



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO. 306 OF 2013**

**BENSON ASIAGO MOCHEO ..... CLAIMANT**

VERSUS

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME ..... 1<sup>ST</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**UNIVERSITY OF NAIROBI..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The 3<sup>rd</sup> Respondent filed a notice of preliminary objection on 21<sup>st</sup> August 2013 to wit;
  - a. The Claim is incompetent as the same is time barred by virtue of Section 4(1) of the limitations of actions Act, Cap 22 Laws of Kenya.
  - b. That the suit also offends Section 90 of the Employment Act 2007.
  - c. The suit also offends Section 4(11) of the Trade disputes Act Cap 23 of Laws of Kenya (now repealed).
  - d. The Claim was filed on 11<sup>th</sup> March 2013 without leave of Court having been brought over six (6) years after the Claimant's retirement on 31<sup>st</sup> December 2006.
2. The Preliminary objection was responded to by the Claimant vide a statement of reply filed on 17<sup>th</sup> October 2013.

The Claimant states that he was granted leave by the Court to file the claim.

3. The Claimant further relies on the Bill of Rights in the Constitution of Kenya, 2010, to state that a claim based on violation of the human rights and fundamental freedoms of an individual cannot be time barred in terms of Article 22(1) as read with Article 22(3)(d) of the Constitution.
4. An earlier Preliminary objection was filed on 17<sup>th</sup> April 2013, stating that this matter is *resjudcata* by reason of the fact that the suit, save for the inclusion of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents is substantially similar to Industrial Court Cause No. 487 of 2011 Benson Asiago Mocheo Vs. Kenya Airways Corporation which was dismissed by this Honourable Court vide an Award delivered by Isaac Mukunya J. on 29<sup>th</sup> June 2011.

## **Facts of the claim**

5. In the Notice of Motion Application dated 17<sup>th</sup> April 2013 and filed on 11<sup>th</sup> March 2013, by the Claimant it is admitted that the initial suit Cause No. 487 of 2011 was heard and dismissed by the Court because the Claimant had no funds to access a lawyer.
6. It is also not in dispute that this suit was filed out of time in that the Cause of Action arose on 14<sup>th</sup> September 2006, when the 2<sup>nd</sup> Respondent retired the Claimant from its employment. The suit was filed on 11<sup>th</sup> March 2013, about six years and five months after the Cause of action arose.
7. The Court has perused the judgment of Isaac E. K. Mukunya J. and is able to confirm the following;
  - i. Industrial Court of Kenya Cause No. 487 of 2011 was between the same parties as the present suit except for addition of Kenya Railways Staff Retirement Benefits Scheme as the 1<sup>st</sup> Respondent and the University of Nairobi as the 3<sup>rd</sup> Respondent.
  - ii. That the cause of action was the retirement of Mr. Benson Asiago Mocheo the Claimant in this suit by Kenya Railways Corporation, the 1<sup>st</sup> Respondent in the suit.
  - iii. That the relief sought is payment of pension by the Respondent in Cause No. 487 of 2011 who is the 2<sup>nd</sup> Respondent in this suit.
8. In Cause No. 487 of 2011, the Court determined that the Claimant was an employee of the Kenya Railways Corporation until 1985 when he transferred his employment to the University of Nairobi, the 3<sup>rd</sup> Respondent in this suit and he retired from employment in 2006 after attaining the age of retirement.
9. That issues of pension for the retired employees of the Respondent are handled by the Kenya Railways Staff Retirement Benefits Scheme which was not a party to that suit but is now the 1<sup>st</sup> Respondent in this suit.
10. That the Claimant had retired in 2006 and had filed his claim in 2011 more than four (4) years after the event.
11. That Section 90 of the Employment Act 2007 provides in mandatory terms that no action based on a contract of employment may be instituted after the cause of action arose.
12. The Court found that the suit was against a wrong party and was time barred and same was dismissed.

## **Determination**

13. Is the matter before Court *resjudicata*?

The simple answer to this question is no. This is because in the current suit, the issue for determination is whether or not the Kenya Railways Staff Retirement Benefits Scheme, the 1<sup>st</sup> Respondent herein owes the Claimant pension dues or not? The Kenya Railways Staff Retirement Benefits Scheme was not a party in the earlier suit and so the issue did not arise at all and the trial Judge had pointed out to the Claimant that the proper party to sue was the 1<sup>st</sup> Respondent herein which the Claimant proceeded to do.

14. This issue could not in my view have been litigated in the earlier case, unless of course there was joinder of the Kenya Railways Staff Retirement Benefits Scheme to that suit which was not the case.

15. As per judgment of Wignam VC in *Henderson Vs. Henderson* [1843] Hove VO, 115, the *Locus classicus* on the matter

*“where given matter becomes the subject of litigation in, and of adjudication by Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been*

*brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of resjudicata applies, except in special cases not only to points which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”*

16.To the extent the issue of pension was determined as between the Claimant and the 2<sup>nd</sup> Respondent, Kenya Railways Corporation, the matter is *resjudicata* and cannot be raised again in this suit as against the 2<sup>nd</sup> Respondent. This is however not true as between the Claimant and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.

#### **Time barred**

17.The cause of action arose in 2006 when the Claimant was retired and the claim was filed in 2011 more than four (4) years from the date the suit was filed.

The Employment Act, 2007, was enacted in 2007 and the Act became operational in 1988.

The law applicable to limitations in respect of this case, is the limitation of Actions Act, Cap 22 of the Laws of Kenya.

18.Section 4(1)(a) thereof provides for six (6) years limitation period for suits based on contract.

19.The cause of action in this suit arose on 31<sup>st</sup> December 2006 and the same was filed on 11<sup>th</sup> March 2013 about six (6) years and three months after the event.

20.In Industrial Cause No. 1686 of 2011, Peter Musembi Vs Barclays Bank of Kenya Limited, Mbaru J. held;

*“time limitation is not a technicality that can be cured by invoking any authority or any part of the Constitution.”*

21.I agree with the views of the learned Judge except to the extent that suits grounded on gross human rights violations under the erstwhile Constitution have been admitted by our Courts many years after the expiry of limitation period.

22.However, suits based on contract, such as the present one are not permitted any extension of time in terms of Sections 27 and 28 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya. This remains good law by which I am bound.

23.The present suit is therefore time barred and the same is dismissed with no order as to costs taking into consideration the torturous routes the Claimant has taken due to lack of proper legal advice at the appropriate time.

**Dated and Delivered at Nairobi this 21<sup>st</sup> day of August, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**