



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 864 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**JAMES MOMANYI KABIRI ..... CLAIMANT**

**-Versus-**

**HAKO INDUSTRIES LIMITED ..... RESPONDENT**

**R U L I N G**

Before me for determination are two applications. One is filed by the respondent and is dated 4<sup>th</sup> September 2015. It seeks the following orders –

1. That the claim and memorandum filed herein be and is hereby dismissed for being statute barred.
2. Costs be granted to the respondent.

The grounds in support of the application dated 4<sup>th</sup> September (the first application are that –

1. The claim arises for an employment contract.
2. The claimant contract of employment was terminated on 27 January 2010 whereas the claim was instituted on 7<sup>th</sup> June 2013.
3. The claim was instituted outside the three (3) years limitation period provided in Section 90 of the Employment Act.

It is supported by the affidavit of CAROLINE KIAMBI, the Human Resource Manager of the respondent. In the affidavit she deposes that at paragraph 4 of the respondent's memorandum in response to the statement of claim it is pleaded at paragraph 4 that the claim filed on 12<sup>th</sup> July 2013 is barred by the Limitation of Actions Act and that the court directed the respondent to make a formal application in respect of the same.

It is further deposed that the cause of action arose on 7<sup>th</sup> January 2010 but the suit was filed on 7<sup>th</sup> June 2013 and is therefore time barred.

The second application is filed by the claimant and is dated 7<sup>th</sup> September 2015. It seeks the following orders-

1. That paragraph 4(i) of the respondent's memorandum in response be struck out.
2. That the claim is not statute barred by virtue of the limitation provisions of the Employment Act, 2007 (at Section 90)
3. That the parties having commenced a conciliation process, the limitation period of three (3) years did into begin to run until it was concluded.
4. That the costs for this application be in the cause.

The grounds in support of the application are that –

1. That the claimant/applicant was an employee of the defendant/respondent from 1<sup>st</sup> January 2001 to 27<sup>th</sup> January 2010.
2. That on 27<sup>th</sup> January 2010, the defendant/respondent summarily dismissed the claimant/applicant and his other colleagues alleging that they had failed to carry out their duties diligently on the night of 14<sup>th</sup> January 2010, which allegedly led to the theft of BIC components.
3. That the matter was referred to the District Labour officer Mr. S. M. Mwaniki at Nyayo House some time to February 2010 for arbitration and reconciliation.
4. That the conciliation process was ongoing for the better part of the year 2010.
5. That the respondent was requested by the said Labour officer to produce the employment records for the pertinent employees, which included the claimant/applicant.
6. That the respondent did not comply with this directive. This then prompted the claimant/applicant to instruct his advocates on record to write to the respondent seeking compensation from the unfair dismissal and wrongfully withholding his remuneration.
7. That the law provides that where a dispute is referred to conciliation, accrual of the cause of the action is suspended until the outcome of the conciliation process is rendered.
8. That in the circumstances, the plaintiff/applicant's claim is not statute barred, paragraph 4 (i) of the respondent's statement in response is vexatious, scandalous and an abuse of the court process.
9. That it is in the interests of justice that this court strikes out paragraph 4 (i) of the respondent's statement in response and sets down this matter for hearing.

The application is supported by the affidavit of the claimant JAMES MOMANYI KABIRI sworn on 7<sup>th</sup> September 2015 in which he deposes that he was summarily dismissed by the respondent on 27<sup>th</sup> January 2010, that the matter was referred to the District Labour Officer, Mr. S. M. Mwaniki at Nyayo House for conciliation in February 2010, a conciliation meeting was fixed for 5<sup>th</sup> March 2010 and a meeting took place on 12<sup>th</sup> May 2010. It is deposed that the timelines in Section 90 of the Employment Act do not lock out litigants who opt for conciliation process until the outcome thereof.

The two applications being related to the same subject matter were argued concurrently by way of written submissions. The Claimant filed written submissions but the Respondent did not even after being granted the opportunity to do so.

### **Claimant's Submissions**

In the submissions filed on behalf of the Claimant he reiterates the averments that the limitation period is suspended in cases of conciliation and relies on the case of **Kenya Plantation and Agricultural**

**Workers Union -vs- Mununga Leaf Base Cause No. 91 of 2012 and Lenoida Makokha & 3 other -vs- Munene Estate Limited Cause 1024 of 2010.**

No copies of the two case were supplied to the court and neither did the claimant supply the citation in Kenya Law Reports. The court therefore did not have the advantage of perusing or making reference to the said authorities.

**Determination**

The issue of limitation period in employment cases or in any other cases is well settled. The law relating to limitation in respect of employment claims is contained in section 90 of the Employment Act, which provides as follows-

**90. Limitations**

*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.*

In the cases of **Josephat Ndirangu v Henkel Chemicals (EA) Ltd [2013] eKLR** and **Fred Mudave Gogo v G4S Security Services (K) Ltd** the court dismissed the suits on grounds that the same were filed after the lapse of limitation period. The court also dismissed the claims in the cases of **James Muriithi Ngotho v Judicial Service Commission [2012] eKLR** and **Nyanamba O. Steve v Teachers Service Commission [2016] eKLR** on grounds of limitation. In the decision of the Supreme Court in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others** and **Bata Shoe Company (K) Limited v Laban Chema Libabu** it was held that the court cannot confer jurisdiction on itself where it is non-existent.

In the decision of the Court of Appeal in Kisumu in **Civil Appeal No.6 of 2015 Kenya Airports Authority v Shadrack Abraham Kisongochi**, the Court overturned the decision of this court in **Cause No.20 of 2014** wherein the court had granted leave to file suit out of time.

As was expressed by the Court of Appeal in **Divecon v Samani** "...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...". 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' v Caltex Oil (K) Ltd**.

The Claimant admits that he was dismissed from employment on 27<sup>th</sup> January 2010. He filed suit 7<sup>th</sup> June 2013. According to section 90 of the Act, limitation period of 3 years lapsed on 26<sup>th</sup> January 2013. The claim was therefore filed about 5 months after the lapse of limitation period. The Claimant's contention that conciliation suspends the running of limitation period is not supported by any judicial or statutory authority. The decision of the court of Appeal in **Divecon v Samani** and **Kenya Airports Authority v Shadrack Abraham Kisongochi** which are binding on this court are conclusive, that the courts do not have jurisdiction to hear claims that are time barred. This court thus does not have jurisdiction to hear the claim herein.

For these reasons, the application by the Respondent succeeds and that by the Claimant fails with the result that the Claim herein is stuck out with no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF APRIL 2018**

**MAUREEN ONYANGO**

**JUDGE**