



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT NAIROBI

CAUSE NO. 989 OF 2013

PATRICK LUMUMBA MUSONYE CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION RESPONDENT

Mrs Ochieng for the Respondent / Objector

Mr. Gachuba for the Claimant / Respondent

RULING

1. The Statement of Claim was filed on 1st July 2013. The cause of action arose on 30th June, 2010 when the Claimant's employment was terminated by the Respondent.
2. The Respondent filed a preliminary objection to wit;
 1. The Claim as filed is time barred and does not lie in law by virtue of **Section 87(b)** of the Kenya Railways Act, Cap 397 of the Laws of Kenya and **Section 90** of the Employment Act, No. 11 of 2007.
 2. The Court lacks the requisite jurisdiction to entertain, hear and determine the matter.
3. The Claimant filed a Replying Affidavit to the preliminary objection and states the objection lacks merit.
4. **Section 87(b)** of the Kenya Railways Corporation Act, Cap 397 provides;

Section 87 -

“(a)

(b) The action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of”

Section 90 of the Employment Act on the other hand provides;

“Notwithstanding the provisions of Section 4(1) of the limitation of Actions Act, no Civil action or proceedings based on 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 this Act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

5. According to the Claimant, time started running on 2nd July 2010, since the last date at work was 30th June 2010.

6. This argument is based on the provisions of **Article 259(5)** of the Constitution of Kenya 2010 which provides;

Article 259 -

(5) In calculating time between two events for any purpose under this Constitution if the time is expressed -

- a. *as days, the day on which the first event occur shall be excluded and the day by which the last event may occur shall be included.*

7. According to the Claimant therefore, the suit having been filed on 1st July 2010 was filed within three (3) years from when the cause of action arose.

8. Furthermore, the Claimant submits that the Employment Act, 2007 was enacted many years after the enactment of the Kenya Railways Corporation Act and therefore if the provisions in the two Acts conflict, the one enacted later shall prevail.

9. The Claimant submits that in any event the Employment Act, was enacted to declare and define the fundamental rights of employees and to provide basic conditions of employment of employees.

10. That the provision of the Employment Act, cover all employees except those excluded from its purview under Section 3 which reads;

Section 3

(1) This Act shall apply to all employees employed by an employer under a contract of service.

11. Under **Section 3(2)** the only excluded employees are those in the Armed forces including the Military Service, Kenya Police, Kenya Prisons, Administration Police and the National Youth service.

Dependants in a family enterprise are also included where the dependants are the only employees.

12. The intention of Parliament is manifestly clear that the provision of the Employment Act apply to all employees serving under a contract of service except those expressly excluded.

Employees in the services of the Railways Corporation, such as the Claimant are not excluded from the purview of this Act.

13. Therefore the provisions of **Section 90** apply to this case for purposes of limitation to the exclusion of the older provision in the Kenya Railways Corporation Act which provided a lesser limitation period of one year from the time the cause of action arose.

14. It is the Court's finding that;

The suit was filed within three (3) years from the date the cause of action arose.

The suit is not time barred and the Employment and Labour Relations Court has jurisdiction to hear and determine it in terms of **Article 162(2)** of the Constitution of Kenya 2010 as read with **Section 12** of the Industrial Court Act, 2011.

The Preliminary Objection is dismissed.

Costs in the cause.

Dated and Delivered at Nairobi this 29th day of April, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE