



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

MISC CIVIL APPLICATION NO. 10 OF 2019

IN THE MATTER OF LEAVE TO FILE SUIT OUT OF TIME

AND

IN THE MATTER OF SECTION 4(2), 27(1) & (2),

29 AND 30(1),(2)(3) & (5) OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ARTICLE 159 OF THE CONSTITUTION

AND ALL OTHER ENABLING PROVISIONS OF LAW

LEO WANDERA.....APPLICANT

v

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

1. Leo Wandera (applicant) was employed as a teacher by the Teachers Service Commission (the Commission) in 1981.
2. On 14 October 2002, the Commission notified the applicant that his appointment would be terminated with effect from 1 January 2003, because he had attained the mandatory retirement age.
3. On 24 October 2018, the applicant demanded the refund of salary deductions, payment of salary arrears and unremitted National Social Security Fund deductions and seeing no response from the Commission caused his advocates to formally demand on 21 February 2019, the refund Kshs 780,213/- said to have been unlawfully deducted from his salary.
4. The Commission responded on 8 April 2019 and on 18 October 2019, the applicant moved the Court seeking leave to file suit against the Commission out of time.
5. The Commission filed Grounds of Opposition dated 30 December 2019.
6. It was not until 10 June 2021 that the Summons was placed before the Court and the Court directed that the parties file and exchange submissions.
7. The Commission filed its submissions on 30 June 2021 while the applicant's submissions were filed on 2 July 2021.
8. It is not in dispute that the applicant separated with the Commission on 1 January 2003. The relationship was contractual.
9. In terms of section 4(1) of the Limitation of Actions Act, the applicant was expected to move the Court within 6 years, which is on or before 1 January 2009, but he did not.
10. The applicant now seeks leave to file suit out of time and urges that the Court has discretion by virtue of 27(3) of the Limitation of Actions Act.

11. The question of extension of time to file suit out of time has severally been addressed by the Courts.

12. Addressing the question of leave to commence suit out of time in contractual claims in *Divecon v Samani* (1995-1998) EA 48, the Court of Appeal held 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.

13. In light of the binding authority from the Court of Appeal, this Court finds it has no discretion to do what the applicants seeks.

14. The Court has no option but to dismiss the Summons. No order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 7TH DAY OF OCTOBER 2021.

Radido Stephen, MCIArb

Judge

Appearances

For applicant Wamalwa Simiyu & Co. Advocates

For Respondent Sylvia Ngere, Advocate, Teachers Service Commission

Court Assistant Mr Musanga