



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**  
**(BIMA TOWERS)**

**CAUSE NO. 290 OF 2013**

**BONIFACE INONDI OTIENO                      CLAIMANT**

**V**

**MEHTA ELECTRICALS LIMITED              RESPONDENT**

**RULING**

1. Boniface Inondi Otieno (the Claimant) filed a Memorandum of Claim against Mehta Electricals Ltd (Respondent) on 12 September 2013 and the issue in dispute was stated as *unlawful termination from duties of Boniface Inondi Otieno by Mehta Electricals Ltd*.
2. The Respondent was served with Notice of Summons and Memorandum of Claim and on 3 October 2013 it filed a Notice of Preliminary Objection to the Claim. Subsequently it filed a Reply to the Memorandum of Claim on 19 December 2013.
3. Because the Preliminary Objection raised points which could determine the Cause, the Court directed it be argued first. The parties submitted on the Preliminary Objection on 13 March 2014.
4. The Preliminary Objection was premised on the grounds that the Cause was *res judicata* and that the cause of action was statute barred under section 4(1)(a) and (2) of the Limitation of Actions Act.
5. I will discuss and refer to the respective parties' submissions in regard to each ground only as may be necessary to the determination of the Preliminary Objection because the legal position/principles regarding *res judicata* and limitation are fairly straight forward.

***Res judicata***

6. In the Notice of Preliminary Objection, the Respondent contended that the Cause is *res judicata* in three respects. Firstly, because the Claimant had filed Mombasa Senior Resident Magistrate's Court Civil Case No. 559 of 2007, *Boniface Inondi Otieno v Mehta Electricals Ltd* and the suit was determined on the merits and no appeal was preferred. A copy of the judgment in the said suit was on record.
7. Secondly, the Respondent also stated that the Claimant had filed Mombasa Misc. Cause No. 2 of 2013, *Boniface Inondi Otieno v Mehta Electricals Ltd*, which was also dismissed.
8. Lastly, the Respondent urged that the issue(s) in dispute/raised in the present Claim had been the subject of arbitration before the Sudanese Director of Public Services and Administrative Reforms and was settled in 2007.
9. *Res judicata* has a statutory underpinning in section 7 of the Civil Procedure Act. The section provides that No court shall try any suit or issue in which the matter ***directly and substantially in issue*** has been directly and substantially in issue in a former suit ***between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a***

**court competent** to try such subsequent suit or the suit in which such issue has been subsequently raised, and has **been heard and finally decided** by such court (emphasis mine).

10. To succeed on a plea that a cause of action is *res judicata*, it is prudent for the party asserting so to present before the Court both the primary pleadings and decision/judgment of the Court which dealt with the issue(s). The Respondent should have done this in respect of Mombasa SRMCC No. 559 of 2007, *Boniface Inondi Otieno v Mehta Electricals Ltd*, Mombasa Misc. Cause No. 2 of 2013, *Boniface Inondi Otieno v Mehta Electricals Ltd* and the proceedings before the Sudanese Director.
11. In the present case, the Respondent did not produce the primary pleadings or the judgment(s). Luckily, the Claimant annexed *the Further Amended Plaintiff* in respect of SRMCC No. 559 of 2007, and a copy of the judgment.
12. There can be no doubt that the parties in the Mombasa Senior Resident Magistrate's Court Civil Case No. 559 of 2007 are the same parties litigating in the present Cause.
13. The issues in dispute/cause of action in the suit before the Magistrate's Court was damages for injuries based on the tort of negligence and the duty an employer owes an employee. This is clear from paragraphs 4, 5 and 6 of the Plaintiff and the prayers sought.
14. The issue in dispute herein/cause of action is unfair termination, an issue(s)/cause of action which was not in dispute before the Magistrate. Unfair termination did not form the gravamen of the Claimant's cause of action in the lower Court. The issue(s)/causes of action are not therefore directly and substantially the same.
15. The Claimant also produced a copy of the Motion which was filed in Mombasa Misc Cause No. 2 of 2013, *Boniface Inondi Otieno v Mehta Electrical Ltd*. The application was seeking leave of Court to allow the Claimant to file suit out of time.
16. That application was heard and determined by this Court and the Court was able to call for and look at the proceedings. The motion application was declined on the basis that the Court did not have the power or jurisdiction to extend time.
17. The issue(s) raised in the current Cause is unfair termination of employment and not extension of time or grant of leave and therefore do not fit in within the four limbs of *res judicata*. The issue(s) of unfair termination were not heard and determined on the merits.
18. The conclusion the Court reaches is that the Respondent has not established that the issues in dispute herein or the cause of action and issues in dispute herein were directly and substantially in issue in Mombasa Senior Resident Magistrate's Court Civil Case No. 559 of 2007, *Boniface Inondi Otieno v Mehta Electricals Ltd* or Misc Cause No. 2 of 2013, *Boniface Inondi Otieno v Mehta Electricals Ltd* and that the same have been heard and finally decided on the merits.
19. As regards the proceedings and settlement before the Sudanese Director of Public Services and Administrative Reforms, sufficient material was not placed before the Court to enable it determine whether the said Director and the proceedings before him meet the threshold outlined in section 7 of the Civil Procedure Act. There was no suggestion that the Director sat as a competent Court.
20. The plea of *res judicata* must therefore fail.

### **Cause of action statute barred**

21. Paragraph 5 of the Memorandum of Claim states that the Claimant's contract was unlawfully terminated on 18 October 2006 (copy of termination letter was annexed).
22. At the time of the termination of the services of the Claimant, the Employment Act, 2007 was not yet in operation and therefore the three year limitation provided at section 90 is inapplicable.
23. The Employment Act, cap 226 (repealed) which was the primary statute dealing with the employment relationship did not have a limitation clause and therefore the Limitation of Actions Act was and is applicable in determining whether this Cause is statute barred.
24. The relationship between the parties was contractual and the limitation period set out in section 4(1) of the Act for contracts, that is, six years is directly implicated. Going by the provisions of the said section, the Claimant was obliged to file or institute legal proceedings alleging unlawful termination on or before 17 October 2012. This Cause was filed on 12 September 2013, clearly out of time.
25. The Claimant had filed Mombasa Misc Cause No. 2 of 2013, *Boniface Inondi Otieno v Mehta*

*Electricals Ltd* seeking leave to file the Cause out of time. I rejected the application for the reasons stated in the ruling in that case.

26. It may be germane just to reiterate that based on the Court of Appeal decision in *Divecon v Samani (1995-1998) EA 48*, this Court and indeed no other Court has the power or jurisdiction to extend time for the institution of a cause of action based on contract, outside the set period of limitation, be it the 6 years as set out in the Limitation of Actions Act or the 3 years now provided for causes of action based on employment relationship in section 90 of the Employment Act.
27. And just to make the point clear, the Court repeats what the Court of Appeal held in the *Divecon* case that ***to us, the meaning of the wording of section 4(1) that:.....is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on 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 brought 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 III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that “the wording of section 4(1) of the Limitation of Actions Act.***
28. The upshot of the foregoing is that the Court upholds the Preliminary Objection on the second ground of limitation, and the logical consequence is that the Memorandum of Claim filed in Court on 12 September 2013 stands struck out with costs to the Respondent.
29. For whatever it is worth, had the parties advanced arguments on whether the present Cause was an abuse of the court’s process in light of the decision in Misc Cause No. 2 of 2013, such a proposition might have merit. But because there was no submission on this point, I say no more.

**Delivered, dated and signed in open Court in Mombasa on this 11<sup>th</sup> day of April 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Boniface Inondi Otieno

Claimant in person

Mr. Sitonik instructed by

Ndegwa Muthama Katisya & Associates

for Respondent