



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit of 208 of 2006

JOSEPH ABEDI MALUSHA.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION....DEFENDANT

RULING

This ruling is in respect of a preliminary objection that was raised by the defendant against the plaintiff's suit. It was argued that the suit is time barred by virtue of **Section 87(b)** of the **Kenya Railways Act Cap 397**. According to the provisions of that Section, the action should have been commenced within twelve months from the date when the cause of action arose.

The plaintiff alleged in his plaint that he was in the defendant's employment until 29<sup>th</sup> September, 2004 when his services were terminated. He lodged an appeal to the defendant's Managing Director and according to paragraph 11 of the plaint:-

*“the appeal was disposed off (sic) on or about the 12<sup>th</sup> day of October, 2005 and the defendant upheld it's (sic) previous decision to wrongfully terminate the services of the plaintiff in the public interest.”*

Mr. Mutonyi for the defendant submitted that the plaintiff's case was filed on 25<sup>th</sup> October, 2006, more than two years from the date when his services were terminated. If, however, time was to be computed from 12<sup>th</sup> October, 2005 when the appeal was determined, the suit was filed outside the statutory period of twelve months, counsel submitted. He urged the court to dismiss the suit as being time barred.

Mrs Ndeda for the plaintiff opposed the preliminary objection. She submitted that after the plaintiff lodged his appeal, he did not receive the outcome until 6<sup>th</sup> July 2006, although a letter dated 12<sup>th</sup> October, 2005 communicating the decision had been written by the defendant's Managing Director. She urged the court to take the 6<sup>th</sup> of July, 2006 as the date from which time began to run for purposes of filing the suit. Counsel referred the court to the plaintiff's list of documents that showed his handwritten endorsement of the date when he received the letter dated 12<sup>th</sup> October, 2005 that was sent to the Secretary General of their trade union.

Mr. Mutonyi responded that the plaintiff did not file any reply to the statement of defence and state the date when he received the communication regarding his appeal. He urged the court to construe the provisions of **Section 87(b)** of the **Kenya Railways Act** strictly.

I have considered the submissions made by counsel. The defendant raised its preliminary objection in its statement of defence that was filed on 17<sup>th</sup> November, 2006. The plaintiff did not file any reply to the statement of defence. It is the plaintiff who expressly stated in paragraph 11 of his plaint that his appeal was disposed of on 12<sup>th</sup> October, 2005. He did not aver that he became aware of the outcome of the appeal on 6<sup>th</sup> July, 2006.

In *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] E.A. 696* it was held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. And that is what I have to assume in this application. I can only consider the pleadings on record. On that consideration, it is clear from the contents of paragraph 11 of the plaint that the appeal was determined on 12<sup>th</sup> October, 2005. There is no basis upon which I can hold otherwise. If that is the case, the plaintiff's suit was filed outside the statutory limitation period of 12 months from 12<sup>th</sup> October, 2005.

I have, however, looked at the letter dated October 12<sup>th</sup>, 2005 from the defendant's Managing Director. It was addressed to the Secretary General, Kenya Railways Workers Union. It bears a stamp of the Union indicating that it was received on 21<sup>st</sup> October, 2005. At the bottom of that letter there is a handwritten endorsement that it was received by the plaintiff on 6<sup>th</sup> July, 2006. If that was true, why did he not plead so in his plaint or traverse the issue of limitation that was raised in the defence by filing a reply to the defence? In view of absence of such an averment and in light of the plaintiff's pleadings. I must uphold the preliminary objection with the result that the plaintiff's suit is struck out as being time barred. There will be no order as to costs.

DATED, SIGNED and DELIVERED at Nakuru this 20<sup>th</sup> day of December, 2007.

**D. MUSINGA**

**JUDGE**

Ruling delivered in open court in the presence of Mr. Mbiyu holding brief for Mr. Mutonyi and Mr. Kipkogei holding brief for Mrs Ndeda.

**D. MUSINGA**

**JUDGE**