



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.227 OF 2015**

*(Before D. K. N. Marete)*

**FREDRICK ONDIEK AROKO.....CLAIMANT**

**VERSUS**

**MOI UNIVERSITY.....1ST RESPONDENT**

**MOI UNIVERSITY PENSION SCHEME.....2ND RESPONDENT**

**RULING**

This matter comprises of the respondents preliminary objection dated 7th June, 2016. It comes out as follows;

*TAKE NOTICE, that the Respondents shall raise a preliminary objection to the Claimant's claim on the following grounds:-*

- 1. The claim is time barred by virtue of Section 90 of the Employment Act.*
- 2. The claim contravenes the provision of the Limitation of Actions Act Cap.22 Laws of Kenya.*
- 3. The Claimant's claim is bad in law and it is res judicata.*
- 4. The Claimant's claim is an abuse of court process.*

The matter came to court severally until the 27th June, 2016 when the parties agreed on a disposal by way of written submissions.

The preliminary objection is not defended. This is because despite the respondent's filing of written submissions on the preliminary objection dated 17th June, 2016, the claimant does not respond or react to the same. The claimant does not file a defence, written submissions or at all.

It is the respondent's/applicant's case that the claim is based on an employment relationship that lapsed in 1998 when the claimant lost his employment with the respondent. This offends S. 90 of the Employment Act, 2007 which provides for a period of three (3) years in which to bring out suits in this respect. This is as follows;

Section 90. 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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.

It is the respondent's further submission that the claim contravenes the provisions of the Limitation of Actions Act, Chapter 22, Laws of Kenya as follows;

4. (1) *The following actions may not be brought after the end of six years from the date on which the cause of action accrued-*

(a) *actions founded on contract;.....*

(b) *.....*

(c) *.....*

(d) *.....*

(e) *actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.*

(2) *An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:*

The respondent further submits that this claim is bad in law and is *res judicata*. This is premised on the fact that the claimant filed Eldoret CMCC No. 174 of 2003 where the issues in dispute in this claim were heard and determined. That the introduction of the 2nd Respondent is a camouflage intended to mislead the court or as the Respondents are the same and the subject matter similar.

In the penultimate, the respondent submits that this suit is an abuse of the process of court. This is as follows;

*.... we need not belabour the point the law cited by the Claimant upon which the claim is premised came into force/or into operation in or about the year 2007 several years after the cause of action arose and therefore it is our humble submissions that the claim cannot stand the test of the law and must fail.*

*.... additionally, we submit that the Claimant has brought this suit without disclosure of material facts to the court with sole intention to mislead the court to grant him sympathy reliefs which is against the law. It MUST be noted that nowhere in the claimants claim has he mentioned the existence of the other suit in Eldoret which is currently pending appeal.*

She further seeks to rely on the authority of **Uhuru Highway Development Ltd. vs. Central Bank of Kenya & 2 Others** where the Court of Appeal had opportunity to comment on a similar situation where a litigant failed to disclose material facts to the court and observed as follows:-

*“..... once the learned Judge was satisfied as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicant's application any further for the courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be, and whatever the merits of the case may be. A man who is prepared to deceive a court in granting him an order cannot validly claim that he has a meritorious case and would have been entitled to the order anyway. If the case is meritorious, there can be no reason for concealing some them from court.”*

With the foregoing agreeable submissions of the respondent/applicant and in the absence of a defence on the part of the claimant, I allow the preliminary objection with orders that each party bears its costs of the same.

This entirety closes the claim at this stage.

Delivered, dated and signed this **14th day of November 2016**.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Ms Hayo instructed by Nyairo & Company Advocates for the Respondent.
2. Mr. Kirwa/ Ms Soita holding brief for Morgan Omusundi & Company Advocates for the Claimant