



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1206 of 2010**

**CHARLES ODHIAMBO KISERA..... APPLICANT**

**VS**

**THE MAKINI SCHOOL ..... RESPONDENT**

**RULING**

The application before court is the one dated 3<sup>rd</sup> November, 2010 and filed on 25<sup>th</sup> February 2011. It was filed by the Respondent Applicant herein under Section 4 (1) (a) of the Limitation of Claims Act and other enabling provisions of law. The Applicant seeks order that:

1. The claim herein be struck out with costs to the Respondent (Applicant);
2. The costs of this Application be borne by the Claimant;

**On grounds that**

- (a) The claim is time barred;
- (b) The claim is otherwise an abuse of the court process, frivolous and vexatious

**IN THE ALTERNATIVE** the Applicant prays that:

3. The time within which to file and serve a copy of the Memorandum of Claim be extended by fourteen (14) days from the date this order.

**On grounds that:**

- (a) The Applicant was served with the Notice of Summons and the Claim both dated 7<sup>th</sup> October 2010 on 30<sup>th</sup> October 2010 after the prescribed period for lodgment of a reply had expired.

The application is grounded upon the grounds that:

- (a) The claim herein is time barred
- (b) That the claim is otherwise an abuse of the court process frivolous and vexations.

The Claimant Respondent herein filed his replying affidavit in respect of this claim and filed it on 18<sup>th</sup> March, 2011.

In a nutshell, the Claimant filed his memorandum of claim on 8<sup>th</sup> October, 2010 seeking orders for payment of some terminal dues as particularized. In his memorandum he claimed that he was employed by the Respondent herein sometime in 1999 and dismissed on 6<sup>th</sup> March 2004.

It is in respect of this claim the Respondent filed this application stating that it is time barred. As per the Respondent's Notice of Motion, the claim is time barred under the Limitation of Actions Act. The Claimant having been employed in 1999 August and terminated on 6<sup>th</sup> May, 2004, the Respondent should have filed this suit within 6 years from the date of termination of 6<sup>th</sup> May, 2004, and this translates to 5<sup>th</sup> May, 2010. However the Claimant filed this suit on 8<sup>th</sup> October, 2010 five months after the expiry of the 6 years.

Section 4 (1) (a) of the Limitation of Action Act Cap 22 Laws of Kenya states that:

***“(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;”***

Section 90 of the Employment Act on the other hand states that;

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

The claim having been founded on contract must have been filed within 6 years from the time the cause of action arose. This claim ought to have been lodged by 5<sup>th</sup> May, 2010. The Claimant failed to do so and he should have sought an extension of time from the court as provided for under Section 28 of Cap.22 which provides as follows:

***“28. (1) An application for the leave of the court for the purposes of Section 27 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action”.***

Since the claim was filed out of the expected time, I agree with the Respondent's contention and allow their application and:

1. Strike out this claimant's claim accordingly.
2. Each party will bear its costs.

Dated, signed and delivered this 13<sup>th</sup> day of November, 2012.

**HELLEN WASILWA**

**JUDGE**

**Appearances:**

Claimant present in person

Mr. Mageto holding brief for

Hayanga & Company Advocates for Respondent

Rachel Gichuki

Court Clerk