



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI  
CAUSE NO. 1623 OF 2012

HERBERT GODEKA .....CLAIMANT

VERSUS

MIDDLE TOWN FOREX BUREAU LIMITED.....RESPONDENT

**RULING**

1. The Respondent/Applicant herein filed an Application dated 16<sup>th</sup> July 2013 seeking to have the suit struck out for being barred by limitation. The Application was opposed.
2. The Respondent/Applicant submitted that the Claimant/Respondent was interdicted on 31<sup>st</sup> August 2006 and terminated on 6<sup>th</sup> November 2006. The Claimant filed the Memorandum of Claim on 13<sup>th</sup> September 2012. The Respondent/Applicant thus submitted that the claim was time barred as the Employment Act 2007 Section 90 set a time limit of 3 years. The Respondent Applicant sought the striking out of the Claim with costs to the Respondent.
3. The Claimant/Respondent did not oppose the Application and did not file any Grounds in Opposition or a Replying Affidavit. No submissions were filed in respect of the Claimant/Respondent. Be that as it may, I must consider the Application and determine it even though it is unopposed.
4. Section 90 of the Employment Act 2007 provides as follows:- *Notwithstanding the provisions of section 4(1) of the Limitation 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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.*
5. That is what the law provided in the post Employment Act 2007 period. Prior to the legal regime brought in by the amendments in the law in 2007, the Limitation of Actions Act was what applied as the Employment Act cap 229 (now repealed) did not make any provision on limitation of actions founded on contract.
6. The Limitation of Actions Act Section 4(1) makes provision on limitation as follows:-
  4. (1) *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).....

7. Nothing in the Employment Act 2007 Section 90 and Section 4(1) of the Limitation of Actions Act provides for a different interpretation. The Employment Act was assented to on 22<sup>nd</sup> October 2007 and came into effect on 26<sup>th</sup> October 2007. It therefore affected all causes of action accruing on or after 26<sup>th</sup> October 2007. The period before 26<sup>th</sup> October 2007 was governed by the Limitation of Actions Act.
8. It could not have been the intention of Parliament to take away a legal right that had accrued to the Claimant. That cannot be the intended result of legislation. Laws take effect prospectively except where expressly stated to have retrospective effect. This was not done in respect to the Employment Act 2007. It applied prospectively and not retrospectively.
9. My brother the Hon. Radido J. has had occasion to delve into the issue of the applicability of the regimes in 2007 and pre 2007 and I would refer parties to the decision of the learned Judge in **Cause No. 1418 of 2010 – Charles Kiruthi Mwangi v. G4S Security** in which he held that the application of Section 90 of the Employment Act was not retrospective in application. I am in agreement.
10. The case cited being ***Meshack Ageng’o Omondi v. Eldoret Municipal Council & Anor. [2012] eKLR*** is not binding on this Court and is not persuasive.
11. The case of ***Peter Nyamai & 7 Others v. MJ Clarke Limited [2013] eKLR*** is not on all fours with the present case. In the ***Peter Nyamai*** case limitation had set in and Justice Radido correctly held that there was no room to extend time. Once limitation sets in there is no remedy.
12. The Claimant herein was entitled to commence his suit within 6 years and the limitation would have set in on 6<sup>th</sup> November 2012. He filed the suit on 13<sup>th</sup> September 2009 which was almost two months before limitation set in. The suit is properly filed and was not barred by limitation. The Respondent/Applicant’s Application is thus not fit for grant and is dismissed with costs.

It is so ordered.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of December 2013**

**Nzioki wa Makau**

**JUDGE**