



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 1967 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

PATRICK OGUTU ODUOR.....CLAIMANT

-Versus-

FASHION "99" LIMITED.....RESPONDENT

RULING

The suit herein was filed by PATRICK OGUTU ODUOR, the claimant vide memorandum of claim dated 23rd September 2016 and filed on the same date. At paragraph 4 of the claim, it is pleaded that the claimant worked for the respondent from 1997 until 26th September 2006 when he was unlawfully dismissed.

On 21st October 2016, the respondent filed a notice of preliminary objection in the following terms:-

1. That the claim herein is fatally defective and unsustainable in law as it has been brought and or filed ten (10) years after the cause of action accrued contrary to the mandatory provisions of Section 90 of the Employment Act, Chapter 226, Laws of Kenya.
2. That the claimant's claim for defamation and unlawful confinement is fatally defective and unsustainable in law as it has been brought and or filed seven (7) years after the cause of action occurred contrary to the mandatory provisions of Section 4 (2) of the Limitation of Action Act, Chapter 22 Laws of Kenya.
3. That the suit is an abuse of the court process.

The preliminary objection was argued by way of written submissions.

Respondent's Submissions

The respondent submits that the law applicable at the time of termination of the claimant's employment. On 26th September 2006 was the Employment Act (now repealed). It is submitted that the principles applicable in determining the merits or otherwise of a preliminary objection are set out in the case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors Limited (1979) EA 696** at page 700, per Law J.A as he then was –

"... A preliminary objection consists of a point of law, which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

It is submitted that a plea of limitation qualifies to be argued as a preliminary objection as it goes to the jurisdiction of the court. It is submitted that the cause of action herein arose on the date of termination of the claimant's employment on 26th September 2006 and relying on the decision of Justice Ndolo in **BENJAMIN WACHIRA NDIITHI -VS- PUBLIC SERVICE COMMISSION & ANOTHER** in which the court cited the case of **HILARION MWABOLO -VS- KENYA COMMERCIAL BANK** where the court stated

"This court has however taken a different view on this matter to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination."

It is submitted that according to Section 4 (1) of the Limitation of Actions Act to claimant's claim lapsed after 6 years, long before the claim was filed on 23rd September 2016 and by virtue of the Court of Appeal decision in **DIVECON -VS- SAMANI [1995-1998], EA.48.**

"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 shows that its provisions do not apply to actions based on contract."

It is submitted that the decision in the case of Divecon has not been overturned and as a binding authority on this court.

It is further submitted that the claim for defamation and unlawful confinement is also fatally defective under Section 4 (2) of the Limitation of Actions Act which provides for limitation period of 12 months as follows: -

"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

Provided that an action for libel or slander may not be brought after the end of twelve months from such date."

The respondent further submits that Limitation of Action Act is the preliminary substantive legislation and cases barred by limitation are not capable of being revived as held by Porter JA in the case of **GATHONI -VS- KENYA CO-OPERATIVE CREAMERIES LIMITED [1982] KLR 104** when he stated that –

"...the law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance do not do what the informed citizen would reasonably have done..."

It is submitted that the suit was brought without seeking leave of court to file out of time and no reasonable explanation has been brought to the court's attention to explain the delay in filing the claim.

The respondent prays that the claim be dismissed with costs and relies on the Court of Appeal's decision in the case of **Attorney General & Another -vs- Andrew Maina Githinji & Another [2016] eKLR.**

Claimant's Submissions

The claimant submits that he obtained leave of court to bring this suit out of time in **Milimani Chief Magistrate's Court, Misc. Application No. 412 of 2016 (05)** vide order dated 1st July 2016, a copy of which is annexed to the submissions.

It is submitted for the claimant that his claim is founded in both tort and contract and the court considered the matter and allowed him to file suit out of time.

Determination

I have carefully considered the pleadings in the memorandum of claim, the preliminary objection and the submissions filed by the parties. There is no dispute that the claimant was dismissed from employment on 26th September 2006 and filed the claim herein on 23rd September 2016; some 10 years after the cause of action arose. The claim was therefore obviously time barred under the Limitation of Action Act, a fact that the claimant was aware of and filed **Milimani CMCC Misc. Application No. 412 of 2016** under which he obtained orders as follows: -

1. That the applicant is hereby granted leave to file suit out of time.
2. That the applicant to bear own costs of the application.

The only issue is therefore whether the leave granted by the Chief Magistrate's court is valid.

In the Court of Appeal's decision in the cases of **James Muriithi Ngotho -vs- Judicial Service Commission [2012] eKLR** and **Nyanamba O. Steve -vs- Teachers Service Commission [2016] eKLR**, limitation is not a mere technicality but goes to the substance of claim. Limitation is provided for by substantive legislation and affects jurisdiction of the court. This means that the court has no jurisdiction to hear a claim that is statute barred. Without jurisdiction, the court must down its tools as was held in the case of **Owners of Vessel Lillian 'S' -vs- Caltex Oil (K) Ltd.**

Section 28 of the Limitation of Actions Act allows for extension of time in respect of actions founded on tort only and only in the specific circumstances as set out therein. In the case of **Divecon -vs- Samani** quoted in **E.Torgbor -vs- Ladislaus Odongo Ojuok** the Court of Appeal stated that *"A perusal of Part III shows that its provisions do not apply to actions based on contract"* and further that *"In light of the 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'"*. In that case the Court of Appeal held 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..."* More recently, the Supreme Court

in the case of **In Re The Matter of the Interim Independent Electoral Commission S.C. Constitutional Application No. 2 of 2011; [2011] eKLR** and in **Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others S.C Application No. 2 of 2012 [2012] eKLR** held that jurisdiction is a matter regulated by the Constitution, statute law and judicial precedent.

Jurisdiction can therefore only flow from either the Constitution, statute or precedent. The leave to file suit out of time obtained by the claimant was given under Sections 27 and 28 of the Limitation of Action Act and Order 37 Rule 6 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The decision of the court in **Milimani CMCC Misc. Application No. 412 of 2016** was therefore made in conflict or without reference to either the provisions of Section 27 and 28 of the Limitation of Actions Act or the many precedents of the Court of Appeal and Supreme Court cited herein above and was therefore made *per incuriam*.

That notwithstanding leave granted by a Magistrate cannot be used for purposes of filing suit in a superior court; as such orders do not bind a superior court.

For the foregoing reasons, the preliminary objection succeeds with the result that this claim is struck off on grounds that it is statute barred and this court lacks jurisdiction to entertain the same.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE