



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

**AT NAIROBI**

**CAUSE NO. 34 OF 2010**

**MICHAEL MAINA NDERITU .....CLAIMANT**

**-VERSUS-**

**KENYA POWER AND LIGHTING CO. LTD. ....1<sup>ST</sup> RESPONDENT**

**STIMA SACCO LTD. ....2<sup>ND</sup> RESPONDENT**

Claimant in person.

Mr. Oduor for the Respondent.

**JUDGMENT**

The 2<sup>nd</sup> Respondent in this matter **STIMA SACCO LTD.** raised two preliminary objections to wit; that it was wrongly joined in this matter as it was not an employer and that the claim was time barred by the Limitation of Actions Act, Cap 22 of the Laws of Kenya same having been filed out of time.

Hon. Justice Kosgey delivered a ruling on the first issue on 12<sup>th</sup> May, 2010 in which it found that the 2<sup>nd</sup> Respondent was not an employer and therefore the court had no jurisdiction to entertain the suit against it.

The court however did not deal with the issue of limitation since the suit against the 2<sup>nd</sup> Respondent was disposed of by the first point of law.

However the court ought to have considered the matter of limitation with regard to the 1<sup>st</sup> Respondent because it goes to the issue of jurisdiction of the court to entertain the matter or not.

The issue was raised in the Statement of Defence of the first Respondent dated 26<sup>th</sup> January, 2010 and filed on 28<sup>th</sup> June, 2010 and has now been revisited in the final submissions of the 1<sup>st</sup> Respondent filed on 25<sup>th</sup> July, 2013 as follows;

The court lacks jurisdiction to determine this matter by virtue of **Section 41 (1)** of the **Limitation of Actions Act, Cap 22** of the Laws of Kenya which provides:

**“The following actions may not be brought after the end of six years from the date on which the cause of action accrued –**

- a. **actions founded on contract;**
- b. **actions to enforce a recognizance;**
- c. **actions to enforce an award;...”**

It is not in dispute that this suit was brought by a Memorandum of claim dated 20<sup>th</sup> January, 2010 and filed on 22<sup>nd</sup> January, 2010.

The issue in dispute is failure to pay terminal benefits to wit;

- i. Payment in lieu of notice;
- ii. Payment in lieu of leave;
- iii. Payment of retirement benefits (Local Authority Pension Scheme and Provident Fund); and
- iv. Salary arrears.

The Claimant was employed by the 1<sup>st</sup> Respondent as a Trainee Technician on 2<sup>nd</sup> March, 1978. He was confirmed in January 1982 earning an annual salary of K£1380.

In August, 1986, the Claimant resigned from his employment and went for further studies at the Kenya Polytechnic on 17<sup>th</sup> February, 1989. He was re-employed in the position of a Senior Installation Inspector.

He worked in that capacity until 21<sup>st</sup> April, 1989, when he was replaced without a notice.

He filed this suit on 22<sup>nd</sup> January, 2010 more than twenty (20) years from the date of termination. The claim for salary arrears arose in 1986 whereas that of leave pay arose in 1983 to 1986.

The Claimant seeks payment of Kshs.5,833/= being payment in lieu of notice. He also claims one month salary for the month of August, 1986, which he says was not paid.

The Claimant told the court he was not granted annual leave between 1983 – 1986. He claims payment in lieu thereof in the sum of Kshs.31,942/=. He was denied leave due to shortage of manpower.

Furthermore he claims salary for the period 1<sup>st</sup> September, to 10<sup>th</sup> September, 1986 when he resigned in the sum of Kshs.2,011/48.

He told the court in his sworn testimony that he had contributed to the Local Authority Pension Scheme a sum of Kshs.8,244/= which was to be paid. He told the court that he had also contributed Kshs.2,160/= to the Provident Fund. He therefore claims his retirement benefits accordingly.

He now works as a private contractor.

Other than the preliminary objection raised by the Respondent in its Statement of defence and written submissions, the Respondent denies the substantive claims made by the Claimant, emphasising that the Claimant’s terminal dues were forwarded to him via a letter dated 29<sup>th</sup> September, 1991.

The Claimant admitted that he received this letter. The Respondent put it to him under cross-examination that his terminal dues in the sum of Kshs.33,470/30 were forwarded to Stima SACCO to cover the loan he had taken. The Claimant however denies that he had any loan with the Stima SACCO.

In the Industrial Court **Cause No. 1201 of 2012, Banking Insurance and Finance Union (K) -v- Bank of India** this court while dealing with the issue of limitation stated:

**“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.”**

In the present case, no leave to extend the period in which to file the case was sought prior to its filing.

In any event, **Sections 27 and 28** of the Limitations of Actions Act Cap 22 limits extension of time for filing cases to actions based on negligence, nuisance or breach of duty but not contracts.

In the case of **Director Ltd vs. Samani [1995 – 1998] 1 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, in 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 based 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.”**

Relying on the authority of this case, I concluded and I do today;

*“The court has therefore no discretion in this matter. Furthermore this is not a mere technicality. It is a jurisdictional issue.”*

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** where he stated at page 2 as follows:

*“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 the holding thus by the very brief ruling by Justice Visram in Timothy M. M. Mukalu vs. Reuben Alubale Shiramba & 3 others [2005] e KLR to the effect that Sections 27 and 28 of the Limitations of Actions Act are only applicable on actions based negligence.”*

The delay in the present case is so inordinate that this matter ought to have been raised at the first instance and dealt with by Hon. Justice Kosgey in his ruling.

As it is, the court lacks jurisdiction to entertain this matter as the same is statutory barred.

The judgment was reserved on 29<sup>th</sup> July, 2013. The court would have wished to deliver this judgment earlier than it has but for the large number of pending judgments that preceded it. We offer our apology in this respect.

It is so ordered.

***Dated and delivered at Nairobi this 21<sup>st</sup> day of November, 2013.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**