



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 85 OF 2020

JOSEPH KAGUTHI1st CLAIMANT
DR. SALIM NDEMO.....2nd CLAIMANT
DR. FRANCIS SANG3rd CLAIMANT
IBRAHIM DUALE4th CLAIMANT
MAJOR (RTD) RAMA NDENGWA MWANGOMBE.....5th CLAIMANT
NURIA ABDULAHI6th CLAIMANT
LT.CO. (RTD) FRANCIS CHARLES MUGAMBI.....7th CLAIMANT
ZIPPY NZISA MUSYIMI8th CLAIMANT
NANCY WAMBUI GACHOKA.....9th CLAIMANT
IMMANUEL ICHOR IMANA.....10th CLAIMANT
PURITY SEIN KARARIET..... 11th CLAIMANT
CAREN WAKOLI.....12th CLAIMANT

VERSUS

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION
OF NATIONAL GOVERNMENT.....1st RESPONDENT
HONOURABLE ATTORNEY GENERAL.....2nd RESPONDENT

RULING

1. The 12 applicants filed an Originating Summons on 12 February 2020 seeking orders

1. **THAT** the Honourable Court be pleased to grant the Claimants/Applicants leave to file the instant suit out of time.
2. **THAT** the annexed draft Statement of Claim be deemed to have been duly filed upon payment of the requisite court fees.
3. **THAT** costs of this application be provided for.

2. When the Summons was placed before the Duty Court on 14 February 2020, it directed that it be served upon the Respondents for *inter-partes* hearing.

3. The Respondents filed Grounds of Opposition to the Summons on 3 March 2020, and pursuant to Court directions, they filed submissions on 4 March 2020 while the applicants filed submissions on 6 March 2020.
4. The Court took oral highlights of the submissions on 9 March 2020.
5. A brief background of the intended cause of action would be in order.
6. Through Gazette Notice No. 14485 of 8 November 2013, the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government gazetted a Taskforce on Community Policing.
7. The Taskforce was to serve for 2 years and some of the applicants were appointed members of the Task Force.
8. The Task Force completed its work and on or around 22 April 2016, the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government appointed and gazetted the applicants through Gazette Notice No. 2700 of 22 April 2016 as members of the National Committee on Implementation on Citizen Participation in Security in Kenya. The applicants were to serve for 3 years.
9. Around 10 October 2015, the Head of Public Service requested the Salaries & Remuneration Commission to increase the remuneration and allowances payable to the applicants. In a response dated 8 August 2016, the Commission advised the Head of Public Service to retain the remuneration and allowances payable to the applicants as advised earlier.
10. The applicants commenced performance of their duties upon appointment and on 23 March 2017, the Deputy Director, Human Resources wrote a Memo to the Principal Secretary, Ministry of Interior recommending payment of allowances to the applicants effective January 2017. With time, the applicants carried other official engagements and facilitation was requested for on their behalf.
11. The Respondents did not pay some of the remuneration(s) and/or allowances and on 4 April 2017, the Deputy Secretary wrote a Memo to the Principal Secretary, Ministry of Interior seeking payment of the arrears for the period January to March 2017. The Memo tabulated the arrears.
12. The applicants' term ended around 6 November 2018 but it appears there were still outstanding arrears and this prompted some of the applicants to approach the Commission on Administrative Justice to intervene.
13. The Commission on Administrative Justice wrote to the Principal Secretary, State Department of Interior on 28 May 2019 seeking his assistance.
14. In the letter, the Commission on Administrative Justice noted that the applicants' arrears for January to March 2017 had been paid but November 2015 to December 2016 had not been paid (14 months).
15. The letter further noted that allowances from January 2017 to October 2018 had been subjected to tax which had not been remitted to the Kenya Revenue Authority.
16. The Commission made follow up on the correspondence and on 24 September 2019, the Cabinet Secretary, Ministry of Interior informed it that the Committee/applicants had not made available requisite records/documentation to enable processing of payment.
17. The response also indicated that the Salaries & Remuneration Commission had placed a cap at the number of monthly meetings the applicants could hold in a month.
18. On the question of tax, the letter indicated that the deductions had been sent to the Kenya Revenue Authority and that it is the Authority which had failed to update the applicants' tax records.
19. The applicants seeing no solution sought legal advice and on 4 December 2019, the applicants' advocate on record issued a formal demand to the Principal Secretary. The formal demand was followed with a Statutory Notice to the Attorney General dated 6 December 2019 but received on 31 December 2019.
20. The Respondents did not respond hence the application now under consideration.
21. In explaining why they did not move the Court any earlier, the applicants contended that the delay to institute suit was occasioned by negotiations with the Respondents to settle the dispute amicably and that this led to the failure to serve a statutory notice upon the Honourable Attorney General and that such delay was not inordinate.
22. The applicants also asserted that they wanted to exhaust diplomatic channels before moving the Court.
23. Citing Order 50 of the Civil Procedure Rules and *Rawal v the Mombasa Hardware Ltd* (1968) EA 392, the applicants asserted that the Court had the authority to extend the time for the filing of the suit.
24. In opposing the application, the Respondents argued that the cause of action intended to be prosecuted was a tort and subject to section 3(1) of the Public Authorities Limitation Act which limits the institution of suits to 12 months from date of accrual of a cause of action.

25. Apart from the 12-month limitation, the Respondents contended that it was the High Court which would have jurisdiction as no employment/labour rights were in question.
26. The Respondents also submitted that the Government Proceedings Act was not applicable and hence the reliance on failure to serve a statutory notice was without foundation.
27. The Court has considered all the material placed before it including case law even if no express reference is made to them in this Ruling.
28. The substratum of the applicants intended action is anchored on breach of contract/statute on the payment of remuneration and allowances due for their membership of the National Committee on Implementation on Citizen Participation in Security in Kenya.
29. The remuneration and allowances form the terms and conditions of service upon which they served in the Committee.
30. The gravamen of the applicants' case being terms and conditions of service within the public service, the Court finds no merit in the argument advanced by the Respondents that the dispute was tort-based and outside its jurisdiction. The dispute is contractual and falls within the ambit of the jurisdiction of this Court and not the High Court.
31. On the question of limitation, the Court finds the reference to the provisions of the Government Proceedings Act and the Public Authorities Limitation Act not determinative.
32. The determinative issue, in the view of the Court, without making any finding on whether the applicants are out of time or not, is whether a Court has jurisdiction in contractual actions to extend time or grant leave to file suit out of time.
33. The question was answered long ago by the Court of Appeal in *Divecon v Samani* (1995-1998) EA 48 when it 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". (Emphasis mine).
34. A limitation provision or statute vests or gives to a party/defendant a right, and it is not just a procedural right but a substantive right. It is the cause of action which is barred and not the remedy which is barred.
35. Whether it is the limitation prescribed by section 4(1) of the Limitation of Actions Act, section 3(1) of the Public Authorities Limitation Act or section 90 of the Employment Act, 2007, it is the view of this Court that no civil action or proceedings shall lie after the lapse of prescribed limitation time.
36. Consequently, the Court finds that the legal principle in the case of *Rawal v Mombasa Hardware Ltd* distinguishable as the case concerned a dismissal of a suit for want of prosecution and the power of a Court to reinstate a dismissed suit.
37. From the foregoing, the Court finds no merit in the Originating Summons filed in Court on 12 February 2020 and it is dismissed with no order on costs.

Delivered through video/email, dated and signed in Nairobi on this 22nd day of May 2020.

Radido Stephen

Judge

Appearances

For applicants Ms. Guserwa instructed by J.A. Guserwa & Co. Advocates

For Respondents Ms. Akuno, Senior State Counsel, Office of the Attorney General

Court Assistant Judy Maina