



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAKURU**  
**CAUSE NO. 190 OF 2013**

**(Originally Nairobi Cause No. 175 of 2012)**

**ALFRED AMBULULI OGALO                      CLAIMANT**

**v**

**VALLEY BAKERY LIMITED                      RESPONDENT**

**JUDGMENT**

1. Alfred Ambululi Ogalo (Claimant) sued Valley Bakery Ltd (Respondent) on 26 September 2012 alleging unfair termination of employment.
2. The Respondent filed a Reply to Memorandum of Claim on 14 January 2013 and on 6 November 2013, the Claimant filed an *Amended Memorandum of Claim* stating the issue in dispute as *wrongful dismissal and/or unfair termination*.
3. As a result, the Respondent filed a *Reply to Amended Memorandum of Claim* on 11 November 2013 which prompted the Claimant to file a Rejoinder on 20 November 2013.
4. On 13 January 2014, the Respondent filed a Preliminary Objection contending that the cause of action was statute time barred in terms of section 90 of the Employment Act, 2007.
5. On 26 February 2014, when the objection came up for hearing, the parties informed the Court that they had agreed to compromise the suit and sought for time to record a consent. No settlement was reached and the Respondent proposed that the objection be taken during the hearing.
6. The cause was heard on 2 February 2016 and the Claimant filed his submissions on 22 February 2016, while the Respondent filed its submissions on 30 March 2016.
7. The Court has considered the pleadings, evidence and submissions and adopts the issues as set out in the submissions, to wit, *whether the cause of action is statute/time barred, whether the summary dismissal of the Claimant was unfair and appropriate remedies including entitlements accruing out of the employment contract*.

**Whether cause of action statute/time barred**

8. The Claimant pleaded in paragraph 5 of the Memorandum of Claim that he was dismissed on 27 June 2009. The pleading is borne out by the letter of summary dismissal annexed to the Memorandum of Claim.

9. The Memorandum of Claim was lodged in the Court's registry in Nairobi on 26 September 2012.

10. These are irrefutable facts.

11. It can be deduced from the pleaded facts that the Memorandum of Claim was lodged in Court some 3 years and 3 months after the cause of action accrued. In other words, the legal injury/actionable wrong complained of were occasioned some 3 years and 3 months earlier.

12. Section 90 of the Employment Act, 2007 which is the law prescribing limitation for causes of action arising out of a contract of service provides that Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in case of continuing injury or damage within twelve months next after the cessation thereof.

13. The Claimant herein commenced the claim more than 3 years after the prescribed period while the law is clear that no such cause of action lies or can be instituted.

14. The Court therefore finds and holds that the cause of action does not lie, and the finding is fortified by the ratio by the Court of Appeal in *Divecon v Samani* (1995-1998) EA 48 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... (*for six years read three years - my considered view*)

15. The fact that the Claimant filed and withdrew a claim before the Subordinate Court does not help his case. In fact, he denied, despite being shown copy of the decree from the Subordinate Court that he had filed and withdrawn a claim based on the same facts/cause of action and this goes to his credibility.

16. Because of the conclusion reached, it is not necessary for the Court to embark on a journey of examining the other issues posed for determination.

17. The Court orders the Memorandum of Claim filed in Court on 26 September 2012 to be struck out with costs to the Respondent.

18. It is so ordered.

**Delivered, dated and signed in Nakuru on this 15<sup>th</sup> day of July 2016.**

**Radido  
Judge**

**Stephen**

**Appearances**

**For Claimant**

**Mrs. Ndeda instructed by Ndeda & Associates**

**For Respondent**

**Mrs. Kairu instructed Sheth & Wathigo Advocates**

**Court Assistant Nixon**