



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 889 OF 2012**

**VICTORIA MUKONYO MUINDE ..... CLAIMANT**

**VERUS**

**JAMII BORA TRUST ..... RESPONDENT**

Claimant in person

Mr Mutua for the Respondent

**JUDGMENT**

The Claimant brought this suit by way of a memorandum of claim dated 29<sup>th</sup> March 2012 and filed on 22<sup>nd</sup> May 2012.

The claimant alleges failure by the Respondent to pay her terminal benefits to wit:

- a. Unpaid salary for June and July 2005 in the sum of Kshs. 22,000/=;
- b. Accrued annual leave for 3 years in the sum of Kshs. 26,250/=;
- c. Refund of provident fund as at July 2005; in the sum of Kshs. 88,000/=;
- d. Refund of provident fund as at August 2005 to December 2006 in the sum of Kshs. 24,000/=;
- e. Unlawful deductions @2,200/= from August 2005 to December 2006 in the sum of Kshs. 24,000/=;
- f. Unremitted NSSF funds 2002 – 2005 in the sum of Ksh. 6,800/=;
- g. Refund of staff welfare fund at 200/= per month – December 2001 – 2005 in the sum of Kshs. 12,200/=;
- h. Unlawful deductions for alleged misuse of Petty Cash in the sum of Kshs. 30,000/=; and
- i. School fees for 2 children @ 20,000/= per child for 2 years (2006 – 2007) in the sum of Kshs. 80,000/=;

j. Total claim, 322,250/=.

### **Brief facts on which the claim is based**

The claimant alleges that she was employed by the Respondent on or about December 2001 as a Loans Officer at a monthly salary of Kshs. 12,500/=. That at the time of termination of her services she was earning Kshs.8,960/= per month.

That on 31<sup>st</sup> December 2006, the claimant was transferred by the Respondent to another company following a restructuring of the Respondent and wrongfully and unlawfully did not pay her terminal benefits before transferring her to the new entity.

### **Respondent's case**

The Respondent denies all the particulars of claim as follows:-

It is denied that "Jamii Bora Trust" the Respondent, is a legal entity capable of suing and being sued in its memorandum of Response dated 7<sup>th</sup> December 2012.

The Respondent states that Jamii Bora Charitable Trust, Registered Trustees was incorporated to run a micro-finance management for the benefit of the poor in the country. It was wound up in October 2011.

That Jamii Bora Charitable Trust Registered Trustees engaged the Claimant as a Loans officer during which period she was involved in misappropriation of loan cash in the cause of the employment. Following the theft, her services were not terminated on humanitarian grounds and she continued to serve the Trust until the 31<sup>st</sup> December 2006, when the Claimant wilfully transferred her services to a different legal entity namely; Jamii Bora Kenya Limited. The letter of appointment to this offer was produced in Court.

That Jamii Bora Kenya Limited subsequently became Jamii Bora Bank Limited which the claimant hence forward worked for.

That Jamii Bora Charitable Trust Registered Trustees were not in any way involved in the management of this Bank.

The claimant apparently lost her job with the bank for reasons best known to her which issue is not the subject of this suit. The claim for terminal dues is denied by the respondent in toto.

It is pleaded that these terminal benefits in as far as they are predicated on the severance of employment relationship between the Claimant and Jamii Bora Charitable Trust Registered Trustee on or around 31<sup>st</sup> December 2006 are not justiciable and are time barred by virtue of the express provisions of Section 90 of the employment Act 2007.

**The Law**The Court notes that the claim for terminal benefits precedes the coming into operation of the Employment Act No. 11 of 2007, which in fact came into operation in the year 2008.

The limitation of Actions Act, Cap 22 of the Laws of Kenya is applicable in respect of this matter. See the case of **Banking Insurance and Finance Union (K) Vs. Bank of India, Industrial Court Cause No. 1201 of 2012** where I stated:

*"The fact of the matter is that Employment Contracts like other commercial contracts were subject to the provisions of the limitations of Actions Act Cap 22 of the laws of Kenya at the time with regard to limitation but presently the limitation is governed by Section 90 of the Employment Act 2007 which has reduced the*

*limitation period in employment matters to three (3) years.”*

I further found:

*“Sections 27 and 28 of the Limitations of Actions Act Cap 22 provide for application of extension of time in which a matter is to be filed with respect to actions based on negligence, nuisance or breach of duty but not contracts”.*

This finding was premised on the decision of the Court of Appeal in **Derecon Limited Vs. Samani (1995 – 1997), E.A. 48 at 54** where the Court found:

*“No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued founded on a 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 based in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of part II shows that its provisions do not apply to actions based on contract.”*

Furthermore no application for extension of time was made in this matter.

### **Conclusion**

Accordingly the prayers sought by the Claimant and in particular prayers a, b, c, f, g and h arose in the year 2005. Going by the last day of the year 2005, that is, 31<sup>st</sup> December 2005, six years elapsed in December 2011.

This suit was filed on 22<sup>nd</sup> May 2012 well beyond the limitation period.

The Court lacks jurisdiction to grant the reliefs sought with respect to these claims therefore, and the same are out rightly dismissed.

With regard to prayer (d) for the refund of provident fund as at August 2005 to December 2006 in the sum of Kshs.24,000/=, no evidence has been placed before Court whatsoever to establish that the Claimant is owed any refund from the provident fund by the Jamii Bora Charitable Trust, Registered Trustees.

With regard to the claim for unlawful deductions @ 2,200/= from August 2005 to December 2006, there is overwhelming evidence that the Claimant had misappropriated Trust funds but was pardoned by the Registered Trustees on humanitarian grounds following an apology and consent to repay the misappropriated money. In any event a large portion of this claim is also caught by the limitation period of six years. Only claims for the period May to December 2006 would be within the limitation period of six years otherwise the rest of the claim from August 2005 to April 2006, is caught by the doctrine of Laches.

In any event the Court is of the considered view that the Jamii Bora Charitable Trust, Registered Trustees had justification to recover the money misappropriated by the Claimant.

With regard to prayer (i) it was established that payment of school fees was not part of the Claimant's terms of service in the year 2006 to 2007. The claim has no merit.

The witness for the Respondent Dr. Ingrid Sofia Monroe gave a candid testimony of how she single handedly, amidst a myriad of many nay Sayers started a programme to rehabilitate street children in Nairobi from drugs abuse, dejection, total hopelessness and poverty.

She became the founder of the Jamii Bora Charitable Trust, Registered Trustees which eventually

spread its wings all over the country.

That the claimant was one of the first beneficiaries of the project and was taken up as a loans officer by the Trust until the 1<sup>st</sup> January 2007, when Jamii Bora Kenya Limited came into being. It was the microfinance part of Jamii Bora.

She told the Court that she was still the founder and managing Trustee of Jamii Bora, Charitable Trust, Registered Trustees.

That Jamii Bora has since given birth to Jamii Bora SACCO which is now referred to as Yawezekana SACCO and Yawezekana Housing Cooperative to which she is the chairperson.

She narrated how the claimant was rehabilitated, employed and posted to Machakos Branch. It was at this Branch where this misappropriation of funds took place, but determined to keep the Claimant from degenerating back to street life, she persuaded the Trustees to forgive her and be retained in her employment subject to repayment of the lost funds.

The Court wholly accepts the evidence of Madam Ingrid Sofia Munroe regarding the specific claims by the Claimant and finds that the Claimant was not owed any terminal dues by Jamii Bora Charitable Registered Trustees as at 31<sup>st</sup> December 2006. This is in addition to the findings we have made on the issue of limitation to remove the impression that the claims were defeated solely on the basis of limitation.

In the final analysis the suit is dismissed in its entirety with no Order as to costs.

***Dated and Delivered at Nairobi this 17th day of February, 2014.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**