



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

**CAUSE NO. 2000 OF 2013**

*(Before D.K.N. Marete)*

**ELIUD GATUNDU WANJOHI.....1ST CLAIMANT**

**WALLANCE KAMAU KIRAGU.....2ND CLAIMANT**

**ANDREW DISHON MWANGOLA.....3RD CLAIMANT**

**JOHN FRANCIS KABUCHU.....4TH CLAIMANT**

**Versus**

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**RULING**

Before court is a suit by way of statement of claim dated 4th December, 2013 by the claimants who were employees of the defendant. It is a claim borne out of erroneous computation of salary in accordance with the respondents proper scales and now seek that this be rectified and they be paid what is rightly due to themselves.

The respondent in opposition filed a Notice of Preliminary Objection dated 6th January, 2014 praying that the suit be stuck out for having been filed out of time. It is as follows;

*1. The Claim as filed herein is time barred and does not lie in law by virtue of Section 87(b) of the Kenya Railways Act Chapter 397 of the Laws of Kenya and Section 90 of the Employment Act, No. 11 of 2007.*

*2. This Honourable Court lacks the requisite jurisdiction to entertain, hear and/or determine this matter.*

The matter came to court variously until the 26th May, 2014 when the parties agreed to a disposal of the same by way of written submissions.

The respondent's case is that the claim is filed 20 years done the line with the sole intention of vexing the respondent and ensure that when the matter goes for trial, the Corporation will be highly prejudiced in its defence since, as a state corporation it is mandated to keep documents for 6 years and same are destroyed to create room for fresh ones. It should therefore not be countenanced.

Section 90 of the Employment Act, 2007 provides as follows:

*Section 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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

Further, the respondents rubbishes the claimants' contention on extension of limitation period by virtue of negotiations with the respondents and denies accepting liability to their claim as follows:

*33. My Lord, even if the Claimants were to elect to argue that there were negotiations between it and the Corporation, which negotiations acted to revive and or maintain the cause of action herein, as purported at paragraph 15 of the Claim; this argument*

is untenable in law, the same cannot save the claim herein from being statute barred since the Respondent Corporation did at no time inform the Claimant that it shall waive its statutory rights should a claim be brought against it.

The mere fact that negotiations have taken place between a claimant and a person against whom is made does not debar the defendant from pleading a statute of limitation, even though the negotiations may have caused the claimant not to bring his action until the statutory period has passed.

36. Accordingly, it is pertinent that however meritorious the Plaintiff's may claim it's suit herein to be, the same is incompetent and untenable in law and the most this Honourable Court can do is to strike out this suit as against the 1<sup>st</sup> Defendant Corporation with costs.

The respondents also sought to rely on this court's decision in **Joyce Kavulani Ligame vs Kenya Railway Corporation**, Industrial Court **Cause No. 483 of 2012**, (unreported), where it was held as follows:

*'The claimant brought this suit to court 4 years after the event complained about. This is clearly outside the period of limitation and there is no evidence of leave having been granted so to act. Further the requisite written notice of intention to sue was never sought or obtained from the commission. This claim, like in the Langat case aforecited therefore fails.'*

As a derivation of the above authority, the respondents at paragraph 42 argue as follows;

42. *The above decision by your Lordship has never been set aside by the Court of Appeal and as such the same is sound law and applicable as persuasive decision. We see no reason why your Lordship should depart from the said finding and as such urge your Lordship to uphold the same and lawfully proceed to dismiss the Claim herein.*

The claimants disagree and oppose the objection of the respondent. This is on the basis that the claimants have for a long time engaged the respondents through correspondence and meetings with a view to a resolution of the issue of their computation of salary which they countered were wrongly done and based on the wrong salary scales.

The claimants argue and submit the issue led to their petition to the Minister for Transport but that this was not responded to. Again, vide a letter dated 1st March, 2013, the claimants sought to engage the respondent on the issue and the respondent by a letter dated 12th March, 2013 in which the respondent's management decided to consider the claim based on precedent and applicable negotiations. It is the claimants submission that by virtue of this action by the respondent, any claim to limitation of action is ousted. This is further buttressed by a letter dated 18th September, 2012 where the respondent admits a miscalculation of the claimants' salaries as hereunder;

*The Corporation will accordingly pay you arrears of adjusted salary Lumpsum and pension while KRSRBS will pay your adjusted pension for the period it is concerned.*

The claimant seeks to counter the claim of liability on the authority of Section 23(3) of the Limitation of Actions Act, Chapter 22, Laws of Kenya as hereunder;

*"Where a right to action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payments in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment".*

On the premises, the claimant claims compliance and conformity with the one year limitation period provided by S.87 of the Kenya Railways Act and also S.90, Employment Act, 2007. The claimant further seeks to rely on the authority of the **Co-operative Bank of Kenya Vs Peter Kimani where Koome, J.** (as she then was) held as follows;

*"It is trite law that striking out pleadings is a drastic measure which is done when the pleadings complained about are an abuse of the court process and discloses no triable issues. (see the case **D.T. Dobie v Muchina (1982) as per Madan JA:***

*The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."*

The claimants further sought to rely on the authority of **Afrofreight Forwarders Ltd Vs. African Liner Agencies, Civil Appeal No. 25 of 2007** the court held:

*"It was Mrs Maina's submission that in view of that letter the respondent acknowledged indebtedness. For that reason, so she submitted, the right to action accrued on 4th July 2000 hence when the suit was filed on 29th July 2002 it was so filed within limitation period. She therefore asked us to allow the appeal, set aside the judgement of Serگون, J and reinstate the judgement of the Resident Magistrate."*

and **Kenya Orient Insurance Limited Vs. Oraro and Company Advocates Misc. Cause No. 701 of 2012** where Gikonyo, J. held as follows;

*"I should even state that, I belong to the school of thought, which takes the view, and I believe is the position of the law, that the question of limitation of actions is both a matter of law and fact and cannot be determined in limine or as a preliminary objection.*

*Parties must be heard; evidence must be adduced; the court has to evaluate the entire circumstances of the case and make a decision. It is a matter for the trial”.*

The respondent seeks to rely on the authority of **Langat Vs Kenya Posts and Telecommunications Corporation (2000) EA/147** and **Joyce Kavalani Ligame Vs Kenya Railways Corporation (supra)** to demonstrate the court’s position on the issue of limitation of action on grounds of a time bar. I must admit that these are distinguishable in the circumstances of this case. The situation here is different in that on the instant case, the parties delved into negotiations on the subject as evidence by correspondence in 2012 and 2013. This unsettled and tilted the issue of limitation in favour of the claimants.

The circumstances of this case also agree with the dictum by Gikonyo, J. aforesaid: that limitation of action, **and particularly by virtue or ground of a time bar** is not an issue that can clearly and absolutely be determined by way of a preliminary objection. This must be interrogated and evidence adduced to support the various diverse factual positions of the parties. It requires a physical interrogation of facts and evidence, (emphasis mine.)

The claimants have factually demonstrated a case against limitation. The case of the respondents’ acknowledgment of the claim in both 2012 and 2013 outs any further claim to limitation. This also frustrates the respondents’ submission on harassment and lack of data to deal with the matter, twenty years down the line. Rights must be observed at all times and within the framework of the law and reality.

I am in the circumstances inclined to dismiss the preliminary objection with costs to the claimants.

Delivered, dated and signed the 25<sup>th</sup> day of July 2014.

**D.K. Njagi Marete**

**JUDGE**

Appearances:

1. Mr. Odembo instructed by Nyiha Mukoma & Co. Advocates for the Claimants
2. Mr. Angwara instructed by Prof. Albert Mumma & Co. Advocates for the Respondent.