



**REPUBLIC OF KENYA**

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

**CAUSE NO. 389 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa 3<sup>rd</sup> February, 2020)**

**JAMES OPATO OLUNDO.....CLAIMANT**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**RULING**

1. The Respondent, Kenya Railways Corporation subsequently filed a Notice of Preliminary Objection dated 21<sup>st</sup> February 2019 seeking to have the Claim herein dismissed on the grounds that:-

- 1. The Claimant's claim is defective and incurable for want of Statutory Notice of Intention to Sue as mandatorily required under the enabling provisions of the law.***
- 2. The Claimant's claim is time-barred for offending the legal provisions on Limitation of Actions under the relevant laws.***
- 3. For the preceding, this Honourable Court lacks the requisite jurisdiction to entertain, hear and/or determine this matter.***
- 4. The Claimant's case should therefore, be struck out with costs to the Respondent for being defective, incompetent and incurable and an abuse of the Court process.***

2. In response to the Notice of Preliminary Objection, the Claimant, James Opata Olundo filed his Grounds of Opposition dated 19<sup>th</sup> July 2019 that:-

- 1. A valid notice of intention to institute the claim was issued and in any event, this is a matter of fact and not law.***
- 2. The law applicable to the claim herein is the Pensions Act.***
- 3. The claim herein does not fall within classes of actions that are subject to limitation. The right to pension is an investment and it does not lapse.***
- 4. The issue of non-payment and/or under payment of pension is a matter of fact that cannot be determined at a preliminary stage.***
- 5. The Honourable Court has jurisdiction to entertain and determine the claim herein.***
- 6. The Notice of Preliminary Objection is an abuse of the Court process and ought to be dismissed with costs.***

3. The brief facts are that the Claimant retired from the Respondent Corporation on 30/04/2006 upon attaining the mandatory retirement age of 55 years and after serving the Respondent for 33 years and 7 months.

4. On retirement, the Respondent computed his benefits at Kshs. 409,005/= and subsequently partly paid him Kshs. 100,000/=. The balance of Kshs. 309,005/= was well communicated to the Claimant and he was also to be paid his monthly pension of Kshs. 5,112.55.

5. Vide the payment generation report of 17/07/2012 the Claimant was duly paid outstanding dues of **Kshs. 682,221.15** which as per the Respondent was the full and final payment but which amount the Claimant now disputes in this Claim.

6. The Claimant claims that his pension and benefits ought to have been calculated afresh when the Respondent made the belated payment in 2012. He thus claims for further benefits and dues of Kshs. 4,007,294/= on the basis that having not been fully paid his retirement benefits he remained in the employment of the Respondent until the same had been paid in full.

### **Respondent's Submissions**

7. The Respondent's submissions focuses on the issue of limitation by time stating that it opts not to argue the ground on want of statutory notice for known reasons.

8. It submits that the Claimant's right or entitlement is not among the issues before Court in the main claim to warrant his invoking of the right and that it is not disputed the Claimant is entitled to pension, rather to what amount.

9. That the Claimant continues to earn pension since 2012 when he complied with procedural requirements and was introduced into the pension payroll by the relevant pension scheme and that he did not serve as its employee any time after the date of retirement.

10. That the Claimant did not receive the balance of the lump sum and pension arrears because he failed to furnish the required information for 6 years and the Respondent submits that the cause of action arose when the Claimant was paid his retirement benefits in full in June 2012.

11. That the Claimant ought to have brought this claim within the limitation period but he instead filed the same on 24/02/2017, which is approximately 5 years later. It cites the case of **Justus Atulo Ashioya –v- Akshar Team Security Ltd (UR), Industrial Cause No. 849 of 2011** where the Court observed:-

*“The period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of termination, the employee should be accorded all benefits arising under the contract of employment. The event that triggered this Claim happened on or about 26th January, 2011, and the Claim to enforce the full range of benefits was filed on 11th August, 2011, well within the period created under Section 90 (of the Employment Act, 2007).”*

12. That in the ***Justus Atulo case*** above, despite the employee having the right and entitlement of all benefits due to him, the Court found that the same accrued at a specific time and failure or delay to pay did not make it a continuing cause of action. Simply put, the cause of action accrues when the aggrieved party can move to Court for redress.

13. The Respondent submits that it is established under **Section 3(1) of the Kenya Railways Corporation Act (Cap 397)**, which Act provides for the management of the Corporation including power and mandate over its employee's terms of engagement such as remuneration and benefits.

14. That the Act also provides for the promulgation of regulations relating to the general conditions of service of employees with **Section 81(a)** regulating: *‘the grant of pensions, gratuities and other retiring allowances to employees and their dependants and the grant of gratuities to the estate or dependants of deceased employees.’* That there further exists **The Kenya Railways Corporation (Pensions) Regulations of 1983** which takes care of the corporation's employees' issues and that the same was communicated to the Claimant in the letter dated 16/01/2006.

15. That contrary to the Claimant's assertions in his grounds of opposition that the law applicable to this matter is the Pensions Act, the applicable law is therefore The Kenya Railways Corporation Act (Cap 397) as the primary statute and The Kenya Railways Corporation (Pensions) Regulations of 1983. That the Employment Act will apply in so far as it touches on issues of employment and limitation by time since the said Act does not extend to matters of pension.

16. It is submitted by the Respondent that **Section 87(b) of the Kenya Railways Corporation Act (Cap 397)** on Limitation states as follows:-

*‘Where any action or other legal proceedings is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect:-*

*b) the action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.’*

**That the basis of this matter being a contract of service between the Claimant and the Respondent Corporation, it is subject to Section 90 of the Employment Act which provides that:-**

*‘Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.’*

17. That it is imperative to note that Section 87(b) of the Kenya Railways Corporation Act and Section 90 of the Employment Act are capped in mandatory terms and any exercise of discretion against the exact wording of these provisions would go against the intention of the

provisions.

18. That **Section 3(2) of the Public Authorities Act** is equally capped in mandatory terms providing for a limitation period of three years. That **Section 93 of the Employment Act** further sets out the transitional provisions relating to continuance of valid contracts of service and foreign contracts of service entered into before commencement of the Employment Act.

19. The Respondent relies on the case of **Joseph Sebastian Ringo –v- Kenya Railways Corporation [2015] eKLR** where a claim filed 7 years after the cause of action was found to be time-barred by virtue of Section 90 of the Employment Act and section 87 of the Kenya Railways Corporation Act. That in the case of **Teachers Service Commission –v- Pauline Kasumba Osembe (suing on behalf of the Estate of John Mugonya Kasuma) & 2 others [2019] eKLR**, the Court found allowed the appeal on the basis that the suit was time barred stating:-

*“From the foregoing, had the 1<sup>st</sup> respondent’s suit not been tainted by the issue of jurisdiction and limitation, she would have been entitled to the pension.”*

20. The Respondent also submits that based on the aforementioned provisions on limitation of time, this Court should find that this Claim is time-barred and cannot be salvaged and to dismiss it with costs.

21. It further submits that this Court lacks jurisdiction to entertain a claim barred by time and it cites the case of **Owners of Motor Vessel ‘Lillian S’ v Calter Oil (Kenya) Limited (1989) KLR 1** where the Court held that jurisdiction is everything and without it, the Court has no power to make one more step.

22. It is the Respondent’s further submission that Part III of the Limitation of Actions Act does not provide for extension of time for matters in which the cause of action is based on contracts and that **Section 31 of the Limitation of Actions Act** allows the incorporation of Part III of the Act into limitation provisions of other statutes.

23. That this Court cannot therefore extend the limitation period as it is not seized of jurisdiction to do so in cases found on contract under Part III of the Limitation of Actions Act as was held in the case of **Divecon Ltd v Samani [1995-1998] 1 EA 48.**

24. The Respondent submits that when the Claimant retired, he ceased having any kind of relationship with the Respondent and that the **Kenya Railway Staff Retirement Benefits Scheme (KRSRBS)** under which he had been registered as a pensioner then took over.

25. That KRSRBS is thus responsible for the handling of the Claimant’s retirement benefits and pension matters and which he was expressly informed about vide a letter dated 04/06/2012. That the party sued in this matter is the wrong party and any orders directed to the corporation would be directed to the wrong party and that although it did not raise this in its Preliminary Objection, it urges the Court to find that this suit is defective for suing the wrong party and strike it out.

#### **Claimant’s Submissions**

26. The Claimant submits that he had to follow up the balance of his retirement benefits for six years and that with the said payments being made six years after retirement, he expected the Respondent to have recalculated the said benefits as at 01/06/2012. According to him, the cause of action is the non-payment and or under payment of pension/retirement benefits and that since he has not been paid all the benefits, there is a continuing injury which has not ceased.

27. He further submits that a claim for pension does not form part of the contract of employment as it is an investment made over time throughout the working life of the pensioner. That it cannot therefore be subjected to the same limitation period as other claims that are founded on an employment relationship and that it is a right that does not lapse until it is fully paid, as similarly held in the case of **Peter Njogu Mwangi & 3 Others v General Motors E.A Limited & 3 others [2018] eKLR**.

28. That claiming this action is statute barred would mean that the Claimant would be denied the opportunity to be heard and prove his facts either through documentary evidence or viva voce evidence. That the Court in the **Peter Njogu case above** went on to hold that:-

*“...That dispute is not statute barred under the Retirement Benefits Act and it requires evidence to be taken between the claimants on one hand and the 2nd respondent and the 3rd party on the other hand. The said determination can be done based on the records of employment and deposition filed by the 1st respondent and other parties herein.”*

29. That the Court of Appeal in the case of **Joseph Sebastian Ringo –v- Kenya Railways Corporation, Civil Appeal No. 129 of 2017** similarly found that the lower Court had erred in deciding the issue of limitation outside trial and allowed the appeal while setting aside the ruling allowing the Preliminary Objection and striking out the suit. The Claimant in the instance case submits that the fact that issue of pension cannot be determined at a preliminary stage is enough ground that the Respondent’s Preliminary Objection does not lie.

30. It is submitted by the Claimant that the Kenya Railways Corporation Act and the regulations made thereunder do not oust the application of other laws that regulate the payment and administration of pensions. That the major legal enactment governing the pensions for government employees or employees in the public service is the **Pensions Act** which at **Section 2** defines *public service* as:-

*‘b) Service under the High Commission, the Organization, the Community, the East African Railways and Harbours Administration, the East African Posts and Telecommunications Administration, the East African Railways Corporation, the East African Harbours Corporation, the Kenya Posts and Telecommunications Corporation, the Kenya Railways Corporation or*

*the Kenya Ports Authority.’*

31. That where the retirement benefits and pension remains unpaid as his case, he should be retained in the employment of the Respondent and be entitled to all benefits and salaries payable to employees, which assertion is buttressed by **Section 16A of the Pensions Act** which provides:-

*‘A person to whom a pension or other allowance is payable under this Act shall be entitled to be retained in the service until payment in full of the gratuity payable to him consequent upon the exercise by him of his option to receive such gratuity under the provisions of the Act’*

32. That your Ladyship considered the provisions of the Pensions Act in the case of **Charles M. Shitiavai –v- City Council of Nairobi (2012)** and stated that section 16A is explicit that what is due or owing for a pensioner must be paid in full and if the amounts remain outstanding, it is deemed that the recipient is still in employment and he shall be entitled to his full pay.

33. The Claimant submits that the Respondent has ignored the second limb of Section 87(b) of the Kenya Railways Corporation Act and Section 90 of the Employment Act that apply only to the extent of a continuing injury like in this case.

34. He urges this Court to find that the nature of this claim is not a contract or tort but an issue of pension and that the time limits specified in the said legislations have not started running. That this claim is therefore not statute barred and this Court’s jurisdiction is not ousted and submits that if the Court were to find that the Pensions Act is not applicable, then this Claim is unique being an investment that does not lapse as well as a continuing injury.

35. He further urges the Court to dismiss the Preliminary Objection with costs to the Claimant.

36. I have examined the averments of both Parties in this case. The Applicant’s contention is that this Court has no jurisdiction to handle this claim the same being time barred. From the pleadings in the matter, this claim concerns late payment of pension for which the Claimant aver that he is entitled to as per Section 16A of the Pension Act.

37. This matter being a matter relating to pension for which the Court of Appeal has in Civil Appeal No. 20/2017 stated that the jurisdiction of this Court does not extend to pension matters. It would be futile for me to consider the merits or otherwise of this application.

38. I find that I do not have jurisdiction to handle the claim or even the application. I therefore strike out this claim with no order as to costs.

**Dated and delivered in open Court this 3<sup>rd</sup> day of February, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Osodo holding brief Owino for Claimant

Iseme holding brief Kiara for Respondent