



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

MISC. APPLICATION NO. 2 OF 2017

MICHAEL BENHARDT OTIENO.....APPLICANT

VERSUS

NATIONAL CEREALS AND PRODUCE BOARD.....RESPONDENT

RULING

1. Michael Benhardt Otieno (applicant) was dismissed from employment by the National Cereals and Produce Board (Respondent) through a letter dated 20 June 2003. The effective date of dismissal was 3 April 2003.
2. efore the dismissal, the applicant had on 27 March 2003 issued a 3 month notice of resignation to the Respondent.
3. On 27 January 2017, the applicant moved Court seeking
 1.
 2. That this Honourable Court grants leave for the applicant to file his claim out of time.
 3. That NATIONAL CEREALS AND PRODUCE BOARD be summoned to enter appearance defence of the substantive claim.
4. Among the reasons advanced by the applicant in seeking leave were, that the Limitation of Actions Act does not apply to the Respondent by dint of section 42(1)(k) as read with Article 22(1) of the Constitution; that section 90 of the Employment Act, 2007 is subject to Part III of the Limitation of Actions Act; that he became aware of the material facts in May 2016 when he obtained the Respondent's Human Resources Policies and Procedures Manual; that the failure to pay his dues was contrary to clause 7.6.6 of the Manual and this amounted to fraud and that the claim was for equitable relief (draft Memorandum of Claim was also filed).
5. When the application was placed before Court, the Court directed that it be served for *inter partes* hearing. The Respondent's Legal Officer swore a replying affidavit in opposition to the application on 17 March 2017 which prompted the applicant to file a further affidavit on 21 March 2017, when oral arguments were taken.
6. The Respondent's opposed the application on both technical and substantive grounds, to wit, that the supporting affidavit was attested to by an advocate who was not qualified to practice; the application was brought through a notice of motion instead of an Originating Summons; that application for leave to file suit out of time can only be allowed in causes of action arising out of tort and not contract; that the delay

of 14 years would infringe its right to a fair trial and that allegations of fraud in concealing the Human Resources Manual are not substantiated among other reasons.

Section 42 of Limitation of Actions Act

7. The applicant contended that section 42(2) of the Limitation of Actions Act as read with section 41(1) (k) of the said Act saved his proposed cause(s) of action from the law on limitation. He also sought solace in Article 22 of the Constitution on enforcement of bill of rights.

8. That contention has no legal basis because that provision applies to actions relating to claims for recovery or compensation in respect of the loss of or damage to any **public property**.

9. The applicant in the instant case is agitating for his contractual entitlements and not enforcement of bill of rights.

The law on leave to file suit out of time

10. The applicant stated the issues in dispute in the Memorandum of Claim as

- 1. Surcharge and recovery of Sh. 350,943/45.*
- 2. Wrongful dismissal and/or unfair termination.*
- 3. Staff savings refund.*
- 4. Nafaka Sacco Gold Savings refund.*
- 5. 90 days leave earned.*
- 6. Acting allowance for 14 months.*
- 7. Gratuity.*
- 8. Pension.*
- 9. Travel and subsistence allowance*
- 10. Duty allowance.*

11. It cannot therefore be disputed that the cause(s) of action being advanced are contractual in nature.

12. The law on limitation on contractual wrongs/breaches at the time the applicant gave notice of resignation and/or was dismissed in 2003 was the Limitation of Actions Act.

13. It is therefore the limitation provided in section 4 of the Act that is applicable in determination of whether the cause(s) of action being agitated by the applicant had become statute time barred.

14. The Employment Act, 2007 therefore does not apply.

15. The applicant in his papers contend that he was forced to resign due to a hostile work environment.

16. Supposing that the applicant was forced out by a hostile work environment and thus entitled to claim constructive dismissal, he should have instituted legal proceedings within 6 years of his resignation, which was by end of March 2009.

17. On the other hand, if the applicant wanted to pursue a cause of action for breach of contract of

employment because of the dismissal by the Respondent, he should have instituted proceedings by April 2009 because the legal injury(ies) or wrongful action(s) accrued with the dismissal on 3 April 2003.

18. On both constructive dismissal and unfair termination, the applicant is clearly out of time.

Can the Court extend time/grant leave?

19. It is section 27 of the Limitation of Actions Act which gives a Court the power to extend time where a cause of action is caught up by limitation.

20. The Court of Appeal examined the applicability of the power in *Willis Onditi Odhiambo v Gateway Insurance Co. Ltd* (2014) eKLR and held that

This section clearly lays down the circumstances in which the Court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.... The parties could not confer jurisdiction on the judge by their consent.

21. As regards the applicability of section 4(1) of the Limitation of Actions Act and extension of time, the Court of Appeal held in the case of *Divecon v Samani* (1995-1998) 2 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 (emphasis mine) 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.

22. The cause(s) of action proposed to be presented before Court being anchored on contract, this Court has no jurisdiction to extend time or grant leave as sought.

Concealment of cause of action by fraud

23. The applicant also asserted that the Respondent had through fraud concealed from him facts which were material to the action advanced in respect of his entitlement to certain dues or benefits such as staff savings refund, gratuity, accrued leave, which were contingent on the employment contract.

24. He asserted that he became aware of his true entitlements in May 2016 when he got a copy of the Manual and that because the Respondent had concealed the details of the dues, he could not have instituted legal proceedings earlier.

25. If the assertions by the applicant were proved, then in terms of section 26 of the Limitation of Actions Act, his cause of action would not be caught up by the law of limitation.

26. The section provides

Where, in the case of an action for which a period of limitation is prescribed either;

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or the

(c) action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. (my emphasis)

27. However, the contentions by the applicant of concealment through fraud cannot be correct, for he has filed among his supporting documents a letter dated 13 December 2005 in which the Respondent replied to his letter dated 14 November 2005 (not produced).

28. The substance of the Respondent's letter was that the applicant was only entitled to his share of contributions to the provident fund.

29. In the Court's view, the applicant was alive as to what he expected in terms of dues and/or benefits as early as 2005 when he made the demand for the same and not in May 2016 when he brought the instant application.

30. The applicant's own documents strongly suggest knowledge of what he is agitating for earlier than he is prepared to accept.

31. The application must therefore fail on the substantial grounds, and because of this conclusion, it is not necessary for the Court to address the technical grounds raised by the Respondent.

32. The application dated 25 January 2017 is therefore dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 14th day of July 2017.

Radido Stephen

Judge

Appearances

Applicant in person

Respondent Mr. Mburu instructed by Gikera & Vadgama Advocates

Court Assistant Nixon