



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

**AT KISUMU**

**CLAIM NO. 306 OF 2015**

*(Formerly Kisii High Court Civil Suit No.8 of 2014)*

*(Before Hon. Lady Justice Maureen Onyango)*

**SILVANUS OMBATI BONGOYE.....CLAIMANT**

**-Versus -**

**NATIONAL POLICE SERVICE COMMISSION.....1ST DEFENDANT**

**PUBLIC SERVICE COMMISSION.....2ND DEFENDANT**

**CABINET SECRETARY, ADMINISTRATION AND SECURITY...3RD DEFENDANT**

**HON. THE ATTORNEY GENERAL.....4TH DEFENDANT**

**R U L I N G**

The suit herein was originally filed in the High Court at Kisii as Kisii High Court Civil Suit No.8 of 2014 but was transferred to this court by an order of the High Court Kisii of 6th July, 2015.

The suit was filed vide plaint dated 28th March, 2014 and filed on the same date. By notice of preliminary objection dated 23rd May, 2014 the Respondents raise preliminary objection on the grounds that:-

1. The suit is time barred and a contravention of the provisions of section 4(1) of the Limitation of Actions Act Cap 22 Laws of Kenya.
2. That this court has no jurisdiction to determine the matter.

The Claimant filed a Memorandum in opposition to the preliminary objection. When the preliminary objection came up for hearing parties agreed to proceed by way of written submissions.

In the Respondents submissions filed on 27th September 2016, it is submitted that the Claimant was employed by the Respondent in 1981 and was dismissed from service on 5th January, 2006. The Respondents submitted that the case was filed on 28th March, 2014 more than 8 years from the date of accrual of cause of action. The Respondent relied on the case of **Fred Mudave Gogo v G4S Security Services (K) Ltd [2014] eKLR** in which the court held that -

*'It cannot be denied that the cause of action herein is based on a contract of employment. The*

*Claimant's employment was terminated on 8th August 2008, a period over 3 years from the date of filing this claim in the Industrial Court on the 5th June 2013 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in causing the claimant/applicant from filing the claim in good time."*

The Respondent further submitted that being time barred the case cannot be salvaged and relied on the case of **Benjamin Wachira v Public Service Commission & Another [2014] eKLR** in which the court discussed when time starts running, whether the matter before court was time barred and whether the court had discretion to extend time. The Respondent submitted that in the case of **Divecon v Samani [1995-1998] 1 EA 48 at page 54** the court stated -

*"No one shall have the right to power to bring after the end of six years from the date of 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 ."It is therefore the defendants' case that the court does not have jurisdiction to adjudicate over this matter."*

The Respondent urged the court to dismiss the case on grounds that it is time barred.

The Claimant filed his written submissions on 4th October, 2016 in which he argues that the court has jurisdiction to entertain this matter and that is why the case was transferred from Kisii High Court. He submitted that a preliminary objection is a mere technicality and can be cured under Article 159(2) (d) which states that justice shall be administered without undue regard to procedural technicalities.

### **Determination**

I have considered the arguments of the parties. The issue for determination is whether the suit is time barred.

Under section 4(1) of the Limitation of Actions Act, no suit based on contract may be entertained by a court after the lapse of 6 years. The cause of action in this case having arisen in January, 2006 when the Claimant was dismissed, and before enactment of the Employment Act, 2007 under which limitation period for employment claims is 3 years, it should have been filed in court before the lapse of 6 years, that is, by January, 2012. The suit having been filed in March 2014, it is time barred.

The Claimant's argument that time is a procedural technicality and can be cured under Article 159(2) (d) is not valid as limitation is not a technicality as was held in the case **Fred Mudave Gogo (supra)** and **Benjamin Wachira (Supra)**. Limitation is a jurisdictional issue as held in the case of **Divecon v Samani**. The effect of limitation is to extinguish the cause of action so that there is no issue for the court to determine.

In the case of **Divecon v Samani**, the Court of Appeal categorically stated that no court has jurisdiction to entertain a claim in contract that is statute barred or any application to extend such time for bringing the action.

The claim by the Claimant herein is therefore incurable defective and this court has no jurisdiction to entertain the same with the result that the case is struck out.

There shall be no orders for costs.

**DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017**

**MAUREEN ONYANGO**

**JUDGE**