



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

**MISC APPLICATION NO. 37 OF 2018**

**JARSO JILLO LUKE**

**CLAIMANT**

**V**

**KENYA WILDLIFE SERVICES**

**RESPONDENT**

**RULING**

1. On 29 October 2007, Jarso Jillo Luke (applicant) was arrested by the police and charged before the Magistrate's Court in Kajiado.
2. Upon the arraignment, the Kenya Wildlife Service (Respondent) wrote to the applicant on 19 February 2008 to inform him of his suspension from duty pending the outcome of the criminal case.
3. On 23 February 2009, the criminal cases against the applicant (and another accused) were dismissed under section 206 of the Criminal Procedure Code.
4. On 17 November 2009, the Respondent wrote to the applicant to inform him that his services had been terminated with immediate effect.
5. About 1 year later, the applicant wrote to the Respondent what he called a *reminder* regarding an appeal against the termination, and in 2011 he approached the Public Complaints Standing Committee which wrote to the Respondent to review the complaint by the applicant and respond appropriately.
6. It appears nothing happened until 25 April 2017 when the applicant wrote another reminder on his appeal and the Respondent replied on 26 May 2017 promising to revert.
7. On 4 July 2017, the Respondent reverted to the applicant with the information that the appeal was unsuccessful.
8. On 6 April 2018, the applicant moved the Court seeking orders
  1. ...
  2. The Honourable Court be pleased to grant leave to the Claimant/Applicant to institute civil proceedings against Kenya Wildlife Services (KWS) for recovery of general and special damages arising from unfair termination and refusal to pay the Claimant his terminal dues and malicious prosecution.
  3. The Honourable Court be pleased to extend the period of time within which to file and serve a suit against Kenya Wildlife Service (KWS).
  4. ...
9. The Court directed that the application be served. The Respondent filed grounds of opposition on 7 May 2018 and a list of authorities on 9 May 2018.
10. The applicant filed a replying affidavit on 31 May 2018 in response to the grounds of opposition, and the Court heard addresses from the parties on 12 June 2018.
11. Among the arguments advanced by the applicant were that there were exceptional circumstances warranting the Court departing from the settled jurisprudence on limitation in contractual disputes.

12. The circumstances, the Court was informed included the fact that the Respondent had not communicated its decision on the applicants' appeal until 2017; the applicant was based in Moyale and could not be easily accessed; the issue was of great public importance as it implicated fundamental rights and reference was made to Articles 10, 41 and 258 of the Constitution.

13. The applicant maintained that the Court has the discretion to extend time to institute suit.

14. In opposing the motion, the Respondent contended that the proposed cause of action was caught up by section 90 of the Employment Act, 2007 as the cause of action accrued at the time of termination of employment, and not determination of the appeal.

15. According to the Respondent, the Court did not have the discretion the applicant was asking it to exercise.

16. The Respondent also accused the applicant of inordinate delay.

17. The Court has considered the facts, arguments and authorities cited by the party even though it will not allude to them in this ruling.

18. The law on limitation and extension of time/grant of leave to institute legal proceedings in causes of action arising out of contract generally and employment contracts out of time is now well settled in this country.

19. The Court of Appeal in *Divecon v Samani* (1995-1998) EA 48 held thus

**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***

20. Although the Court of Appeal was addressing a particular statutory construction, in my view the legal principle applies in the case of section 90 of the Employment Act, 2007 as well.

21. 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 only the remedy which is barred.

22. Consequently, the Court finds that it has no power or jurisdiction to grant the orders sought by the applicant and the application dated 26 March 2018 is dismissed with costs to the Respondent.

**Delivered, dated and signed in Nairobi on this 20<sup>th</sup> day of July 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For applicant Mr. Ondieki instructed by Ondieki & Ondieki Advocates

For Respondent Ms. Ombonya instructed by Ombonya & Co. Advocates

Court Assistant Lindsey