



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

**CAUSE NO. 386 OF 2014**

**MUIRU MWANGI MUITA .....CLAIMANT**

**V**

**GREENPARK WATER SERVICES LTD.....RESPONDENT**

**RULING**

1. Muiru Mwangi Muita (Claimant) sued Greenpark Water Services Ltd (Respondent) on 22 August 2014 and he stated the issue in dispute as *unfair termination*.
2. In paragraph 5 of the Memorandum of Claim, the Claimant pleaded
  5. THAT the claimant worked for the Respondent until 10<sup>th</sup> October, 2008 when he was unfairly, wrongfully and unlawfully terminated by the Respondent while earning a monthly salary of Kshs 5,400/=.
3. When the Respondent was served, it filed a Notice of Preliminary Objection on the grounds that
  - a) The Claim is incompetent, fatally defective and an abuse of the court process as the same is statutorily time-barred and offends the provisions of section 90 of the Employment Act, 2007.
  - b) The Claim was filed on 22<sup>nd</sup> August, 2014 without leave of Court having been brought more than five (5) years after the Claimant's termination on 8<sup>th</sup> of October 2008.
4. The Respondent filed written submissions together with the Notice of Preliminary Objection, in which several authorities were cited.
5. The Claimant filed what he referred to as Reply to Preliminary Objection on 11 February 2015.
6. On 22 July 2015, the Court granted the Claimant leave to file an Amended Memorandum of Claim before 31 July 2015. No amended Memorandum of Claim was filed as directed.
7. The preliminary objection was therefore taken on 29 October 2015.
8. In her submissions, Ms. Mumia urged that the Claim was hopelessly out of time because no dispute was reported to the Cabinet Secretary, Labour within 90 days as prescribed by section 62(3) of the Labour Relations Act.
9. Instead, according to the Respondent, the dispute was reported to the Cabinet Secretary only on 30 November 2012, way outside the prescribed period.
10. Counsel also urged that by dint of section 90 of the Employment Act, 2007, the Cause should have been commenced within 3 years of the dismissal on 10 October 2008 when the cause of action accrued.
11. In the view of the Respondent, the question of limitation was jurisdictional and not merely a procedural technicality, and therefore Article 159 of the Constitution could not salvage or assist

the Claimant's Cause.

12. Mr. Muthanwa for the Claimant opposed the objection. He submitted that the preliminary objection was not a true preliminary objection because it required the Court to ascertain the facts.
13. Regarding the period prescribed for reporting disputes to the Cabinet Secretary, counsel submitted that section 62(3)(b) of the Labour Relations Act gave the Cabinet Secretary the authority to accept a dispute outside the 90 day period and that in this case, the Cabinet Secretary accepted the dispute outside the time prescribed and appointed a Conciliator.
14. In the view of Mr. Muthanwa, a party subject to conciliation cannot move to Court before a certificate of disagreement is issued by the Conciliator.
15. Mr. Muthanwa further urged that time stopped running for purposes of limitation where a dispute was under conciliation and that limitation of time was an issue of procedural technicality as envisaged by Article 159 of the Constitution.
16. Mr. Muthanwa thus posited that *Divecon Ltd v Samani* (1995-1998) 1 EA 48 where the Court of Appeal held that

**to us, the meaning of the wording of section 4(1) that:.....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.**

was a wrong decision.

17. In a brief reply, Ms. Mumia argued that the dispute was reported to the Cabinet Secretary after 4 years and that he did not have the power to entertain the dispute and that the Court had no power to extend time to commence suit in employment contracts.
18. The objection herein raises 2 questions to wit, can a Court extend time to commence proceedings in contractual (employment) claims not filed within the prescribed time and, whether time stops running when a dispute is under conciliation.
19. The question of limitation in employment contracts has refused to go away. Judges of the Court have taken diametrically opposed positions.

### **Can time be extended ?**

20. In my view, the Court of Appeal decision in *Divecon Ltd v Samani* (supra) is still good law and no Court has the power to extend time or grant leave to commence legal action in contractual claims outside the prescribed timelines.
21. I can do no better than repeat the words of the Court 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 (6) years after the cause of action arose or any application to extend such time for the bringing of the action.
22. In employment claims, the period is now 3 and not 6 years.
23. Sections 27 and 28 of the Limitation of Actions Act do not grant the Courts any power to extend time in causes of action arising out of contract.
24. The issue of limitation is therefore a jurisdictional question and not merely a procedural technicality.
25. A party may only succeed where the party demonstrates contract not to plead limitation or estoppel, as prescribed by section 39 of the Limitation of Actions Act.

### **Does time stop running**

26. I have previously addressed this question extensively in *Kenya Electrical Trades & Allied*

- Workers Union v Kenya Power & Lighting Co. Ltd* (2015) eKLR where I also reviewed conflicting decisions from the Court on the question.
27. Nothing was presented before me to make me alter the position as expressed therein but I would seek indulgence to discuss the question again briefly.
  28. Section 14(9)(c) of the Trade Disputes Act (repealed) expressly provided that the then Industrial Court could not take cognisance of a trade dispute if it was in the process of *being settled, investigated or otherwise determined by means of any other proceedings* under the provisions of the Act or any written law. Conciliation was one of the methods prescribed for resolution of trade disputes.
  29. Under that statutory framework, time to commence legal action stopped and a party could only move Court after conciliation.
  30. Although it is not clear whether trade disputes under the Trade Disputes Act (repealed) were subject to the provisions of the Limitation of Actions Act, the Limitation of Actions Act envisages circumstances where time stops running not in a direct sense but indirectly under section 23 where there is acknowledgment or part payment where the cause of action relates to recovery of land, foreclosure (mortgages), recovery of a debt/liquidated claim or moveable property of a deceased.
  31. Section 26 of the Limitation of Actions Act also envisage time stopping to run where the cause of action is based on the fraud of the Defendant until such fraud is discovered.
  32. Now, in my view, claims arising out of employment contracts and more specifically out of unfair termination of employment are not and cannot come under the ambit of section 23 of the Limitation of Actions Act as they do not relate to or concern land, mortgage, debt or liquidated claims or deceased persons property.
  33. I am also unable to envisage a situation where complaints of unfair termination of employment would be based on fraudulent concealment. But, that is an issue for an appropriate case.
  34. In the instances covered by sections 23 and 26 of the Limitation of Actions Act, there is no suggestion that the Court is empowered to extend time. Time stops running by operation of the law.
  35. I now turn my attention to the current statutory framework as expressed in the the Employment Act, 2007 and Labour Relations Act.
  36. The Employment Act, 2007 has no provision decreeing that time stops running either explicitly or when a dispute is under conciliation.
  37. Section 62(3) of the Labour Relations Act gives a party 90 days within which to report a dispute to the Cabinet Secretary if the dispute concerns dismissal or termination of employment. The Cabinet Secretary may on good cause accept a dispute outside the 90 day period.
  38. Without determining in this Cause whether the Cabinet Secretary had good cause to accept the dispute herein 4 years after the dismissal, it is apparent that the statute has set out clear timelines within which the disputes should be processed.
  39. Of particular interest is that the Conciliator appointed by the Cabinet Secretary has, by virtue of section 69 of the Act, 30 days within which to conclude the conciliation, or by operation of law, the dispute would be deemed unresolved. The parties have the option to mutually extend the 30 day timeline.
  40. In the present case, the parties did not even remotely suggest that they mutually agreed to extend the 30 day period to conclude conciliation.
  41. The Claimant in this case had 90 days to report to the Cabinet Secretary to commence the conciliation process. That was not done.
  42. Further, had the dispute been reported timeously, the whole process should have taken slightly half a year.
  43. All said, I find nothing in the statutes referred to by the parties and those I have come across which suggest that time should stop running when a dispute is under conciliation.
  44. I am even more fortified in taking that position by the non retention of the provision in the Trade Disputes Act (repealed) which expressly limited the jurisdiction of the Court from taking cognisance of disputes under conciliation in the Labour Relations Act.
  45. A party is put on notice to commence judicial proceedings in order to preserve his/her rights where the dispute is unresolved in conciliation within the timelines outlined in section 69 of the Labour Relations Act, or to get an undertaking from the other side to serve as an estoppel.
  46. From comparative jurisdictions, the Federal High Court of Nigeria in *Inco Beverages Ltd v Class*

- W, Brans & Ors* (1990-1993) Vol 4 N5C 123 held that there is no principle in law that negotiations with a view to settlement serves as estoppel to a plea of time-bar.
47. A party who seeks an estoppel on running of time should mutually seek such consent before time runs out.
48. To conclude, I do find and hold that the cause of action presented by the Claimant on 22 August 2014 is incompetent and statute barred and order that it be dismissed with no order as to costs.

**Delivered, dated and signed in Nakuru on this 29<sup>th</sup> day of January 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Ms. Mumia instructed by G.V. Mumia & Co. Advocates

Court Assistant Kosgei