



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

MISC CIVIL APPLICATION NO. 6 OF 2015

TITUS OTIENDE

GRACE OMONGE AKINYI

MARCLIUD ODHIAMBO (suing on behalf of

retirees & retrenches of Kisumu County Council

& Nyando County Council.....APPLICANTS

v

THE COUNTY GOVERNMENT OF KISUMU.....RESPONDENT

RULING

1. It is a shame that a straight forward application seeking leave to file suit out of time against the County Government of Kisumu has been pending in the Court system for 6 years. The blame must be placed squarely at the doorsteps of the parties who kept on informing the Court that they were negotiating.
2. On 24 April 2015, the applicants filed an Originating Summons seeking orders:
 - (i) THAT leave be granted to the applicants to file suit against the Respondent out of time.
 - (ii) THAT costs be in the cause.
3. The cause of action the applicants desired to commence was in respect to breach of contract (failure to pay salary arrears and terminal dues).
4. Despite the Court on 10 June 2015 directing the applicants to file further pleadings setting out the cause(s) of action accrued, the applicants did not comply.
5. Instead of clearly setting out when the causes of action accrued, the applicants filed a Memorandum of Claim on 30 June 2015. Since leave had been granted, the filing of the Memorandum of Claim was an exercise in futility.
6. Nevertheless, the Memorandum of Claim show that the applicants separated with the Respondent from 1995 to 2008.
7. In terms of the applicable law at the time, section 4(1) of the Limitation of Actions Act, the applicants should have commenced action within 6 years, that is, on the extreme spectrum, 2014. And on the assumption that section 90 of the Employment Act, 2007 applied, the time run out in 2011.
8. Be that as it may, the authorities are clear that the Courts do not have the power to extend time and/or grant leave to file suit out of time in actions based on contract.
9. The Court of Appeal in *Divecon versus Samani* (1995-1998) 1 EA 48 held

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.

10. The law as stated by the Court of Appeal is still good law save that under section 90 of the Employment Act, 2007, 6 years has now been replaced by 3 years.

11. The applicants herein were calling upon the Court to endorse an enterprise which the Court clearly could not endorse. The applicants must have been aware of that fact hence the dithering to prosecute the application.

12. The Summons is dismissed.

13. The Respondent contributed the prolonging of the determination of the Summons. The Court therefore orders each party to bear own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 31ST DAY OF MARCH 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For applicants K'Owinoh & Co. Advocates

For Respondent Wasuna & Co. Advocates

Court Assistant Chrispo Aura