



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 32 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 19<sup>th</sup> January, 2016)**

**HASSAN ADEN OSMAN .....CLAIMANT**

**VERSUS**

**THE CABINET SECRETARY,**

**MINISTRY OF STATE FOR DEFENCE AND**

**CHAIR PERSON OF THE DEFENCE COUNSEL.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Respondent filed a Preliminary Objection dated 7.9.2015 seeking dismissal of Claimant's claim vide Section 3(2) of the Public Authorities Limitation Act Cap 39 Law of Kenya which states that:

***“No proceedings founded on contract shall be brought against the Government of a Local Authority after the end of three years from the date on which the cause of action accrued”.***

2. The Respondent have submitted that the Claimant was dismissed way back on 2006 and yet the claim was filed on 17.1.2014 almost 10 years later and without leave of the court and further without justifiable reasons.
3. The Respondents cited ***Thuranira Karauri vs Agnes Ncheche (eKLR)*** where the Court of Appeal held that:

***“The issue of limitation goes to jurisdiction and that since the claim was time-barred, it rendered the suit incompetent and therefore the court had the Plaintiff's suit struck out.***

***The Court further said:***

***“In the final analysis, the appeal succeeds and is allowed. We set aside the judgment and decree of the superior court and in view of our finding that the claim was time barred, which rendered the suit incompetent, we substitute an order striking out the Plaintiff's suit with costs to the Defendant .....*”**

4. The Respondent also submitted that the Court has no discretion to extend time. The Respondents cited *Divecon vs Samani (1995 – 1998) 1 EA 48* at page 54 in which the Court of Appeal rendered itself as follows:

***“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 Pat III shows that its provisions do not apply to actions based on contract”.***

5. The Claimant submitted otherwise. They submitted that the Claimant’s service in the Armed Forces was not based on a contract of employment and hence the law of contract as envisaged by Section 3 (2) of the Public Authorities Limitation Act is not application. They *cited Benjamin Muema vs Attorney General & 2 others (2006) eKLR* where J. Ojwang (as he then was) while dismissing the argument of limitation stated as follows:

***“From those conclusions, learned counsel’s argumentations regarding the Plaintiff’s case being time barred, I do hold just will not stand up. Firstly, it is difficult to see the relevance of the attempts by learned counsel to assess the validity of the Plaintiff’s claims on the basis of the common law classifications – whether the claim is a tort or a contract. For certain, learned counsel is interested in those categories as a strategy for demonstrating that the Plaintiff’s claim by his plaint of 27<sup>th</sup> December 2001 was time-barred. Such an approach although valid in forensic strategy, must be assessed in the context of the special facts of this case to the intent that a just resolution be arrived at. Besides, the issues in this case are such a complex nature touching as they do on interplays between civil law and military law and on constitutional principles attached to the criminal process, that it is not possible to determine them by mere interpretations of limitation periods. This is a case to be determined on the merits and not on mere technicalities.***

6. The argument by the Claimant is that the nature of the claim is not in the realm of either tort or contract law and is therefore not covered by Section 3 (2) of the Public Authorities Limitation Act Cap 39 Laws of Kenya.
7. The claim by the Claimant herein from his Memorandum of Claim is about unlawful dismissal from the service, unlawful investigation, conviction and imprisonment and denial of payment of terminal dues. This claim is based on the fact that the Claimant was on 22.3.2006 charged before the Commanding Officer (C.O) with conduct to prejudice good order and service discipline contrary to Section 68 of the Armed Forces Act in that he stole a bicycle belonging to one Corporal Bonface Muriithi. That the said company convened a Court Martial relying on a Military Police report and found the Claimant guilty and sentenced him to 42 days imprisonment and dismissal from the service.
8. The Claimant avers that requirements of Armed Forces Act and Rules 7, 8, 9, 10 & 11 of Armed Forces Rules or Procedure were not followed. The Claimant’s case is therefore based on the fact that his trial, conviction, imprisonment and dismissal was unlawful and ultra vires the law hence null and void and unconstitutional.
9. This claim is based on that special relationship between the Claimant and Respondent by virtue of the disciplined forces laws and which the Claimant opines that is neither based on tort or contract and therefore cannot be determined based on the law of limitation being Section 3(2) of the Public Authorities Limitation Act Cap 39 Laws of Kenya.
10. Section 2 of Cap 39 defines proceedings as ***“civil proceedings in the High court on a subordinate Court”.***

11. From the nature of the claim before this court, I cannot term it as “civil proceedings” as defined under Cap 39 Laws of Kenya and as held by J. Ojwang (supra) proceedings relating to the Claimant’s claim cannot be classified on the basis of common law classifications as to whether the claim is in tort or contract and that...”***Besides the issues in this case are of such a complex nature touching as they do on interplay between Civil Law and Military Law and on Constitutional Principles attached to the Criminal process, that it is not possible to determine them by technical interpretations of limitation periods. This is a case to be determined on the merits and not on mere technicalities***”.
12. I do find the holding by J. Ojwang (as he then was) sound reasoning which I adopt and so find that in the current case the issue of limitation will not be determined at this point given the interplay between Civil and Military Law.
13. I therefore find the Preliminary Objection without merit and I therefore dismiss it accordingly. The case may now proceed on its own merit.

Dated and delivered in open Court this 19<sup>th</sup> day of January, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for the Claimant

No appearance for the Respondent