



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

**AT MOMBASA**

**CAUSE NO. 210 OF 2016**

**ALBERT NGALA KIAMBA & ANOTHER.....CLAIMANT**

**VS**

**G4S KENYA LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. The claimants were employed by the respondent from 2006 as Security guards. On 19.6.2009 they were arrested and charged with the offence of stealing which culminated in their acquittal on 30.4.2015. They brought this suit claiming declaration that they are still employees of the respondent and they are entitled to their salary from June 2009. In the alternative, they have prayed for accrued terminal dues upto June 2009 plus compensation for unfair termination.

2. The respondent has not filed any defence to the suit and instead filed a Preliminary Objection (P.O) dated 15.6.2016. The grounds upon which the Preliminary Objection stands are:

- (a) The suit is statute barred
- (b) No leave was sought and obtained before filing the suit out of time
- (c) The claimants are not entitled to leave to file the suit out of time.

3. The Preliminary Objection was disposed of by written submissions filed by counsel for the two sides. The issues for determination are:

- (a) Whether the suit should be struck out for being statute barred**
- (b) Whether leave can issue to bring a suit out of time in a claim founded on employment contract.**

**Analysis and Determination**

**Time barred suit**

4. The respondent has submitted that the claimants have admitted at paragraph 5 of their claim that they were last in the respondent's employment on 19.7.2009 when they were dismissed and have since never

gone back to work for her or drawn any salary from her nor claim for the same.

5. In view of the foregoing observation, the respondent submits that the claimant's employment ceased 7 years before the filing of the suit herein and urged that the suit is time barred by dint of Section 90 of the Employment Act which limits the time to bring claims based on employment contracts to three years. On that point, the respondent cited **Gunton vs Londo Borough of Richmond upon Thames [1980] 3 ALL ER** which was quoted with approval in **Humphrey Gitonga Ashford v B.O.G Chuka High School [2010]eKLR.**

6. In response, to the Preliminary Objection, the claimant's submitted that the Preliminary Objection does not raise a pure point of law. According to them the issues raised by the Preliminary Objection are issues of facts which can only be determined after full trial. They have further submitted that their main claim is for declaration that they are still employees while the pecuniary claim is only an alternative relief. In conclusion the claimants have cited **Paul Dedan Ochieng & 2 others vs Harambee Co-operative Savings and Credit Society** where Rika J held that leave cannot be granted to file suit out of time when there is no evidence that the applicant was dismissed from employment on a particular or specific date.

7. I have carefully considered the pleadings, submissions, the law and the precedents cited. There is no dispute that the last day the claimants worked for the respondent was 19.6.2009. Thereafter they never went back to work and they never drew any salary from the respondent or demanded for the same. The claimants have not pleaded why they never reported back to work or demanded for any pay since 19.6.2009. They have further not pleaded that they were on suspension until further notice or until the end of their Criminal proceedings. Consequently, I find and hold that the employment relationship between the parties herein *de facto* ended on 19.6.2009 through the conduct of both the respondent and the claimants.

8. It is clear from the pleadings and submissions filed that the claimants never reported back to work after arrest for the alleged theft and the employer ceased paying them any benefits. Constructively therefore, the contract of employment ceased from 19.6.2009. In **Gunton vs Londo Borough of Richmond upon Thames** it was held that:

***“...it is beyond doubt that on October 1, 1957, there was de facto dismissal of the appellant by his employers, the respondents. That on that date he was excluded from the Council's premises. Since then he has not done any work for the Council. In the circumstances, it seems to their Lordships that the appellants must be treated as having been wrongly dismissed on October 1, 1957, and that his remedy was in the claim for damages. It would be wholly unreal to accede to the contention that since October 1, 1957, he had continued to be and that he still continues to be, in the employment of the respondents...”***

9. Under Section 90 of the Employment Act, no claim founded on employment contract can be brought after 3 years next from the date the cause of action arise.

10. In making the foregoing finding, I have differed with the decision in **Paul Dedan Ochieng vs Harambee Co-operative Sacco** where Rika J had the following to say:

***“If it is true they were not issued with termination letter or other communication made by their former employer with clear date of termination, the date when the course of action accrued cannot be presumed. The apprehension that time has lapsed, without having a date when the employer made the termination decision, is unfounded.”***

11. There is no dispute that from 19.6.2009, 3 years lapsed on 18.6.2012. Consequently, it is my holding that this suit being brought on 21.3.2016 was already statute barred vis-à-vis Section 90 of the Employment Act.

**Can leave issue?**

12. No one has sought any leave for enlargement of time within which to file this suit. Even if it was sought, the same would not be available in view of the letter and the spirit of the law in the said Section 90 of the Employment Act which provides:

**“90 Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, 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.” (emphasis added).**

**Disposition**

13. For the reason of this suit being statute barred, I strike it with no order as to costs.

**Signed, dated and delivered at Mombasa this 27<sup>th</sup> day of January 2017.**

**O.N. MAKAU**

**JUDGE**