



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 235 OF 2013

JOSEPH ONDERI NYANGAUCLAIMANT

VERSUS

KENYA MARINE & FISHERIES RESEARCH INSTITUTEDEFENDANT

RULING

INTRODUCTION

1. This is a ruling on a Preliminary Objection (P.O) raised by the respondent against the whole suit on ground that the suit was filed out of time. The P.O is contained in paragraph 11 of the Amended defence and the Amended Notice dated 16/5/2014. The P.O was disposed of by way of written submissions.

RESPONDENT'S SUBMISSIONS

2. The respondent has submitted that, the claimant was suspended from work on 1/12/1999 for misconduct to pave way for investigations. Thereafter the claimant was charged with criminal case. In the meanwhile the claimant was summarily dismissed from employment on 0/5/2001. In 2012 the criminal case was determined and the claimant brought this suit on 30/7/2013 claiming damages for unlawful termination. According to the respondent the suit is time barred because it ought to have been filed latest by 2007 under the Limitation of Actions Act. Under Section 4 of the said Act, the time prescribed for filing a suit founded on a contract was 6 years. The respondent has therefore prayed for the dismissal of the suit for being time barred. She cited DIVECON LIMITED vs SAMANI (1995-1998) E.A 48 where the Court of Appeal of Kenya held that a party has no power to file a suit after 6 years limitation period which in other words means that a court lacks jurisdiction to entertain a time barred suit.

CLAIMANT'S SUBMISSIONS

3. The Claimant has submitted that the respondent should be *estopped* from pleading the defence of limitation because she has not complied with the express terms and conditions of the employment of contract. According to the claimant the termination letter should be read together with the said terms and conditions of service which entitled the claimant to a right of appeal to the Board of Management and thereafter to the Minister whose decision shall be final. It is the claimant's submission that he appealed against the summary dismissal and the appeal is still pending before the respondent Board of Management under Section 4.7(b) of the terms and conditions of service. According to the claimant, the implication of the said appeal is that his termination has not yet

become final until the appeal is determined. He cited ICC NO. 4 of 2014 JOSEPH TINGA JANGA vs KENYA MARINE & FISHERIES RESEARCH INSTITUTE in which the court upheld a plea of *estoppel* in a case where the termination letter had promised the claimant a review in case the criminal charges were determined in his favour.

RESPONDENT'S REJOINDER

4. The respondent has maintained that the suit is time barred and that the facts in this case are distinguishable from the ones in JOSEPH TINGA JANGA'S CASE in that the termination letter in this case did not promise the claimant any review in case the criminal case was decided in his favour.

ANALYSIS AND DETERMINATION

5. The court has carefully read and considered the pleadings and the submissions filed by counsel for the two parties. There is no dispute that the claimant was dismissed from employment by the letter dated 30/5/2001. It is also obvious that this suit was filed on 30/7/2013, more than 12 years since the time when the cause of action arose. There is also no dispute that the suit is governed by the Employment Act Cap 226 (now repealed) and Section 4 of the Limitation of Actions Act Cap 22 laws of Kenya. There is also no dispute that Section 4 of the Limitation of Actions Act limited the life of a cause of action founded on contract to only 6 years. There is also no dispute that Clause 4.7 of the respondents terms and conditions of service entitled the claimant to a right of appeal to the Board of Management and thereafter to the Minister.
6. The issues for determination are whether the suit is barred and whether the claimant can shield himself under the doctrine of *estoppel* as provided for under Section 39 of the Limitation of Actions Act.

TIME BARRED SUIT

7. There is no doubt that the cause of action arose on 30/5/2001 and the suit was filed on 30/7/2013, which was outside the 6 years limitation period prescribed under Section 4 of the Limitation of Actions Act. The suit is therefore time barred. The effect of such lapse of the statutory period was to dispose of the claimant of the right to sue and also to distinguish this court's jurisdiction over the dispute. This court is bound by the said Court of Appeal decision in DIVECON LTD vs SAMANI where the court said, thus,

“No one shall have the right or power to bring an action after the end of six years from the date of which a cause of action accrued, in an action founded on contract. The corollary to this is that no court may or shall have the right to entertain what cannot be done namely, an action that is based on contract six years after the cause of action arose or any application to extend such time for bringing of the action”.

ESTOPPEL

8. The only ground upon which this court may deviate from the forgoing Court of Appeal decision is if the claimant proves that there exists an *estoppel* against the respondent which bars her from pleading the defence of limitation. In this case, the claimant has attempted to plead *estoppel* against the respondent on ground that there is an appeal pending before the respondents Board of Management the effect of which was to stay the claimant's termination from taking effect. The claimant has however not proved that the alleged appeal really existed. He has not proved that he actually lodged the appeal with the said Board and that the same was received. He has also not proved that he has taken some steps in pursuing the appeal. If the correspondences exchanged by the parties after the acquittal of the claimant from the criminal case is anything to go by, the court finds that the alleged appeal was never mentioned. Likewise, the appeal was never mentioned in all other correspondences exchanged between the claimant and the respondent and the office of the president in 2003. It is probable therefore that the alleged appeal dated 2/7/2001 may not have

been lodged and received by the respondent's Board as alleged. The burden of proving the existence of such appeal lies on the claimant of which he has failed to discharge. Consequently the court finds that there is no *estoppel* proved against the respondent to bar her from pleading the defence of limitation.

9. For *estoppel* to accrue, there must be express promise made by respondent on which the claimant has acted to his detriment. In this case, there is no such promise has been proved. Likewise the facts of this case are distinguishable from the facts in the JOSEPH TINGA JANGA'S CASE in that unlike the present case, the termination letter issued in the JANGA'S CASE was subject to review in the event the criminal charges were determined in his favour.

DISPOSITION

10. For the reasons above stated, the court finds that the suit is time barred for having been filed 12 years after the time when the cause of action arose. The same is therefore struck out with no order as to costs.

Orders accordingly.

Dated, signed and delivered this 5th December 2014

O. N. Makau

Judge