

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAKURU

CAUSE NO. 103 OF 2013

[Formerly Cause No. 2295 of 2012 at Nairobi]

JAMES SIMIYU.....CLAIMANT

- VERSUS -

BOARD OF GOVERNORS, MOI FORCES ACADEMY, LANET....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th June, 2014)

RULING

The claimant filed the memorandum of claim dated 10.05.2012 through Nyagaka S. M. & Company Advocates. The claimant filed the memorandum of claim on 14.11.2012. It is not disputed that the claimant was terminated by the letter dated 20.11.2006 and with effect from 11.11.2006.

The respondent entered appearance on 07.06.2013 through Karanja-Mbugua & Company Advocates and filed a notice of preliminary objection on 31.03.2014. The respondent's preliminary objection is that the suit is time barred under section 90 of the Employment Act, 2004. The section provides as follows:

“90. Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or 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 the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

The respondent submitted that three years having lapsed, the claimant's suit was time barred under the section. The respondent stated that the claimant could not urge his case selectively on the basis of rights and obligations of employers and employees under the Employment Act, 2007 while at the same time not relying on the provisions of section 90 of the Act.

The claimant submitted that the cause of action accrued on 20.11.2006 and the suit was filed on 14.11.2012 within six years as prescribed under section 4 (1) of the Limitation of Actions Act. The claimant urged that the suit was therefore not time barred.

The court's holding on the matter in dispute is consistent and settled that for suits accruing before the coming into operation of the Employment Act, 2007, the limitation period is six years under section 4 the Limitation of Actions Act and not three years under section 90 of the Employment Act, 2007. That was the holding by *Nduma J.* in **Richard Nyasoko Kiyondi and 2 Others -Versus- British American Tobacco Limited [2013]eKLR**; *Mbaru J.* in **Peter Musembi Nzioki -Versus- Barclays Bank Kenya Limited [2013]eKLR**; and *Radido J.* in **Charles Kiruthi Mwangi -Versus- G4S Security Services (K) Limited [2012]eKLR**. The court upholds the holding and finds that the preliminary objection will therefore fail. The court further finds that the issue of enforceable rights and obligations and the applicable law will be argued at the full hearing.

In conclusion, the preliminary objection is dismissed with costs and parties are invited to suggest a

convenient mention date for directions on the hearing of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday 13th June, 2014**.

BYRAM ONGAYA

JUDGE