



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 89 OF 2017**

**TABITHA NJERI NG'ANG'A..... CLAIMANT**

**VERSUS**

**SOS CHILDREN'S VILLAGE KENYA.....RESPONDENT**

**RULING**

1. The respondent filed a notice of Preliminary Objection dated 5/11/2020 to wit: -

(a) That the claim is time barred as it was filed 11 years and 10 months from the date the Cause of Action took place since the claimant tendered her resignation on 31/6/2006 as admitted in paragraph 6 of her statement of claim.

(b) That the claim was filed on 19/1/2017 as is explicit on the face of the statement of claim.

(c) That the claim violates Section 90 of the Employment Act, 2007 as read with Section 4(1) of the Limitation of Actions Act, Cap. 22 Laws of Kenya.

(d) That the Supreme Court in the matter of **Samuel Kamau Macharia & Another and Kenya Commercial Bank Limited and 2 Others – Appl. No. 2 of 2012 [2012] eKLR** stated:-

***“A Court’s jurisdiction flows from either the Constitution or Legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.”***

2. That this Court lacks jurisdiction to entertain this suit and it should down its tools forthwith as was dictated by the Court of Appeal in the case of **The Owners of Motor vessel “Lilians” –vs- Caltex Oil Kenya Limited [1989] eKLR** as soon as it finds that it lacks jurisdiction to entertain the suit.

3. The Court has carefully considered the pleadings by the claimant set out in the Statement of Claim and submissions by both parties and is of the considered finding that the respondent formally communicated to the claimant for the first time by a letter dated 8/7/2015 that the Board had sat on 27/5/2015 and considered the request by the claimant for payment of pension in respect of the 15 years’ service, and had resolved that the claimant did not meet the requirements of SOS Kenya Human Resource regulations on mothers’ retirement payment.

4. The claimant then wrote a demand letter to the respondent through her advocates on 28/7/2015 and 13/8/2015 respectively before filing this suit on 19/1/2017.

5. It is apparent the cause of action in this matter regarding the pension claim arose on 8/7/2015 when the SOS Board’s decision on the matter of Pension was first communicated to the claimant.

6. The claimant was entitled to file a claim challenging that decision of the Board within three (3) years from the date the decision was made.

7. The three years period expired on 8/7/2018 and by that time this suit had long been filed on 19/7/2017.

8. If this claim was challenging the termination of employment which occurred voluntarily on 26/20/2006, that would be a different matter.

9. As it is, the facts of this claim are explicit on the face of the statement of claim and have not been challenged by the respondent.

10. Accordingly this suit was filed within the 3 years limitation period and the Court of Appeal decision in **Divecom Limited –vs- Samani [1995-1998] E.A. 48** with regard to striking out a matter that has been filed out of time is not applicable to the present dispute.

11. Accordingly, the Preliminary Objection lacks merit and is dismissed with costs in the cause. This matter should proceed to formal proof since no statement of defence has been filed to date in opposition to the statement of claim filed on 19/1/2017.

**Dated and delivered at Nairobi this 29<sup>th</sup> day of April, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with ***Order 21 rule 1 of the Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by ***Article 159(2)(d)*** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under ***Article 48*** of the Constitution and the provisions of ***Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)*** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Kilonzo for Respondent

P.K. Mutua for Claimant

Ekale- Court clerk.