



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1426 OF 2018**

**FRANCIS GITARI MURIUKI.....RESPONDENT/CLAIMANT**

**VERSUS**

**KENYA AIRWAYS LIMITED.....APPLICANT/RESPONDENT**

**RULING**

1. The respondent raises a preliminary objection that the suit is time barred by dint of Section 90 of the Employment Act, 2007 by way of a notice of motion.
2. The Court first notes that this is not an appropriate means of raising a preliminary objection which ordinarily is a pure point of law in respect of which facts, the basis of the objection should be evident on the face of the pleadings and are not in dispute. See **Mukisa Biscuits Manufacturing Company Limited –vs- West End Distributors Limited [1969] E.A. 696**. The applicant alleges that the suit was filed on 4<sup>th</sup> October, 2018 and this was more than 3 years after the cause of action arose. The applicant prays that the suit be struck out.
3. The claimant filed a replying affidavit in opposition to the notice of motion. This was necessitated by the inappropriate manner the preliminary objection was brought.
4. The parties have also filed written submissions.
5. The Court has considered the objection and finds that the Memorandum of Claim was filed on 8<sup>th</sup> October, 2018.
6. The suit is premised on a demand letter attached to the memorandum of claim dated 17<sup>th</sup> July, 2018 in which the claimant claims through his advocates unpaid salary and other wages amounting to Kshs 13,724,296.80. The particulars of the arrears are set out under paragraph 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30.
7. The alleged unpaid salary increments and unpaid provident fund dated between 1<sup>st</sup> March, 2002 to 30<sup>th</sup> August, 2002; 1<sup>st</sup> July, 2009 to 30<sup>th</sup> June, 2011; 1<sup>st</sup> July, 2010 to 30<sup>th</sup> June, 2011; 1<sup>st</sup> July, 2011 to 30<sup>th</sup> June, 2012; 1<sup>st</sup> July 2012 to 30<sup>th</sup> June, 2013; and underpayments of salary for the months of March 2002 to April, 2003.
8. The claimant raised these matters upon signing Voluntary Early Retirement Package and subsequently wrote a demand letter vide his advocates dated 17<sup>th</sup> July, 2018, claiming total arrear wages in the sum of Kshs 13,724,296.80 enumerated above.
9. The above facts are discernable on the face of the memorandum of claim, which non-payments have been denied by the respondent in its memorandum of reply filed on 9<sup>th</sup> May, 2016.
10. The claimant in addition prays for General damages, costs and interest arising from the alleged default by the respondent.
11. From the facts placed before Court by the claimant, the cause of action as set out under paragraphs 20 to 31 in the Memorandum of Claim arose on diverse dates between March, 2002 and 30<sup>th</sup> June, 2013.
12. The alleged non-payments constitute the entire basis of the claim before this suit which was filed on 8<sup>th</sup> October, 2018 more than five (5) years from the time the last alleged non-payment occurred and more than twenty (20) years from the time the first non-payment occurred.
13. This suit is clearly time barred by dint of Section 4(1) of the Limitation of Actions Act, Cap. 22 Laws of Kenya which mandated any

person who has a suit founded on contract to file it before expiry of six (6) years period. This appertained to employment matters until the enactment of the Employment Act, 2007 which came to effect in August, 2008.

14. In terms of Section 90 of the said Act, all matters arising from a Contract of Employment must be filed within 3 years from the time the cause of action arose. Therefore all the claims in this matter that arose after August, 2008 are also caught by the doctrine of laches in terms of Section 90 of the Employment Act, 2007.

15. The Court relies on the Court of Appeal decision in **Devicon –vs- Samani (1995-1998) EA 48** - *that no Court has authority to extend the time within which a suit based on contract may be filed.*

16. Accordingly, the entire suit is time barred by dint of both Section 4(1) of Cap. 22 Laws of Kenya and Section 90 of the Employment Act, 2007 and is struck out.

17. The Court has considered the nature of the dispute from the facts set out in the pleadings and has deemed this case appropriate for each party to bear their costs of the case.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF DECEMBER, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mrs Oduor for Respondent/Applicant

Mr. Ongayi for claimant/Respondent

Ekale – Court clerk.