

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2309 OF 2013

DAVID MUSUWIKI MUSUNDI.....COMPLAINANT

VERSUS

CFC STANBIC BANK.....RESPONDENT

RULING

1. The Preliminary objection herein was raised during the trial. It is in relation to limitation. The Respondent through its counsel Mr. Okwiri contends that the Claim is time barred under Section 90 of the Employment Act and Section 41 of the Limitation of Actions Act. The Respondent avers the employment of the Claimant was terminated in 2002. He was paid his terminal benefits in 2002 from the Fund Administrators. Mr. Okwiri submitted that the Claimant knew the employment ceased in 2002. Counsel stated that Section 90 requires a claim to be brought within 3 years while Claims on contract need to be filed within 6 years as per the Limitation of Actions Act. He cited the case of **Peter Nyamai & 7 Others v. M. J. Clarke Limited [2013] eKLR** in support.
2. The Claimant through Mr. Ondabu opposed the Preliminary objection. He referred to Section 4 (a) of the Limitation of Action Act and said that this is a Claim on contract. He submitted that a the period of 6 years starts to run when the cause of action arises. He submitted that the cause of action arose on 7th June 2012 upon conclusion of Criminal Appeal No. 188 of 2008. The Claimant was suspended on 7th March 2002, and the Claimant was told to await communication and to date there has been no communication. There is no letter of termination. There is nothing on record to show that the Claimant sought payment of pension. Mr. Ondabu relied on the case of **Kenya Plantation & Agricultural Workers Union v. Mununga Leaf Base [2013] eKLR** where the issue of cause of action arose. He submitted that the case cited by Counsel for the Respondent was distinguishable.
3. In a brief reprise Mr. Okwiri submitted that the case of **KPAWU v. Mununga** cited by the Claimant is distinguishable as in that case there was a conciliation process during which time did not run. He urged the Court to uphold the finding of the Court of Appeal in **Divecon v. Samani** cited by the Hon. Mr. Justice Radido in **Nyamai & Others v. Clarke** above.
4. The Employment Act, 2007 makes no provision for the extension of time neither does it have a provision for the grant of leave to file a Claim out of time. That is to say, after the expiry of the 3 year period stated in Section 90 of the Act. The provisions of the Limitation of Actions Act would therefore come into play in relation to the extension or enlargement of time.
5. The Limitation of Actions Act makes provision that no cause of action shall be founded on contract upon expiry of 6 years from the date the cause of action accrued. In the case before me, the Claimant was suspended in 2002. He did not receive remuneration from February 2002. He was said to be on suspension. When the Claimant's house was on the verge of repossession to repay a loan he had taken on the house, he sought recourse to his pension dues to settle the sums owing.

6. Termination in the case before me was in the class known as constructive dismissal. The Claimant was not paid a salary for the months of March 2002 to December 2002. No salary was paid between January 2003 to December 2003. That was clearly a sign that the contract had come to an end. The treatment by the employer in failing to pay the employee a salary was sufficiently bad enough for the Claimant to regard himself as dismissed. In short, constructive dismissal occurs when the employer commits a fundamental breach of the contract. The employee was entitled to pay under the contract and non-payment of salary constituted a fundamental breach. Section 18(5) of the Employment Act makes provision on termination of a contract of service by effluxion of time.
7. The foregoing is clear that the contract was terminated. What is the date of termination? Having regard to the suspension, a period of 6 months would have sufficed to alert the Claimant that his contract was seriously under threat. All being constant, there conceivably could not have been any employment subsisting as at December 2003. The Claimant ought to have moved Court within the outer limits of a 6 year period from 2003. The last date for filing the Claim would have been December 2009.
8. The decision in **Peter Nyamai & 7 Others v. M. J. Clarke Limited [2013] eKLR** where the Hon. Justice Radido held that there is no scope for extension of time is persuasive, I will follow it. The Claim herein is time barred and is fit for dismissal. I will however exercise my discretion and order that each party bears their own costs.

Dated, signed and delivered this 1st day of November 2013

Nzioki wa Makau

JUDGE