



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC. CAUSE NO. 4 OF 2012

(Originally Nairobi High Court Misc Appl No. 333 of 2010)

IN THE MATTER OF: AN APPLICATION TO COMMENCE SUIT OUT OF TIME

AND

IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP 22

BETWEEN

KIYAI ABDULLA JILLO

BOY BARASA MAUNGO

(suing on their own behalf and

on behalf of 114 employees of)

TANA BASIN ROAD PROJECT.....APPLICANTS

v

TANA BASIN ROAD PROJECT.....1st RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

RULING NO. 2

1. For determination is an application dated 30 March 2011 by the applicants seeking orders

1. ...

2. **THAT** this Honourable Court be pleased to vary and extend the 14 days period directed herein by the Honourable Justice Dulu for lodging the applicants suit to 11th March, 2011.

3. **THAT** this Honourable Court be pleased to issue an order transferring this suit to the Industrial Court Registry for expeditious

disposal.

4. **THAT** the costs of this application be in the cause.

2. 4 Judges of this Court have handled this file/application and one tie or the other and it appears that they have given inconsistent directions/orders because the parties did not alert them as to the history of the file).

3. The applicants initially moved the High Court on 14 July 2010 seeking leave to commence legal action out of time against the Respondents.

4. When the application came up on 23 July 2010, it was adjourned because the applicants' advocate was reported ill.

5. The application next came up for hearing on 1 October 2010 and it was again adjourned at the instance of the applicants' advocate. The same scenario played out on 8 November 2010.

6. On 11 March 2011, the High Court heard the application for leave, and allowed it with a direction that the suit be filed within 14 days.

7. The applicants did not comply and on 5 April 2011, they filed the application dated 30 March 2011 and now under consideration, which application was transferred to this Court through an order of 27 January 2012.

8. The application was placed severally before the Court culminating in a ruling on 21 November 2012 (on file but not signed) in which the Court directed that the application be heard on 31 January 2013 (in respect of order 2). It was not heard and on 5 July 2013, the Court gave fresh directions as to its hearing.

9. On 19 February 2014, the applicants filed a Statement of Claim purportedly pursuant to leave of Court (date when leave was granted was not disclosed). It is also inconceivable that a substantive Cause would be filed under a miscellaneous file if leave had been granted).

10. Things went quiet until the applicants moved Court on 7 April 2018, seeking leave to amend the *Memorandum of Claim*.

11. On 26 May 2018, the Respondents filed an application seeking an order that there was no suit before the Court among other orders.

12. Considering the state of confusion in the file, the Court directed that it would hear the parties on the applicants' motion dated 30 March 2011 on 23 July 2018.

Evaluation

13. The law on limitation in this country and more so in causes of action anchored on contract is now well settled.

14. In *Divecon v Samani* (1995-1998) EA 48 the Court of Appeal held that to us, the meaning of the wording of section 4(1)is clear beyond any doubt. It means that no one shall have the right or power to bring 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. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that "the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked...

15. A limitation provision or statute vests or gives to a party/defendant a right, and it is not just a procedural right but a substantive

right. It is the cause of action which is barred and not the remedy.

16. In light of the binding authority from the Court of Appeal that time cannot be extended or leave granted in contractual causes of action, this Court has to down its tools. The Court therefore declines the invitation by the applicants.

17. The application dated 30 March 2011 is dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 16th day of November 2018.

Radido Stephen

Judge

Appearances

For applicants Mr. Amalemba instructed by Amalemba & Associates Advocates

For Respondents Ms. Wangeci Gichangi, State Counsel, Office of the Attorney General

Court Assistant Lindsey



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