



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 327 OF 2016**

**(Originally Kisumu CMCC No. 258 Of 2013)**

**STEADMAN ONYANGO OGENGA..... CLAIMANT**

**VERSUS**

**KENYA PIPELINE CO LTD .....RESPONDENT**

**JUDGMENT**

1. This Cause was heard on 23 March 2021 when Steadman Onyango Ogenga (the Claimant) testified and on 15 November 2021, when a Senior Human Resource Officer with Kenya Pipeline Co Ltd (the Respondent) testified.
2. The Claimant filed his submissions on 30 November 2021, while the Respondent filed its submissions on 20 January 2022
3. The Court has considered the pleadings, evidence and submissions and has adopted the Issues as set out in the submissions.

**Limitation**

4. The Respondent contended that the action advanced by the Claimant was statute barred by virtue of section 90 of the Employment Act, 2007 because the cause of action arose in 2002, while action was commenced in 2013.
5. The Claimant did not plead the date the cause of action accrued in the Complaint filed before the Chief Magistrates Court on 14 June 2013 (it is the suit which was transferred to this Court).
6. The witness statement accompanying the Complaint did also not set out the date the cause of action arose.
7. In the Amended Complaint filed on 19 March 2021 and admitted by this Court on 23 March 2021, the date of the accrual of action was again not pleaded.
8. However, during the hearing, the Claimant produced exhibits suggesting that the cause of action arose on or around 29 January 2002.
9. The Employment Act, 2007 came into operation on 2 June 2008, and therefore it would not be the limitation law applicable to contractual actions which accrued in 2002.
10. The statute which prescribed limitation for contractual claims in 2002 was the Limitation of Actions Act and it provided at

section 4(1)(a) for a limitation of 6-years.

11. The Claimant filed his action some 11-years after the accrual of cause of action, and the Court finds that the instant action cannot survive.

12. On the assumption that the Court is wrong on the conclusion on limitation, it would now consider another objection raised by the Respondent and which objection also goes to jurisdiction.

#### **Exhaustion of alternative dispute resolution avenues**

13. The Respondent also objected to the competency of the Cause on the ground that under the HIV and AIDs Prevention and Control Act, No. 6 of 2006, the Claimant's first port of call should have been the HIV and AIDS Tribunal established under section 25 of the Act.

14. The Act commenced on 30 December 2009 before the Claimant moved the Court.

15. Section 26 of the Act sets out the jurisdiction of the Tribunal and under section 31 of the Act the jurisdiction include claims of discrimination in the workplace and denial of employment on the basis of HIV status.

16. It is not in doubt that the gravamen of the Claimant's action was alleged discrimination on the basis of HIV status and purported coercion to undergo HIV test prior to employment.

17. In terms of the Act and considering that the Claimant moved the Court after the commencement of the Act, he should have approached the Tribunal in the first instance.

18. The Court of Appeal had occasion to address the question of exhaustion of alternative dispute resolution mechanisms in *Speaker of the National Assembly v Karume* (2008) 1KLR 425, wherein it stated:

Irrespective of the practical difficulties enumerated... these should not in our view be used as a justification for circumventing the statutory procedure... in our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

19. The Claimant moved this Court before exhausting the avenues made available to him under the HIV and AIDS Prevention and Control Act and, again on that ground, the Court declines jurisdiction.

20. With the conclusions on jurisdiction, it would not be prudent for the Court to examine the merits of the Cause save to note that the Claimant must have been alive to the jurisdictional questions hence his hesitation in setting out succinctly in the pleadings, the date when the alleged cause of action accrued.

21. It is also not lost to the Court that the Claimant had approached the High Court in Mombasa through a Petition raising the same cause of action in 2006, but he silently failed to disclose the status of that Petition in this Cause.

#### **Whether dispute concerns employer/employee relationship**

22. The Respondent further raised an objection on the Court's jurisdiction on the basis that an employer/employee relationship had not come into force between it and the Claimant and therefore by dint of section 12 of the Employment and Labour Relations Court Act, the Court had no jurisdiction.

23. Under the common law, an employment relationship starts upon the prospective employee accepting an offer of employment regardless of the fact that the employee has not physically started work or signed a formal contract.

24. The Respondent herein had not made any job offer to the Claimant.

25. Because of the conclusions on the first two jurisdictional questions, the Court will not say any more.

### **Conclusion and Orders**

26. From the foregoing, the Court declines jurisdiction and the Cause is dismissed with costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2022**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Claimant Mwamu & Co. Advocates

For Respondent Kiangoi Mitema & Co. Advocates

Court Assistant Chrispo Aura



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