

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 266 OF 2014

MTANA JUMA MWAHUNGACLAIMANT

VERSUS

B.O.G. ROKA SECONDARY SCHOOLRESPONDENT

R U L I N G

BACKGROUND

1. The claimant brought this suit on 13/6/2014 claiming ksh.80,000 being salary for 8 months plus allowances and interest which fell in arrears from April 2006.
2. The respondent denied liability vide her response filed on 2/9/2014 whereby she also raised preliminary objection (P.O) to the suit for being time barred.
2. The P.O was disposed of by written submissions. According to the respondent the cause of action arose in 2006 and should therefore have been filed within 3 years thereafter as prescribed by Section 90 of the Employment Act. The respondent has submitted that the claim had been filed at the Kilifi Principal Magistrate's Court as PMCC No. 97 of 2010 but later on 28/8/2013 it was withdrawn with costs. She therefore prays for the present suit to be dismissed for being an abuse of the court process.
3. The claimant has opposed the P.O and prayed for it to be dismissed. He admits that the suit was initially filed before the subordinate court but contends that the suit was withdrawn for purpose of transferring it to this court. He has further contended that this suit was filed with the direction of the subordinate court and as such striking it would amount to a miscarriage of justice.

ANALYSIS AND DETERMINATION

5. There is no dispute that the suit was first filed in 2010 before the subordinate court and later the same was withdrawn for filing in this court. There is also no dispute that the cause of action arose in 2006 before the enactment of Section 90 of the Employment Act 2007 upon which the P.O is premised. There is also no dispute that the cause of action herein is governed by the provisions of Section 4 of the Limitation of Action Act which limited the life of a cause of action founded on employment contract to 6 years. It is also clear that in 2010 when the initial suit was filed, the limitation period had not yet lapsed. The issues for determination is whether the present suit is time barred.

Time barred suit

6. The court has considered the submissions by the two parties and noted that although the P.O raised the issue of limitation of time, in reality the same is founded on facts. The circumstances under which the suit was withdrawn from the subordinate court has been raised in the submissions. According to the claimant, the suit was withdrawn upon the court's direction that the same be brought to this court. This court has perused the photocopies of the subordinate court's written proceedings and noted that there is probability that both parties participated in the proceedings which led to the withdrawal of the suit with the intention of filing a fresh suit before this court. This being a matter of facts, the truth can only be proved during full hearing. Consequently the issue whether or not the suit not before the court is time

bared shall be canvassed in trial alongside other issues raised in the suit.

DISPOSITION

For the foregoing reasons the P.O is dismissed with costs.

Dated, signed and delivered this 27th February 2015.

O. N. Makau

Judge