

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 210 OF 2013

ZEDEKIA JUMA ADAYACLAIMANT

VERSUS

MSB EDUCATIONAL INSTITUTERESPONDENT

R U L I N G

The claimant was employed by the respondent in 1996 as a teacher. He worked until October 2012 when he tendered a written resignation to the respondent which was accepted.

The respondent denied liability and dismissed the claim as time barred. In addition the respondent counter claimed for kshs. 59000 against the claimant being one month salary in lieu of notice. Before the suit was set down for hearing, the respondent filed the Notice of Motion dated 22/10/2013 now before the court for determination.

The Notice of Motion seeks to have the claim for salary arrears, accrued leave and overtime contained in paragraph 10 of the claim dated 5/7/2013 struck out. The main ground for the motion is that the claim were filed out of time with respect to Section 90 of the Employment Act which limit such claims to 3 years from the time the cause of action arises.

The claimant has, however, opposed the Motion by his replying affidavit sworn 2/11/2013. The gist of the replying affidavit is that time to institute suit starts to run from the date of termination of the employment contract and prayed for the dismissal of the Motion.

The Motion was disposed by way of written submissions which revolved around the issue of limitation of action as provided for under Section 90 of the Employment Act. The claimant had however contended that the breach in dispute was a continuing injury and as such under Section 90 of the said Act he had the right to file a claim within 12 months after cessation thereof. According to him the suit was filed seven months after his resignation which resignation was due to the respondents default to pay to the claimant the said accrued benefits the subject matter of this suit.

Upon careful reading and consideration of the pleadings, the Motion, affidavit and submissions presented before the court, the court finds that both parties have reasonable arguments which needs further inquiry. The purposes of the court to do justice to both parties who appear before it. It should not be in haste in sending litigants away from the seat of justice unless the case is frivolous and vexatious.

In the present case, the applicant wants the court to determine the case in bits by striking out certain claims for being time barred. The claimant contends on the other hand that the injury in issue was continuing until his resignation due to the said breach. The court is of the opinion that in view of the contesting submissions by the two parties, the issue of limitation of actions shall be treated as a triable issue for determination at the hearing. It is important for both parties to tender evidence in support and opposition especially considering Section 90 of the Employment Act which provides for filing claims for continuing injury within 12 months of cessation thereof.

The court is also of the view that some of the claims may be covered by Section 4(1) of the Limitation of Actions Act which provides for 6 years limitation period and Section 39 of the said Act

which provides for *estoppel* against the party pleading limitation. Consequently the Notice of Motion dated 22/10/2013 is dismissed to pave way to full hearing on the merits. No order as to costs.

Dated, Signed and delivered this 30th May 2014.

O.N. Makau

Judge