



REPUBLIC OF KENYA



**Aduord & 2 others v Judicial Service Commission (Cause E262 of 2015)
[2023] KEELRC 2871 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2871 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E262 OF 2015
MA ONYANGO, J
NOVEMBER 10, 2023**

BETWEEN

**SEBASTIAN BEN ADUORD 1ST CLAIMANT
ISACK JARSO ARABELI 2ND CLAIMANT
WYCLIFFE ORINA KIMONGE 3RD CLAIMANT**

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. Before me for determination is a notice of preliminary objection dated 17th June 2022 and filed by the Respondent herein on the grounds that:-
 - i. The suit is time barred and offends the mandatory provisions of Section 90 of the [Employment Act, 2007](#)
 - ii. The suit is incompetent, bad in law and the same should be struck out with costs.
2. The 1st Claimant, Sebastian Ben Aduord responded to the notice of preliminary objection through a “response affidavit to the preliminary objection” in which he states that after being reinstated by the Respondent he wrote several letters all in vain without getting any reply.
3. On 13th July 2022, the court directed that the Preliminary Objection be canvassed by way of written submissions. I have perused the record and found submissions for the Respondent dated 19th July 2022 and the Claimants submissions dated 22nd August 2022.



Determination

4. I have considered the notice of preliminary objection, the response thereto and the respective submissions of the parties.
5. From the Claimants memorandum of claim, it is clear that the claimants herein who are in the employment of the Respondent were at some point dismissed and later reinstated vide letters dated 3rd January 2012 for the 1st Claimant and letter dated 13th December for the 2nd Claimant. The letter for reinstatement of the 3rd Claimant is not on record.
6. The reinstatement letters stated that the period between the date of dismissal and the date of reinstatement would be treated as unpaid leave.
7. From these letters, the cause of action herein which relates to payment of arrears from 1995 to 2012, arose when the Claimants were issued with the reinstatement letters.
8. Section 90 of the Act is framed in mandatory terms. It provides;

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.

9. The cause of action herein arose 3rd January 2012 for the 1st Claimant, and on 13th December 2011 for the 2nd Claimant. Their claims ought to have been filed within 3 years from the date of reinstatement, being 3rd January 2015 for the 1st Claimant and by 13th December 2014 for the 2nd Claimant. It is therefore evident that this claim having been filed more than 3 years later, is time barred and contrary to the provisions of section 90 of the Employment Act.
10. In the case of Wilson Nyabuto Areri v Postal Corporation of Kenya [2018] eKLR this court observed that “Limitation is not a procedural technicality but substantive law that affects jurisdiction.”
11. The Court of Appeal in Divecon v Samani [1995-1998] 1 EA 48 while addressing the question of the court’s jurisdiction to extend time beyond the limitation period under section 90 of the Employment Act, 2007 held as follows;

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.

12. In Maria Machocho v Total (K) Industrial Cause No. 2 of 2012 the court held as follows:

... Section 90 of the Employment Act has now amended the Limitation of Actions Act to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the Employment Act. I now have to determine whether this Court has the jurisdiction to grant leave or extend time in respect to causes of action based on breach of contract generally and breach of contract of service or actions arising out of the Employment Act specifically. The precedent in this regard was set out by the Court



of Appeal in *Divecon Ltd v Samani* [1995-1998] 1 EA 48 at 54 that section 4(1) of the *Limitation of Actions Act* was clear beyond any doubt and that the section meant that no one shall have the right or power to bring an action 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 the 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.

13. Similarly, in the case of *Beatrice Kabai Adagala v Postal Corporation of Kenya* [2015] eKLR where the claimant’s suit was dismissed for being time barred, the Court of Appeal held as follows:

Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the *Employment Act* 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of *Divecon Limited v Samani* [1995-1998] 1 EA P.48, a decision relied upon by Radido, J. in *Josephat Ndirangu v Henkel Chemicals (EA) Limited*, [2013] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act*.

14. The above being the case, this Court has no jurisdiction to hear the Claim by the Claimants herein. As was stated by Nyarangi JA in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR:

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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

15. Having found that the claim herein was filed contrary to the provisions of Section 90 of the *Employment Act*, this court is without jurisdiction. The court must accordingly down its tools. Consequently, the claim is dismissed. There shall be no orders as to costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 10TH DAY OF NOVEMBER, 2023.

M. ONYANGO

JUDGE

