



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 430 of 2011**

**CHARLES ONGANYA OKULO AND 3 OTHERS.....CLAIMANT**

**VS**

**SWEETY SWEETS LIMITED.....RESPONDENT**

**RULING**

1. On 24th March 2011, the Claimants filed a Memorandum of Claim claiming payment of outstanding dues from the Respondent. The Respondent filed a Statement of Response on 29th April 2011 denying the Claimants' claims in entirety. The Respondent also pleaded that the Claimants' claims were statute barred.
2. The Respondent subsequently filed a Notice of Motion dated 17th April 2012 seeking orders that the Claimants' Memorandum of Claim dated 22nd March 2011 and filed on 24th March 2011 be struck out and the suit be dismissed with costs, on the grounds that:
  - a) The suit is time barred as it was instituted outside the three (3) years limitation period under Section 90 of the Employment Act.
  - b) The suit is time barred in so far as it was instituted outside the limitation period of six (6) years stipulated under Section 4 of the Limitations of Actions Act.
3. The application was supported by the affidavit of Jitendrakumar Laljibhai Thanki sworn on 17th April 2012.
5. . In opposing the Respondent's application, the Claimants relied on a replying affidavit sworn by the first Claimant, Charles Onganya Okulo on 2nd July 2012.
6. Charles Onganya Okulo deponed that prior to coming to the Industrial Court the Claimants had on 25th February 2008, filed Civil Suit No. 1094 of 2008 at the Chief Magistrate's Court at Milimani-Nairobi.
7. Upon coming into effect of the Employment Act, 2007 and the Labour Institutions Act, 2007 Counsel for the parties on 16th November 2010 agreed by consent that Civil Suit No. 1094 of 2008 be withdrawn and that the present case be filed in this Court. Although no written consent was produced, the Respondent did not deny its existence.
8. The Claimants accused the Respondent of mischief and dishonesty in bringing this application since the Respondent consented to withdrawal of the case at the Chief Magistrate's Court. The Claimants therefore asked the Court to exercise its discretion in their favour.

9. In the Claimants' written submissions filed on 8th August 2012, Counsel submitted that the issue of limitation is a matter of technicality which the Court should ignore and proceed to render substantive justice by hearing the case on merit.

10. Conversely, Counsel for the Respondent submitted that the issue of limitation is a substantive point of law and not merely a technicality, citing the well known case of **Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd [1969] 1 EA 696** where the court held that:

***“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”***

11. Section 4(1) (a) of the Limitations of Actions Act provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. The only reprieve is granted under Section 22 which allows extension of the limitation period in cases of disability.

12. Section 90 of the Employment Act, 2007 provides that:

***Notwithstanding the provisions of section 4(1) of the Limitations of Actions Act, no civil action or proceedings based on 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.***

13. I agree with Counsel for the Respondent that limitation is a substantive matter of law and not merely a technicality.

14. The Claimants' claims as particularised in the Memorandum of Claim relate to the period between the year 2000 and 2007 and the Claimants filed their case at the Chief Magistrate's Court on 25th February 2008. In my understanding this means that some claims are time barred while others are within time. Consequently, I find that it is not in the interest of justice to strike out the entire claim at this stage. The Claimants would be well advised to examine their claims with a view to making amendments in light of the law on limitation.

The net effect of this ruling is that the Respondent's application dated 17th April 2012 stands dismissed. The costs of this application will be in the cause.

**DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY 2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**