's submissions in this respect was said to be grounded on section 90 of the Employment Act, 2007.

7. Further the Respondent submitted that there was no provision under the Employment Act, 2007 or any other statute for that matter, regarding extension of time or grant of leave to file a Claim out of time.

8. For the Claimants', it was admitted that Claimants' were dismissed at the times pleaded in the Memorandum of Claim but that because the Kenya Shipping, Clearing and Warehouses Workers Union had a registered Collective Bargaining Agreement with the Respondent and the said Union made a report of a trade dispute to the Minister of Labour and Human Resource Development on 5 February 2010 and the said dispute was accepted for conciliation on 15 June 2010, time for purposes of section 90 of the Employment Act, 2007 did not begin to run until 30 August 2011 when the Conciliator informed the Minister and the parties that there was no agreement reached on some of the issues in dispute.

9. The question that this Court has to address is whether the Claimants' Claim was filed out of time and or is statute barred.

10. The Employment Act, 2007 has not made any provision for the extension of time or granting of leave to file a Claim after the expiry of the 3 year period stated in section 90 and therefore I must turn my attention elsewhere. The general written law dealing with limitation in Kenya is the Limitation of Actions Act, Cap 22 Laws of Kenya. The provisions of the Limitation of Actions Act has been the subject of interpretation over the years and I will discuss one decision which in my view will settle the question posed by the Preliminary Objection.

11. The first thing I need to state is that the time limit on filing of Claims is a jurisdictional question and not merely procedural.

12. I say so placing reliance in the Court of Appeal decision in *Divecon v Samani* (1995-1998) EA 48. I must however mention that the cause of action in the *Divecon* case was based on tort though, the Court of Appeal mentioned that the trial Court had found that the cause of action was founded on both tort and contract. The Court of Appeal nevertheless went ahead to consider the grant of leave or extension of time in respect of causes of action based on contract.

13. In the *Divecon* case which I hold is binding upon this Court, the Court of Appeal stated that

**to us, the meaning of the wording of section 4(1) .....is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that "the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked".** (emphasis mine)

14. In the final analysis the Court of Appeal held that 'the trial judge erred in holding that the wording of section 4(1) of the Limitation of Actions Act implied that a court had the discretion to extend time in deserving cases regarding actions in contract. The words of section 4(1) were clear beyond any doubt and meant that no one had the right or power to bring an action founded on contract after the end of six

*years from the date on which the cause of action accrued...’.*

15. The High Court has also had occasion to pronounce itself on the question of extension of time or grant of leave to file suit out of time. In my view the Limitation of Actions Act has given a competent Court the jurisdiction and discretion to extend time or grant leave to file a suit out of time if the cause of action is based on *negligence, nuisance or breach of duty* but not in causes of action based on contract. I take comfort in stating thus by the very brief ruling by Justice Visram in *Timothy M Mukalo v Reuben Alubale Shiramba & 3 others* [2005] eKLR to the effect that sections 27 and 28 of the Limitation of Actions Act are only applicable on actions based on *negligence*. I would add to actions based on *negligence*, actions based on *nuisance and breach of duty*.

16. In my considered opinion, the holding by the Court of Appeal and Justice Visram stated the correct legal principle applicable even in this type of case and I therefore do hold that this Court has no jurisdiction or discretion to extend time or grant leave of Court to file a case grounded on breach of employment contract where the limitation time set out in section 90 of the Employment Act has expired.

17. Further it is general legal principle that a limitation clause grants a Respondent or Defendant an accrued substantive benefit/right/defence of limitation.

18. In respect to the submission by the Claimants’ that time did not start to run until the conciliation process was completed or alternatively that time stopped running, my attention was not drawn to any precedent or work on statutory interpretation to support the submission and I cannot concede to such an interpretation.

19. The end result is that I do uphold the Preliminary Objection filed on 19 February 2013 that the Memorandum of Claim herein was filed out of the time stipulated in section 90 of the Employment Act, 2007 and in any case this Court has no jurisdiction or discretion to extend time or grant leave to file a Claim out of time in respect of causes of action based on breach of employment contract. The Memorandum of Claim is therefore struck out.

20. There is no order as to costs.

***Dated, delivered and signed in open Court in Mombasa on this 12<sup>th</sup> day of April 2013***

**Justice Radido Stephen**

**Judge**  
**Appearances**

*Mr. Odhiambo instructed by*

*Odhiambo S.E. & Co. Advocates*

*For Respondent/Applicant*

*Mr. Okemwa instructed by Siocha*

*Okemwa & Co. Advocates*

*For Claimants/Respondents*