



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

**MISCELLANEOUS APPL NO. 93 OF 2017**

**KENYA UNION OF DOMESTIC, HOTELS,  
EDUCATIONAL INSTITUTIONS & HOSPITAL  
WORKERS .....APPLICANT**

**VERSUS**

**EMBAKASI GIRLS SECONDARY SCHOOL.....RESPONDENT**

**RULING**

1. On 17 July 2017, the Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers (Union) filed an application seeking orders

1. ...

2. **THAT** this Honourable Court be pleased to extend the limitation period and grant the Applicant leave to file her suit out of time.

3. **THAT** the attached Draft Memorandum of Claim to be deemed as duly filed upon payment of the requisite court fees.

4. **THAT** the costs of this application be provided for.

2. When the application was served upon the Respondent, the Attorney General filed a Preliminary Objection on 16 October 2017 on its behalf to the effect

1. **THAT** the suit is time barred and offends the mandatory provisions of section 90 of the Employment Act.

2. **THAT** the suit is an abuse of the court process; and

3. **THAT** the suit is incompetent and ought to be struck out with costs.

3. Although the Union was directed to respond to the preliminary objection it did not, and on 19 January 2018 the Respondent filed submissions in support of the objection and in opposition to the Union's application.

4. On 26 June 2018 the Court directed that the Preliminary Objection be taken as grounds of opposition to the Union's application, and the Court heard brief oral submissions from the parties on 12 July 2018.

5. It is not in dispute that one Jackline Mokuia on whose behalf the Union seeks leave to commence legal proceedings for unfair termination of employment was dismissed on 12 June 2013.

6. It is also not disputed that the Union reported a trade dispute to the Cabinet Secretary, Labour on 10 July 2013, and that the dispute was not resolved within 30 days as envisaged by section 67(1)(a) of the Labour Relations Act (there was no material placed before the Court that the parties agreed to extend the period).

7. In terms of section 90 of the Employment Act, 200, any Court challenge to the termination of employment should be commenced within 3 years of the accrual of action (12 months in case of continuing injury).

8. The Grievant herein had her employment terminated on 12 June 2013 and therefore these proceedings should have been lodged on or before 11 June 2016. That was not done and hence the Union's application.

9. The Union sought to overcome the 3 year limitation by asserting that the parties were going through conciliation and therefore time did not run during the conciliation process.

10. The Judges of this Court had taken inconsistent positions on the question of limitation during conciliation process but the Court of Appeal in *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye* (2016) eKLR set the law by holding that While there is no doubt that section 15 of the Employment and Labour Relations Court Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiation. It was incumbent upon the Respondents to bear in mind the provisions of Section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service.

11. This Court is bound by the above authority, and even if time had stopped running, the Court has no jurisdiction to grant leave or extend time to file suit in contractual disputes as held by the Court of Appeal in *Divecon v Samani* (1995-1998) EA 48 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.

12. Although the Respondent had worded its Preliminary Objection to suggest that there was a suit in existence (it was an application to allow commencement of suit), the Court finds no merit in the Union's application and orders that it be dismissed with no order as to costs.

**Delivered, dated and signed in Nairobi on this 9<sup>th</sup> day of November 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Union	Mr. Tonge Yoya, Industrial Relations Officer
For Respondent	Ms. Wangeci Gichangi, State Counsel, Office of the Attorney General
Court Assistant	Salome