



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 144 OF 2018

1. JAMES GITAU NJOROGI

2. NDIRANGU MUGURE.....CLAIMANTS

VERSUS

BUCHANA COFFEE GROWERS CO-OPERATIVE SOCIETY....RESPONDENT

**JUDGMENT**

1. The Claimants seek the interposition of the court in the matter of the dismissal from employment. They were dismissed summarily on 30<sup>th</sup> April 2005 without due notice or reason. The 1<sup>st</sup> Claimant was the factory manager while the 2<sup>nd</sup> Claimant was the watchman at the material time. They assert that the dismissal was due to the internal politics at Kiriko Factory where they served. They have given particulars of the dismissal. They seek a declaration that the termination of the Claimants' employment was unfair and violated the rights to fairness and the labour relations as provided by the Constitution and the Employment Act. They thus sought general damages for unfair termination arising from the summary dismissal, special damages of Kshs. 100,700/- to the 1<sup>st</sup> Claimant and Kshs. 50,170/- to the 2<sup>nd</sup> Claimant as well as costs of the suit, interest at court rates and any other relief the court may deem fit to grant.

2. The Claimants testified before the court on 17<sup>th</sup> September 2018 and they reiterated their claims. The 1<sup>st</sup> Claimant stated that he was not paid his dues after working for 9 years and 1 month. He sought salary arrears, NSSF contributions and benefits amounting to Kshs. 85,020/- as gratuity, salary arrears of Kshs. 9,280/-, unremitted NSSF dues of Kshs. 6,400/-. He had gone to collect the dues and after some time the board committee treasurer made payment of part of the claim. The 2<sup>nd</sup> Claimant testified that he had worked for 3 years and claimed unpaid salary of Kshs. 50,170/- which was owed. His NSSF contributions were unpaid.

3. This suit was filed on 5<sup>th</sup> April 2018 while the cause of action arose on 30<sup>th</sup> April 2005. At the time, the Employment Act did not have a provision on limitation and the fall back was the Limitation of Actions Act, cap. 22 Laws of Kenya. Under Section 4(1) of the Limitation of Actions Act, a cause of action on contract was limited to 6 years. The time for filing the suit therefore expired on 30<sup>th</sup> April 2011. The suit was filed 7 years or so after limitation had set in. As was held in the case of **Divecon v Samani (1995-1998) EA 48** the Court of Appeal made a definitive and binding position on extension of time in relation to limitation. Though the **Divecon** case was based on tort, the Court of Appeal did consider the grant of leave or extension of time in respect of causes of action based on contract as well. The Court of Appeal stated as follows:-

*...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'. (Underline mine)*

4. The claim by the former employees of the Respondent is therefore without any basis. The suit is dismissed but I make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 11<sup>th</sup> day of October 2018

Nzioki wa Makau

**JUDGE**