



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 226 OF 2016**

**GEORGE OTIENO ATUDO**

**CLAIMANT**

**v**

**COUNTY PUBLIC SERVICE BOARD, KISUMU**

**1<sup>st</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KISUMU**

**2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. George Otieno Atudo (the Claimant) instituted legal proceedings against the County Public Service Board, Kisumu (the Board) and the County Government of Kisumu (the County Government) on 3 August 2016, and he stated the Issues in Dispute as:

(i) Whether the Claimant is entitled to reinstatement.

(ii) Whether the Claimant is entitled to increment allowances/terminal benefits and/or pension.

(iii) Whether the Claimant is entitled to:

(a) Accumulated leave days.

(b) Overtime committed to leave days.

(iv) Whether the Claimant is entitled to claim principal sum from 1<sup>st</sup> October 1993 to 1<sup>st</sup> September 2012 Kshs 3,268,975/- (Three million two hundred and sixty-eight thousand, nine hundred and seventy-five) only before tax and LAPTRUST deductions.

(v) Whether the Claimant is entitled to statutory deductions.

(vi) Whether the Claimant is entitled to general damages.

(vii) Whether the Claimant is entitled to costs and interest of this suit.

2. The Respondents filed a Response on 24 February 2017.

3. The hearing commenced on 18 February 2019, when the Claimant went through examination-in-chief, and the hearing was rescheduled to 13 March 2019.

4. On 13 March 2019, the Claimant sought leave to file an Amended Memorandum of Claim and additional documents.

5. The Court granted the leave to file additional documents and re-opening of the examination-in-chief, and the hearing was fixed for 16 October 2019.

6. The Claimant only filed an Amended Memorandum of Claim on 14 October 2019.

7. When the Cause was called out for hearing on 16 October 2019, the Respondents applied for and secured an adjournment to 23 June 2020.

8. However, due to COVID19, it was only on 16 December 2020 that the Cause was placed before the Court.

9. The parties suggested, and the Court agreed that the hearing proceeds from the stage it had reached (the Judge who had taken the Claimant's testimony had been transferred).
10. When the Cause was called for further hearing on 11 March 2021, the Court declined to grant an adjournment sought by the Respondents.
11. The Respondents, therefore, opted to close their case without leading evidence, and pursuant to Court directions, the Claimant filed his submissions on 29 March 2021, while the Respondents filed their submissions on 20 May 2021.
12. The Court has considered the pleadings, evidence and submissions, and it will address itself to a latent jurisdictional question which emerges from the face of the pleadings (was raised in paragraph 6 of the Response to Claim).

### **Limitation**

13. In paragraph 5 of both the initial Memorandum of Claim and Amended Memorandum of Claim, the Claimant stated that his employment was wrongfully terminated on or around 29 June 2012.
14. The letter of dismissal was dated 21 November 2012.
15. It is not in dispute that the wrongful acts complained of by the Claimant are anchored on the contract.
16. In terms of section 90 of the Employment Act, 2007, the Claimant had 3 years within which to institute these legal proceedings.
17. Assuming that the cause(s) of action arose on 29 June 2012, the Claimant should have moved the Court on or before 29 June 2015.
18. Nevertheless, considering that the Claimant was notified of his dismissal on or around 21 November 2012, that would have been the action accrued, and therefore he should have filed the Cause on or before 21 November 2015.
19. The Claimant moved the Court on 3 August 2016, outside the prescribed 3 year limitation period.
20. The fact that the Claimant may have appealed the dismissal would not have stopped time for purposes of limitation from running.
21. The law on limitation, which has been restated in recent decisions/authorities, is found in the decision of the Court of Appeal in *Divecon v Samani* (1995-1998) EA 48 where the Court 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.
22. I would endorse the law as stated therein as equally sound in employment contracts and/or causes of action to which section 90 of the Employment Act, 2007 applies.
23. The Court, therefore, has no option but to down its pen.
24. The Cause is struck out with no order on costs as the Respondents did not lead any evidence.
25. The Court could not deliver this judgment on 27 October 2021, due to other official engagements.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 25TH DAY OF NOVEMBER 2021.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

### **Appearances**

For Claimant Otieno C.O. Ayayo & Co. Advocates

For Respondents Office of the County Attorney, County of Kisumu

Court Assistant Chrispo Aura