



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 492 OF 2016

(Originally Nairobi High Court Civil Case No. 124 of 2012)

JAMES MBOYA ONYWERA.....CLAIMANT

VERSUS

(HON ATTORNEY GENERAL)

MINISTRY OF ENVIRONMENT & NATURAL RESOURCES.....1st RESPONDENT

MINISTRY OF WATER & IRRIGATION.....2nd RESPONDENT

JUDGMENT

1. James Mboya Onywera (Claimant) instituted legal proceedings against the Attorney General on behalf of the Ministry of Environment & Natural Resources and the Ministry of Water & Irrigation (Respondents) before the High Court on 15 March 2012 alleging unlawful termination of employment on 30 September 2000 (early retirement).

2. The Claimant sought special damages/terminal dues and general damages for the unlawful termination of employment.

3. The Respondents filed a *Statement of Defence* on 20 June 2012, and the Claimant filed *List of Issues* on 2 June 2015.

4. On 21 March 2016, the High Court transferred the suit to this Court for hearing and determination.

5. When the Cause first came up for hearing before this Court on 15 October 2018, it was dismissed because of the non-attendance of the Claimant. The dismissal order was vacated on 3 January 2019 paving the way for hearing on 29 May 2019 (2 hearings aborted in the interlude because of the absence of the Claimant's advocate).

6. On 9 May 2019 the Respondents filed a *Notice of Preliminary Objection* contending that the Cause was statute barred (limitation).

7. The Claimant testified and was cross-examined while the Respondents did not call any witnesses. Claimant filed his submissions on 17 July 2019.

8. The Court will at the first instance consider the question of limitation as it goes to jurisdiction, and can be raised at any time before judgment.

Limitation

9. In paragraph 5 of the *Statement of Claim*, the Claimant pleaded that his employment was unlawfully terminated through a letter dated 30 August 2000, and that the effective date of termination was 30 September 2000.

10. It is not in dispute that the Claimant appealed more than twice against the termination. He produced appeal letters dated 4 September 2000 and 24 September 2000.

11. It is also common that the Claimant's cause of action is founded on a contractual relationship.

12. The Claimant moved the High Court, as already stated on 15 March 2012, more than 11 years after the accrual of the cause of action.

13. The applicable law at the time the cause of action arose was the *Limitation of Actions Act*.

14. Section 4(1)(a) of the Act provided for a limitation period of 6 years in contractual actions. The Claimant should have moved the Court within 6 years. He did not.

15. In *Divecon v Samani* (1995-1998) EA 48, the Court of Appeal 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.

16. Clearly, the Claimant instituted the instant proceedings outside the time prescribed by statute, and the pen of the Court is constrained.

17. The Court has no option but to down its pen and strike out the Cause.

18. The Respondents seemed to suggest that the terminal dues payable to the Claimant under the early retirement scheme may be lying somewhere. In good faith, they should facilitate the Claimant through his advocate to get the dues paid.

19. No order as to costs.

Delivered, dated and signed in Nairobi on this 19th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Odero Olonde instructed by Odero-Olonde & Co. Advocates

For Respondents Ms. Cheysina, Litigation Counsel, Office of the Attorney General

Court Assistant Lindsey