



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

CAUSE NO. 160 OF 2016

PAUL K. LANGAT.....PETITIONER

VERSUS

KENYA DEFENCE FORCES 9TH BATTALION.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

RULING

1. This ruling relate to the resonant notice of preliminary objection dated 25/10/2019 which prays for the suit to be struck out for on grounds that:-

(a) The Suit is time barred by dint of section 3 of the public Authorities Limitation Act

(b) The claim is substantially based on the Employment Act Cap 226 law of Kenya which does not apply to the respondent's by dint of section 3(2) of the Act

2. The Respondents submit that the cause of action herein arose on 5/2/2013 as pleaded in paragraph 7 of Statement of Claim. Under section 3(2) of the Public Authorities Limitation Act, no suit founded on contract can be brought against the Government or local authority after the end of three years from the date on which the cause of action arose.

3. They contended that the Kenya Defence Forces is a state organ within the Government of Kenya and as such the suit herein falls within the confines of the Public Authorities Limitations Act and it is time barred. In their view, the cause of action arose on 23/1/2013 and the suit ought to have been filed latest on 22/1/2016 but it was filed on 22/11/2016.

4. For emphasis they relied on **Anacleth Kalia Musau –vs Attorney General & 2 others [2020] e KLR** where court of Appeal upheld the decision of the High Court that under section 3(1) of the igh court decision that found that under section 3(1) of the public auorites limitation of Act a sit founded on court could not be brought after 3 ears from the date when the case of action arose.Public Authorities Limitations Act (PALA), a suit founded on tort could not be brought after 3 years from the date when the cause of action arose.

5. They also relied on **Samuel Okoth Kamwere –vs -Ministry of Labour & Human Resource development & Another {2008} e KLR** where the court held that under section 3(2) of the said Act the suit ought to have been filed within 3 years from the date the cause of action arose because it was based on contract between the parties.

6. In view of the foregoing, the respondents submit that the court lack jurisdiction to entertain the suit and prayed for the court to down its tools. For emphasis, they relied on several binding precedents including the court of Appeal decision in **Anacleth Kalia Musau case, Supra**.

7. Finally, the respondents submitted that the suit is substantially grounded on the Employment Act, which does not apply to the members of Kenya Defence forces. They relied on section 3 (2) (a) of the Employment Act to fortify the foregoing submission and urged the court to uphold the objection and strike out the suit with costs.

8. On the other hand,the claimant opposed the preliminary objection. While appreciating that the cause of action arose on 25/1/2013 and thatit ought to have been filed before the lapse of 3 years from that date, the claimant suggested that the time stopped running after he sought review of his dismissal from service.

9. e further urged that the respondents had obligation to respond to his application for a revie udner section 159(3) of the He further urged that

the respondent had obligation to respond to his application for a review under section 159(3) of the Kenya Defence Forces (KDF) Act. He submitted that section 3(2) of the PALA should be read with section 159(3) of the KDF Act. In his view the respondents should be stopped from pleading the defence of limitation yet they are the ones who failed to respond to his application for review.

10. For emphasis, he relied on **Samson Tonui –v- Tinderet Tea Estate, Eldoret ELRC No. 231 of 2018** where the court dismissed a similar objection because it was not clear when the claimant was dismissed.

11. Finally, he submitted that because he is no longer a member of the KDF, section 3(2) of the employment Act does not apply to him as the provisions of the KDF Act do not apply to him any More.

ANALYSIS

12. I have considered the pleadings, objection and the submissions by the two sides, the issues for determination are:-

- a) *Whether the objection raises pure points of law*
- b) *Whether suit is time barred*
- c) *Whether the suit offends section 3(2) of the Employment Act*

Pure point of law

13. In the case of **Mukisa Biscuits –vs Westend Distributor Ltd [1969] EA 696**, the court observed that: -

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

14. In this case, I am satisfied that the objection raises pure points of law which do not need evidence to establish. They are also capable of ending the suit if they are established.

TIME BARRED SUIT

15. There is no dispute that the suit herein is founded on contract of service between the parties herein. It is also a fact that the cause of action herein accrued on 23/1/2013 according to the respondent or on 5/2/2013 according to paragraph 7 of the Claim. Further, it is not disputed that the suit was filed after the lapse of 3 years from the date when the cause of action arose.

16. Section 3(2) of the PALA provides that:-

“No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the course of action accrued”

17. The suit herein was filed on 22/11/2016 about 10 months after the lapse of the limitation period. It is therefore time barred by dint of section 3(2) of the PALA. I gather support from the Court of Appeal decision in **Anaclet Kalia Musau, Supra** that:-

“...the overriding purpose of all limitation statutes is based on the maxim interest reipublicae ut sit finis litium, that it is in the public interest that there be an end to litigation. A party will not be permitted to prosecute stale claims.”

18. Having found that the suit is time barred it is also obvious the court lacks jurisdiction to entertain the same. In my view it is common sense that the lapse of limitation period means that the mandate of the court to receive and entertain proceedings in a particular cause of action is extinguished by effluxion of time.

19. I gather support from the case of **Bakery Confectionery food Manufacturing and allied workers union –vs Razo Limited [2021] e KLR** where Onyango J held that:

“The claimant did not file the matter in court until 25th February 2016 which is 5 years after the last course of action arose. As such the suit is statute barred and the court does not have jurisdiction to hear and determine the claim.”

IN APPLICATION OF EMPLOYMENT ACT

20. Section 3(2)(a) of the Employment Act provides that:-

“This Act shall not apply to the Kenya Defence Forces or the reserve as respectively defined in the Kenya Defence Forces Act, 2012.”

21. The disputes herein is between a former KDF officer and KDF. Paragraph 22 of the Statement of Claim states that:-

“This Honourable court had jurisdiction to entertain this matter by virtue of the provisions of section 12 of the labour institutions Act, Employment Act section 45 and section 87 (2) and section 73 of the Labour Relations Act”.

21. Whereas I have no doubt about the jurisdiction of the court over the dispute between the parties, I am however, clear in my mind that the provisions other Employment Act do not apply to KDF pursuant to section 3(2) (a) of the Act. It follows that an officer of KDF can only invoke the court's jurisdiction under the KDF Act, Constitution, Fair Administrative Actions Act or any other law but not under the Employment Act.

CONCLUSION.

22. I have found that the suit is time barred and founded on the Employment act which does not apply to KDF. Consequently the preliminary objection is sustained and the suit stuck out. Each party shall bear own costs

DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF DECEMBER, 2021.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE