



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1362 OF 2013

KENYA AIRWAYS LIMITED CLAIMANT

VERSUS

DONALD OSEWE OLUOCH RESPONDENT

M/S Mugo for Respondent/Applicant

Mr. Mbaluto for Claimant/Respondent

RULING

1. The cause of action arose on 25th June 2007 when the Respondent resigned from the employment of the Claimant notwithstanding a training sponsorship bond in the letter of appointment dated 23rd November 2006 that bound the Respondent to work for the Claimant for a period of three (3) years upon completion of the training sponsored by the Claimant in the sum of Kshs.8million.
2. This suit was filed at the Industrial Court on 23rd August 2013 more than six (6) years from the date of the cause of action arose.
3. A preliminary objection was filed by the Respondent on 8th October 2013 to wit;
 1. that the claim herein is statute barred by virtue of the provision of **Section 90** of the **Employment Act, Act No. 11 of 2007** and **Section 4** of the **Limitations of Actions Act**. The Claimant should have filed the memorandum of claim on or before 25th June 2010.
 2. that, the Claimant is estopped from filing the instant suit before the Industrial Court as it had earlier opposed an application to have **Milimani HCCC No. 754 of 2009 Kenya Airways Vs. Donald Obewe** filed at the Commercial and Admiralty Division from being transferred to the Industrial Court. The suit was subsequently dismissed by the Court of Appeal for want of jurisdiction. The suit was not canvassed at all on merits.
4. We start from this second objection by noting that there cannot be an estoppel against an objection on the jurisdiction of the Court to entertain a suit.

Indeed, if the matter is not raised by either party, the Court has an obligation to *suo moto* raise the matter and determine it in the interest of justice and economical use of the Court's time. A Court either has jurisdiction to hear and determine a matter or it does not have. If it has no jurisdiction it

must strike out the suit and down its tools.

5. The suit presently before Court is a fresh matter and time must be reckoned from the date the cause of action arose to the date the matter was filed at the Industrial Court.

6. **Section 90** of the *Employment Act, No. 11 of 2007* reads:

“Notwithstanding the provisions of Section 4(1) of the Limitations of Actions Act, no civil action 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 (12) months next after the cessation thereof.”

7. As noted earlier, this suit was filed on 23rd August 2013, more than six (6) years from the date the cause of action arose.

As at the 25th June 2007, when the cause of action arose, the Employment Act 2007 had not commenced operation. As a matter of fact, the Act came into operation in August 2008. The provisions of **Section 90** cannot be applied retroactively to this suit.

8. The law applicable to the present suit is **Section 4(1)** of the *Limitations of Actions Act, Cap. 22* of the *Laws of Kenya*.

In terms thereof, limitation period for causes founded on contract is six (6) years. Causes founded on negligence may be accorded extension of time in terms of **Sections 27 and 28** of *Cap 22*.

9. See **HCCC at Nairobi, Misc. Application 696 of 2004; Timothy M. Mukato Vs. Reuben Alubale Shiramba and 3 others**. Per **Alnashir Visram Judge** (as he then was).

10. At the time this suit was filed on 23rd August 2013, more than six years had lapsed and no application for extension of time was made by the Claimant prior to the filing.

That notwithstanding the **Milimani HCCC No. 754 of 2009, Kenya Airways Vs. Donald Osewe** which suit concerned the same parties and same subject matter was filed in good time and was ventilated at the High Court and the Court of Appeal until the same was struck off for want of jurisdiction.

11. According to **K. J. Tomji, The Law of Limitation and Adverse Possession Vol. I Butterworths & Co., 1938 P.234 Paragraph 14(1)**:

“In computing the period of limitation prescribed for any suit, the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.”

12. The Court agrees with the above exposition of the law notwithstanding that the Claimant did not bring an application for extension of time since the entire time the matter was pending at the High Court and at the Court of Appeal, time did not run for purposes of limitation of actions.

Accordingly, this suit was filed within time and this Court has jurisdiction to entertain the same.

The objection in limine is dismissed with costs in the cause.

Dated and Delivered at Nairobi this 11th day of July, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE