



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT NAIROBI**  
**Cause No. 1201 Of 2012**

**BANKING INSURANCE AND FINANCE UNION (K).....CLAIMANT**

**-VERSUS-**

**BANK OF INDIA .....RESPONDENT**

Mr. Mituga for Respondent/Applicant

Mr. Odero for Claimant/Respondent

**R U L I N G**

This suit was brought by way of a Memorandum of Claim dated 5<sup>th</sup> July, 2013 on 17<sup>th</sup> July, 2012 by the Claimant union on behalf of two Grievants:

1. ***Samuel Mwangi Kanubi.***
2. ***Moses Nandwa Sharon.***

It is common cause that the two Grievants were summarily dismissed from employment of the Respondent on 27<sup>th</sup> April, 2005. The letters of dismissal are attached to the Memorandum of Claim as Appendix 2a and b respectfully.

It is also common cause that on 8<sup>th</sup> April, 2005 the two Grievants were arrested on suspicion of having committed fraud in the course of duty and were released on bond on 14<sup>th</sup> April, 2005.

They were subsequently charged with twelve counts of stealing and forgery under Criminal Case No. 600 of 2005.

That the matter proceeded until the 24<sup>th</sup> March, 2011, when both Grievants, were acquitted by the court for lack of evidence.

That on 7<sup>th</sup> December, 2011, they requested the Respondent to reinstate them to their previous positions and by a letter dated 14<sup>th</sup> December, 2011, the advocates for the Respondent wrote to the

Claimant union indicating that the Respondent required 14 days to consider the matter as the records had since been archived.

There was no further communication from the Respondent. Meanwhile a dispute concerning the dismissal was reported to the Minister of Labour in accordance with **Section 4** of the **Trade Disputes Act Cap 234** of the Laws of Kenya on 26<sup>th</sup> October, 2005. Mr. G.T. Stimuli was appointed conciliator on 14<sup>th</sup> February, 2006.

Conciliation meeting was called on 25<sup>th</sup> April, 2012, following the acquittal of the Grievants. A Certificate of unresolved dispute was issued by Mr. J.N. Makaa, conciliator on 6<sup>th</sup> June, 2012.

The Respondent filed a Statement of Response dated 3<sup>rd</sup> September, 2012 on the same date.

On 15<sup>th</sup> March, 2013, a notice of preliminary objection was filed by the Respondent to wit:

*“That the Claimant’s action is statute barred by virtue of Section 4 of the Limitations of Actions Act (Cap 22, Laws of Kenya) and/or Employment Act.”*

The Respondent prays that same be dismissed with costs.

### **The Law**

It is not in dispute that the summary dismissal of the Grievants took place as earlier stated on 27<sup>th</sup> April, 2005.

Indeed the Claimant reported the dispute being “*wrongful dismissal of: 1. Mr. Sameul Mwangi Kanubi.*

*2. Mr. Moses Sharon Nandwa.”*

a few months later on 26<sup>th</sup> October, 2005.

It cannot therefore be disputed that the cause of action arose on 27<sup>th</sup> April, 2005.

At the time, the law applicable to dismissals at the work place was the **Employment Act Cap 226** of the Laws of Kenya and the **Trade Disputes Act Cap 234** of the Laws of Kenya.

The two statutes did not provide a statutory limitation period within which an employment dispute would be lodged with the court.

This being the case the law applicable in this respect was **Section 4 (I) (a)** of the **Limitations of Actions Act, Cap 22** of the Laws of Kenya which provides that no action based on contract can be instituted after the lapse of six (6) years from the date the action arose.

It is the Respondent’s submissions that the Grievants slept on their rights and now are time barred by statute to sue the Respondent.

The period 27<sup>th</sup> April, 2005 when the cause of action arose and 17<sup>th</sup> July, 2012 when the suit was filed is slightly over seven (7) years.

The Claimant opposes the preliminary objection on the basis that the suit commenced on 26<sup>th</sup> October, 2005, when the dispute was reported to the Minister of Labour. That the dispute was accepted by the Minister on 14<sup>th</sup> May, 2006, six (6) months after the summary dismissal.

That the conciliator, an officer of the Ministry of Labour advised that conciliation continue after the criminal proceedings against the Grievants had been finalised hence the delay in bringing the suit to the Industrial Court which only happened after a Certificate of unresolved dispute was issued by the conciliator on 6<sup>th</sup> June, 2012.

The Claimant relies on the decision in **Banking Insurance and Finance Union (K) versus Standard Chartered Bank (K) Ltd. I.C. Cause No. 10 of 2008** where Hon. Justice James Rika held:

*“On the ground of Limitation of Actions Act, Cap 22 of the Laws of Kenya, the Industrial Court has traditionally interpreted limitation in a liberal manner. Trade disputes are neither Civil actions, nor Arbitrations. Contracts of service in employment are not treated similarly with commercial or property contracts. The Industrial Court is itself not a tribunal dealing with hardcore commercial rights and duties. The trade Disputes Act, Cap 234 of the Laws of Kenya intended that workers are not denied access to the Industrial Court by a rigid interpretation of the law.*

*The Court was intended to be attuned to the requirements of social justice, remain flexible without being overly legal in its proceedings, and discourage technicalities.”*

The fact of the matter is that employment contracts like other commercial contracts were subject to the provisions of the **Limitations of Actions Act Cap 22** of the Laws of Kenya at the time with regard to limitations but presently the limitation is governed by **Section 90** of the Employment Act 2007 which has reduced the limitation period in employment matters to three (3) years.

This matter was filed without seeking leave to extend the period for filing the matter in the belief that the matter commenced when the dispute was filed with the Minister of Labour on 26<sup>th</sup> October, 2005.

**Sections 27 and 28** of the **Limitation of Actions Act Cap 22** provide for application of extension of time in which a matter is to be filed with respect to actions based on negligence, nuisance or breach of duty but not contracts.

In **Direcon Ltd v. Samai [1995 – 1998] I EA 48 at page 54**, the court ruled:

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

The court has therefore no discretion in this matter. Furthermore this is not a mere technicality, it is a jurisdictional issue and this view was confirmed by Hon. Justice Radido in the matter of **Maina Machocho vs. Total Kenya Limited. I.C of Kenya at Mombasa Misc. Cause No. 2 of 2012** wherein he stated at page 2:

*“In my view Sections 27 and 28 of the Limitations of Actions Act are not applicable in case under discussion because the cause of action is not based on negligence, nuisance or breach of duty. I take comfort in holding thus by the very brief ruling by Justice Visram in Timothy M. Mukalo v. Reuben Alubale Shiramba & 3 others [2005] eKLR to the effect that Sections 27 and 28 of the Limitation of Actions Act are only applicable on actions based on negligence.”*

Once the court finds that a matter based on contract is filed out of time it cannot take any further steps. It must terminate the proceedings forthwith.

The other issue worth attention is whether in terms of the repealed **Trade Dispute Act, Cap 234** of the

Laws of Kenya, a suit can be said to have commenced from the date the dispute was lodged with the Minister of Labour.

**Section 4 (4)** provided thus:

**“Any trade dispute involving the dismissal of an employee or the termination of any contract of employment shall be reported to the Minister within twenty eight days of the dismissal or termination of employment provided that the Minister may, if he considers that the circumstances of a particular case so warrant, accept the report of a trade dispute concerning a case of dismissal or termination not so reported to him within twenty eight days.”**

**Section 8** of the Trade Disputes titled “Reference of trade disputes by Minister to Industrial Court provides:

**“Where a trade dispute has not been settled under Sections 5, 6 and 7 the Minister may in a case where an appeal to the Industrial Court does to already lie, on the representation of any trade union employer or group of employees refer the dispute to the Industrial Court and the provisions of Part IV shall apply to any such reference.”**

A careful interpretation of these provisions shows that dismissal cases prior to the promulgation of 2007, Labour Laws commenced upon lodging of the matter with the Minister of Labour as this was a mandatory procedure in terms of **Trade Disputes Act Cap 234** of the Laws of Kenya. As a matter of fact, no suit for dismissal of an employee could be brought to court directly without first filing a complaint with the Minister for purposes of conciliation and a Certificate of unresolved dispute was issued.

To the extent that this process was commenced by the Claimant prior to the repeal of Trade Disputes Act, and replacement with the 2007 labour laws, and specifically on 26<sup>th</sup> October, 2009, the court finds that indeed this suit was lodged then and is to that extend not time barred.

This would not be the case, if the matter had not been lodged in terms of the Trade Disputes Act, with the Minister prior to the repeal of the Act, because it was no longer mandatory for a claimant to obtain a certificate of unresolved dispute from the minister before approaching the court with a claim for unlawful termination.

This exception is therefore applicable to a limited number of cases that were commenced in terms of a mandatory procedure outlined above.

The preliminary objection is not upheld and the matter is to proceed to hearing on the merits.

***Dated and delivered at Nairobi this 6<sup>th</sup> day of September, 2013.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**