



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 11 OF 2014

**BETWEEN**

JOSPHAT M. M'RWIGI ..... CLAIMANT

**VERSUS**

KENYA PORTS AUTHORITY ..... RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Khaminwa & Khaminwa Advocates for the Claimant*

*Addraya Dena Advocate for the Respondent*

**JUDGMENT**

1. This Claim was initially filed at the Resident Magistrate's Court Mombasa, registered as R.M.C.C Number 826 of 2013. It was transferred to the current Court, with the Consent of the Parties on 23<sup>rd</sup> January 2014
2. In the Amended Claim filed on 4<sup>th</sup> April 2014, the Claimant states he was employed initially by a Company called Landing and Shipping Company of East Africa, in 1962.
3. This Company later became East Africa Cargo Handling Company Limited. It was later taken over by the Respondent State Corporation, which continued to employ the Claimant. The Respondent took over all the responsibilities of the predecessor Companies.
4. The Claimant's contract was terminated by the Respondent, on 31<sup>st</sup> October 1994. The Claimant states the decision was unfair and unlawful. He only had 3 years left before retirement. The Respondent went on to compute his terminal benefits from the year 1994 instead of the year 1962. He lost part of his commuted pension, and sustained monthly pension underpayment from November 1994 to-date. The Claimant seeks Judgment against the Respondent, in the following terms:-
  - a) A declaration that termination of employment conducted by the Respondent on the Claimant, vide their letter dated 31<sup>st</sup> October 1994 was un-procedural and unlawful.
  - b) The Respondent do pay the Claimant's dues in the sum of Kshs. 2,864,783.74 together with continuing pension underpayment from January 2014.

c) General damages.

d) Costs and interest.

5. The Respondent filed Amended Response on the 17<sup>th</sup> October 2014. It is denied that the Claimant's contract was unlawfully terminated. His benefits were correctly tabulated. The Respondent further states that the Claim is time –barred, and the Court does not have jurisdiction to extend time to file the Claim.

6. The Respondent filed a Notice of Preliminary Objection on 8<sup>th</sup> April 2014, based on the same ground of temporal jurisdiction. Also filed by the Respondent on 30<sup>th</sup> April 2015, is a Notice of Intention to Challenge *ex parte* Order given to the Claimant by the High Court, extending time to file the Claim..

7. Parties agree that termination of the Claimant's contract of employment, took place on 31<sup>st</sup> October 1994. The initial Claim at the Resident Magistrate's Court was filed on 9<sup>th</sup> May 2013.

8. The Claimant explains that he obtained leave to file the Claim out of time, through the *ex-parte High Court at Mombasa, Civil Suit Number 68 of 2012 [OS]*. Copies of the *ex-parte* Originating Summons and consequential order are on record.

9. Upon transfer of the Claim to the current Court, the Respondent argued its Preliminary Objection. Hon. Judge Stephen Radido made a ruling on the Preliminary Objection, dated 18<sup>th</sup> July 2014.

10. The Court agreed with the Respondent that the Claimant was time-barred under Section 4[1] of the Limitation of Actions Act Cap 22 the Laws of Kenya. Section 90 of the Employment Act invoked by the Respondent had no application to the dispute herein. The Claimant however had obtained leave at the High Court to bring his Claim out of time. Leave could be challenged by the Respondent at the main hearing, as held in *CA Civil Appeal Number 96 of 1984, Yunes Oruta & another v. Samuel Nyamato*. It would be up to the trial Judge at the main hearing to determine the issue of limitation as one of the issues in dispute, but not as a preliminary point. The Court declined the Preliminary Objection, directing Parties to instead canvass the issue as part of the substantive Claim.

11. The main hearing was scheduled for 2<sup>nd</sup> December 2015. The Claimant's Advocate informed the Court that the Claimant is an old man, who suffers a spinal condition and was unable to travel from his residential Meru County, to the Court in Mombasa. The Court suggested to the Parties, that the file is transferred to the Employment and Labour Relations Court at Nyeri, which is nearest to the Claimant's place of residence.

12. Hearing was adjourned to allow the Advocates consult their Clients, and appraise the Court at the next sitting on 16<sup>th</sup> December 2015. The Claimant's Advocate reported back that the Claimant had been treated and was now ready to travel to Mombasa. Hearing was fixed for 16<sup>th</sup> September 2016 when the Court did not convene. The matter was mentioned on 4<sup>th</sup> October 2016, when the Claimant's Advocate informed the Court that his Client was ill, and once again unable to travel to Mombasa. The Advocates agreed that the matter is considered and disposed of, on the strength of the record. They confirmed the filing of their Closing Submissions on 22<sup>nd</sup> November 2011.

### **The Court Finds:-**

13. Objection based on time-bar in this dispute, remains to be resolved. It was ruled by the predecessor Judge that Parties would take up the issue at the main hearing. As it is there was no oral hearing, the Claimant having failed to travel due to illness, and rejected the Court's suggestion of taking justice closer to his home.

14. The Court would have to consider the objection based on the material on record, considering the mode of hearing and disposal selected by the Parties. *Yunes Oruta v. Samuel Nyamato* allows the trial Court to

revisit the *ex parte* order issued by the High Court, granting the Claimant leave to file the Claim out of time.

15. It is common ground that the Claimant was late in filing his Claim. He filed the Claim 9 years from the date of termination.

16. The Respondent submits Section 4 [1] of the Limitation of Actions Act, places a time ceiling of 6 years, on filing of contractual disputes, from the date the cause arises. The Claimant filed his Claim well beyond the 6 years.

17. The Respondent, relying on the decisions of the Court of Appeal as well as this Court, submits that Section 4 [1] of the Limitation of Actions Act is a jurisdictional law. The Court cannot assume jurisdiction in a dispute which arose in 1994. Emphasis is placed on the Court of Appeal leading decision on the subject ***Divecon v. Samani E.A Law Reports [1995-1998] 1 EA 48 [CAK]***, where it was held 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 6 years after the cause of action arose, or any application to extend time for bringing of that action.

18. The Claimant concedes the Claim was filed out of time. He submits that he lost a daughter, and he was in poor health, making it difficult for him to approach the Court in time. These reasons are similarly captured in the Claimant's Affidavit filed at the High Court in support of the Originating Summons. The High Court granted him leave to bring the Claim out of time. Parties agreed to have the Claim heard before the current Court. The Claimant argues that the Respondent cannot challenge the validity of the order made granting the Claimant leave to file the Claim out of time, having entered consent on transfer and hearing before this Court.

19. In light of ***Divecon v. Samani***, and considering that Parties agree the Claim was filed out of time, the Court is persuaded the High Court did not have jurisdiction to extend time to file this Claim out of time, and this Court similarly lacks jurisdiction to consider and determine the merits of the Claim. Parties' consent to transfer the matter to this Court would not have the effect of conferring the Court temporal jurisdiction. Parties cannot consent to change the law and confer any Court with jurisdiction. Courts derive their mandates from the Constitution and Legislation, not from Litigants.

20. This orthodox position, regarding no extension of statutory time limits on filing of Claims, has been upheld by the Court Appeal in recent decisions, even in cases where Parties are late in filing their Claims, because they were engaged in out-of-court negotiations.

21. While this Court appreciates the reasons given by the Claimant for late filing, and fully appreciates the reasoning of the High Court in extending time, this Court as well as the High Court are constitutionally bound to follow the decisions of the Court of Appeal, until such decisions are varied by the Court of Appeal itself, or overturned by what is characterized as the Court of final error, the Supreme Court of Kenya.

22. Temporal jurisdiction should be less rigidly interpreted, in the respectful view of this Court. Why should Parties who are engaged in alternative dispute resolution mechanisms before filing Claims be time-barred? Why should a Party who is disabled in coming to Court within time by illness, or bereavement, such as the Claimant herein, be closed out of pursuing his grievance in Court? Time limits in dispensation of justice should ideally be viewed as guidelines, not deadlines. There should be some discretion left to the Court, particularly in employment disputes, in extending statutory time limits.

23. The Court finds the Claim is time-barred. Neither the High Court, nor the Employment and Labour Relations Court, has jurisdiction to extend time, or to hear the dispute and grant the remedies sought. IT IS ORDERED:

***a) The Claim is hereby dismissed as it was brought out time, with no order costs.***

Dated and delivered at Mombasa this 23<sup>rd</sup> day of June 2017

James Rika

Judge