



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APL. 23 OF 2016

ABDULRAHMAN OMAR.....APPLICANT

VERSUS

KENYA RED CROSS.....RESPONDENT

RULING

1. The applicant has by the Notice of Motion dated 22.01.2016 prayed for orders for enlargement of time to enable him file a suit arising out of an alleged injury he suffered while he was engaged in the course of his duties as an employee of the Respondent on the 3.4.2012.
2. In an attempt to discharge his onus of explaining the delay leading to the lapse of time, applicant has explained that having been injured on the treatment till 31.12.2013 when he was terminated. However the letter dated 27.11.2013 show that he was never terminated but his contract terms expired and was never renewed.
3. There is other reason advanced for failure to file suit in time being that there have been negotiations between the applicant and the Respondent's and insurer, engaged in negotiations with the insurers promising to pay as evidenced by the Occupational Safety Officer's letter of 4.6.2014 assessing the applicant compensation under Work Injury Benefit Act at kshs. 241,333,30.
4. Although this application is by law ought to proceed *ex parte* by virtue of the provisions of section 28 Limitation of Actions Act, whether or not to enlarge time is an exercise of judicial discretion which must be exercised upon reasons and set principles.

Section 28 Limitation of Actions Act provide:-

“ (i) 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.

(ii) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect or any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient:-

(a) to establish that cause of action, apart from any defence under section 4(2); and

(b) to fulfil the requirements of section 27(2) in relation to that cause of action.”

5. The fundamental consideration therefore is what prevented the applicant from filing the suit in time and whether or not there is material fact relating to the cause of action which was outside the knowledge of the applicant.

6. In the instant case, the only reason advanced is that the applicant was undergoing treatment then negotiations to settle followed leading to conciliation and determination and assessment of compensation by the County Occupational Safety Officer, Mombasa on 4.6.2014. That assessment was as well be the basis of a suit but not is for advise by the legal advisors not this court.

7. It is now well settled that an employee suffering injuries in the course of employment is entitled to pursue remedies in both tort and contract, depending on how the matter is pleaded. In **Kenya Cargo Handling Services Ltd. -vs- Ingwang [1985] KLR 503** where the court of appeal upheld a decision by the High Court to the effect that:-

“...this suit is based on contract and tort the plaintiff can pursue his remedies on contract of employment. The period of limitation in respect of a case of action founded on contract had not expired when the suit was filed.”

and later in the Judgment it said:-

“...A claim for personal injury arising in the cause of employment may be the subject of an action either for breach of an implied term in the contract of employment or in tort simpliciter and a claimant may make an election as which of those actions he intends to pursue.”

8. Those words resonate well with the facts of the case before me. The accident/incident leading to the suit now sought to be pursued took place on the 03.04.2012. Indeed for a claim founded on tort of negligence time lapsed on 2.4.2015 while a claim grounded on an implied term in the contract of employment still subsists to date.

9. I have taken notice that there appear to have been the statutory process of assessing the applicants compensation due which was completed in 4.6.2015. It cannot be said that the delay, between that date and when this application was filed was unreasonable. The Applicant was entitled to expect good faith on the part of the Respondent to settle the assessed compensation. Now that the Respondent seen not ready, the Respondent should not be allowed to reap the benefit of its failure to comply with the law by strictly interpreting the law permitting extension of time.

10. In the interests of substantial justice, I allow the application for enlargement of time to file a suit founded on tort, if the applicant shall intend to go that route, and order the time is enlarged for a period of 30 days from the date of this ruling.

11. I order that costs be in the intended suit.

Dated, signed and delivered at Mombasa this 29th day of April 2016.

Before Hon. Justice Thande in the presence of:-

Ms.Maina for Plaintiff/Applicant

No appearance for Defendant/Respondent

P.J.O.OTIENO

JUDGE