



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

**AT MOMBASA**

**CAUSE NO. 266 OF 2014**

**MTANA JUMA MWAHUNGA.....CLAIMANT**

**VS**

**B.O.G. ROKA SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed as the Headmaster of the Roka Secondary School on 10.2.2006. His salary was kshs.10,000.00 per month. He worked until November 2006 when he resigned. During the time of his service, the school was operating as a Community school. As at the time of his departure, the claimant had unpaid salary arrears amounting to kshs.80,000.00. He filed suit, PMCC NO.97 of 2010 before Kilifi Law Court seeking to recover the salary arrears from the respondent but he withdrew it on 28.8.2015 on ground of jurisdiction and brought this suit.
2. The respondent raised Preliminary Objection (P.O) on ground of statutory time but the court directed that the same be canvassed during trial. In addition to the preliminary objection, the respondent has also denied liability on ground that there existed no employment relationship between her and the claimant. According to her the claimant was employed by the school when it was a community project before it was taken over by the Government and the respondent constituted.
3. The suit was heard on 7.12.2015 when the claimant testified as Cw1, and the respondent called Catherine Charo Mwatula as Rw1. In addition the counsel for the two parties agreed to adopt the statement of Dorothy Wanje and Simon Kilemba as evidence for the defence without hearing them in court. Thereafter both parties filed written submissions.

**Analysis and Determination**

4. After careful consideration of the pleadings, evidence and the submissions presented before the court, the following issues arose for determinations:-
  - a. Whether the claimant was ever employed by the respondent.
  - b. Whether the reliefs sought to issue.
  - c. Whether the suit is time barred.

**Time bar**

5. The claimant was given an opportunity to prove that the suit before the court is not time barred.

He however did not do so. He also neither pleaded nor established that the respondent was estopped from pleading the defence of time bar. The claimant never produced any proceedings or court order showing that the respondent consented to the withdrawal of PMCC 97 of 2010 and to the filing of a fresh suit. In that respect, the suit before the court is time barred and the court lacks jurisdiction to continue entertaining it.

### **Employment relationship**

6. The foregoing notwithstanding, the court has considered the period when the claimant was employed by the school being 2006 and the fact that the respondent was constituted after the school was taken over by the Government in 2008. The claimant never adduced any evidence to show that the new entity took over the liabilities incurred by the former community project. For that reason, even if the suit had not expired, the claimant's claim would still have failed. Without express agreement by the respondent to assume the liabilities incurred by the defunct community project, the claim for salary arrears must fail for want of privity of contract between the claimant and the respondent.

### **Reliefs**

7. In view of the foregoing findings, no relief is available to the claimant from the respondent.

### **Disposition**

8. For the reasons stated above, the suit is dismissed. Each party to bear his or her own costs.

**Dated, signed and delivered this 6<sup>th</sup> day of May 2016.**

**ONESMUS MAKAU**

**JUDGE.**