



**Ondis v Muhoroni Constituency Development Fund (Cause
202 of 2014) [2016] KEELRC 1870 (KLR) (6 June 2016) (Ruling)**

Engineer Gilbert Ondis v Muhoroni Constituency Development Fund [2016] eKLR

Neutral citation: [2016] KEELRC 1870 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 202 OF 2014
MA ONYANGO, J
JUNE 6, 2016**

BETWEEN

ENGINEER GILBERT ONDIS CLAIMANT

AND

MUHORONI CONSTITUENCY DEVELOPMENT FUND RESPONDENT

RULING

1. The Claimant herein filed a statement of claim alleging that his contract of service with the Claimant was terminated on 21st May, 2007. The Claim was filed on 14th August, 2014. Among the prayers sought by the Claimant is a declaration that the dismissal was unlawful, payment of unspecified outstanding dues, general damages for unlawful dismissal, costs and interest.
2. By an amended statement of Claim filed on 14th October, 2015 pursuant to leave granted by the court, the claimant states that he was interdicted on or about 21st May, 2007 and that the interdiction has not been lifted to date. He avers that he was arraigned in court and charged under section 349 of the penal code but was acquitted on 15th March, 2012. He avers that on or about 9th July, 2012 the Respondent undertook to pay his salaries and sought particulars which were duly supplied. The Claimant seeks payment of general damages for unlawful and unfair suspension or interdiction.
3. The Respondent filed a defence to the statement of Claim on 26th August, 2014. At paragraph 13 of the defence the Respondent states that the claim was filed out of time and this court lacks jurisdiction to entertain the same save for purposes of having it struck out with costs. The defence was filed under protest.
4. On 20th March, 2015 the Respondent filed a notice of preliminary objection on the following points of law;



- (i) The claim is statute barred by Operation of Section 90 of the *Employment Act* 2007.
 - (ii) The court lacks jurisdiction to entertain the suit by dint of the Operation of Section 52 of the Constituency Development Fund Act which creates an alternative Dispute Resolution Mechanism and which has never been resorted to nor exhausted by the claimant.
5. The Respondent prayed that the Claim be struck out with costs to the Respondent.
 6. The preliminary objection was canvassed by way of written submissions.
 7. The Respondent argues in the submissions that the claim is statute barred by operation of section 90 of the *Employment Act*, and secondly that this court does not have jurisdiction by dint of section 52 of the Constituency Development Fund Act which provides for alternative dispute resolution mechanism through the constituency Development Board.
 8. The Respondent relied on the case of Owners of Motor Vessel "Lillian S" v Caltex Oil (K)Limited [1989]KLR 1 where Nyarangi J.A held that:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of Law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The Respondent also relied on the cases of James kariuki v Eng. John Kiragu & 2 others [2013]eKLR in which the court discussed three Court of Appeal decisions of Franco v King [2009]KLR 518; Speaker of National Assembly v Karume [2008] KLR (EP) 425 and Konesv Republic and Another Ex-parte Kimani wa Nyoike (Civil Appeal No.94 of 2005) all of which applied the principle that "where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."
 9. The Respondent further relied on the decision of Wendo J. in Wilson Wachira Ngunjiri & Another v Ol' Joro' Orok Constituency Development Fund Committee and 3 others [2014]eKLR. The Judge stated that:-

"No doubt this court has unlimited jurisdiction under Article 165(2) of *the Constitution*. The said jurisdiction cannot however be invoked where parliament has specifically prescribed procedure for resolution of disputes."
 10. The Respondent also relied on the case of George Morara Manyara v Hon. Maina Kamanda & 3 others [2014] eKLR in which Mumbi Ngugi J. held;

"If the complaint is criminal in nature, the Board is required to refer it to the government agencies charged with prosecution powers. If civil, it may be referred to arbitration. The essence of these provisions, however, is that before a matter arising under the Act is taken to court, it must be subjected to the dispute resolution process under the Act."
 11. With respect to the prayer that the Claim is statute barred the Respondent relied on the case of Fred Mudave Gogo v G4s Security Services (K) Limited [2014]eKLR where the court held that a claim relating to termination of employment must be brought to court within 3 years and further that the issue of limitation is not a mere technicality as it touches on the substance of the Claim and a fundamental flaw if not addressed before parties file their Claims.



12. For the Claimant, it is submitted that section 12 of the *Employment Act* and Article 162(2) (a) of *the Constitution* give jurisdiction to this court to hear all employment and labour relations claims. The Claimant relied on the case of *KBS Ltd v Minister for Transport & 2 others* (Nairobi HCC No.504 of 2008) in which Majanja J. held that section 13A of the *Government Proceedings Act* violates Article 48 of *the Constitution* on access to justice.
13. The Claimant further submitted that having been dismissed before the coming into force of the *Employment Act* 2007 which provides for limitation period of 3 years, his Claim is covered by the *Limitation of Actions Act* and the limitation period applicable is 6 years. The Claimant relied on the case of *Divecon v Samani* (1995-1998) 1 EA 48 in which the court stated:-

"No one shall have the right of power to bring an action after the end of six(6) 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 (6) 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 the 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 direction that can be invoked."

Findings and Determination

14. I have considered the submissions of the parties on the preliminary objection. The issues that arise for determination are two; whether this court has jurisdiction to hear this suit in view of the provisions of the Constituency Development Fund Act, and whether the Claim is statute barred.
15. In the "Lillian S" case (Supra) Nyarangi J stated that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide on the issue right away on the material before it. It is therefore imperative that I deal with the issue of jurisdiction first so that should I find that I have no jurisdiction, I make no further orders in the matter.
16. The basis of the Respondents argument on jurisdiction is the current section 56 of the constituency Development Fund Act which was previously section 53 (before the Amendment of 2015). The section provides as follows:-

56.

- (1) All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.
- (2) Complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers.
- (3) Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to court.
- (4) Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary to reconsider the Board's decision and determine the matter.



- (5) Subject to this Act, no person in the management of the Fund shall be held personally liable for any lawful action taken in his official capacity or for any disputes against the Fund.
17. The Respondent relies on section 56(3). It is my opinion that the section applies to disputes arising from the implementation of the Fund and that is why the section provides for disputes arising therefrom to be referred to the Board whose functions are set out under section 16 of the Act as;
16. The functions of the Board shall be to -
- (a) ensure timely and efficient disbursement of funds to every constituency;
 - (b) ensure efficient management of the Fund;
 - (c) consider project proposals submitted from various constituencies in accordance with the Act, approve for funding those projects proposals that are consistent with this Act and send funds to the respective constituency fund account of the approved projects;
 - (d) co-ordinate the implementation of projects at the inter-constituency level;
 - (e) receive and address complaints that may arise from the implementation of the Act ;
 - (f) encourage best practices in the implementation of projects;
 - (g) administer the funds and assets of the Board in such manner and for such purpose as shall promote the best interest of the Board in accordance with the Act to ensure efficient management of the Fund; and
 - (h) perform such other duties as the Board may deem necessary from time to time for the proper management of the Fund.
18. The Board does not have the powers to deal with employment disputes relating to employees of the Fund.
19. On the contrary, Article 162(2)(a), section 12 of the *Employment and Labour Relations Court Act* and Section of the *Employment Act* vest exclusive jurisdiction on employment matters to this court.
20. I therefore find that the Claimant's case falls squarely under the jurisdiction of this court and dismiss the first ground of the preliminary objection on the issue of jurisdiction.
21. The 2nd ground of objection is that the Claim is time barred.
22. In both the original and the Amended statements of claim, the Claimant states that his last working day was 21st May, 2007 when the Claimant was interdicted from the position of project co-ordinator by letter of the same date. From evidence attached to the statement of claim it is evident that the Claimant was subsequently arrested and arraigned in court where he was charged with 6 counts of forgery of the signatures of signatories of the CDF Fund on cheques. The Claimant was acquitted of all the charges on 15th March, 2012. He thereafter filed the claim herein on 14th August, 2014.
23. The Claimant in his submissions argues that the cause of action arose on the date of judgement, that is 15th March, 2012. His prayers however are for payment of salary up to September 2007 and general damages for unfair dismissal and unfair suspension or interdiction.
24. It is therefore apparent that the Claimant was interdicted before the *Employment Act* 2007 was enacted. The Claim falls under the *Limitation of Actions Act* and the relevant limitation period for the Claim is 6 years.



25. The Claimant argues that the period should be reckoned from 15th March, 2012 when he was acquitted. I have however noted from his letter of appointment that the term of his contract was for that parliamentary term. At paragraph 2 of the Appointment Letter it is stated that "The contract shall not go beyond the current Parliament Term." I take judicial notice that the term of the parliament that was in place on 27th November 2005 ended in December 2007 when the National Elections were held.
26. The import of this is that the Claimant's Claim can only be reckoned from that date and should therefore have been filed by December 2013 when the six year limitation period lapsed.
27. There is a further angle to the case. Even assuming that the "Claim were to be reckoned from the date of Claimant's acquittal on 15th March 2012, his Claim would still be bad on the face of it as he needed to seek extension of time to file as the pleadings state he was interdicted on 21st May, 2007. No such extension was sought, and had it been sought, would not have been granted on the principle set by the Court of Appeal in the case of *Divecon v Samani* (Supra) where the court stated no court can extend time for filing suit under section 4(1) of the *Limitation of Actions Act*.
28. I must add here that at the time of acquittal of the Claimant on 15th March, 2012 the 6 year limitation period had not lapsed as it lapsed on 21st May, 2013, when the Claimant was still within the limitation period. He however failed to file suit until 14th August 2014, more than a year later, when the limitation period had lapsed. It was his lack of vigilance that locked him out of the court.
29. The result is that the second ground of preliminary objection succeeds. Consequently I strike out the claimant's suit herein with no orders for costs.

RULING DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JUNE, 2016

MAUREEN ONYANGO

JUDGE

