



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Cause 2 of 2013

BONIFACE INONDI OTIENO

CLAIMANT

v

MEHTA ELECTRICAL LIMITED

RESPONDENT

RULING

1. Boniface Inondi Otieno (the Applicant) filed a Notice of Motion on 21 February 2013 under Order 51 of the Civil Procedure Rules and section 1A, 1B & 3A of the Civil Procedure Act.
2. The Applicant was seeking orders that the Court exercises its discretion to allow him file a Claim out of time and that the Memorandum of Claim attached to the Motion be deemed as duly filed.
3. It appears the Respondent got wind of the application and filed a Memorandum of Appearance on 11 March 2013 and when the application was placed before Justice Makau on 12 March 2013, it indicated that it required to respond. The Judge allowed it time to respond and adjourned the hearing of the application to 20 March 2013. On this day, when the application was called before me there was no appearance for the Respondent and the application proceeded ex parte.
4. After I had completed a draft of this ruling my attention was brought to a Reply to Memorandum of Claim filed by the Respondent on 19 March 2013.
5. The applicant on the face of the application and in the supporting affidavit deposed to the reasons why he was seeking leave to file the Claim out of time. I will not address myself to those reasons because of the view I have taken of the matter.
6. However I will not consider the application in light of the cited provisions of the Civil Procedure Act and Rules but in light of the Limitation of Actions Act and a decision of the Court of Appeal which in my view set out the applicable legal principles in this type of application.
7. I have in the recent past had occasion to deal with applications seeking extension of time or grant of leave to file a Claim out of time. Some of the cases in this regard are Industrial Court of Kenya at Mombasa, *Misc Cause No. 2 of 2012, Maria Machochi v Total Kenya Ltd* (2013) eKLR and Industrial Court of Kenya at Mombasa, *Misc Civil Application No. 1 of 2013, Michael Milisi v Kenya Ports Authority*.
8. The first thing I need to state is that I have taken the view that the issue now before me is a jurisdictional issue and not just procedural and arrived at the conclusion that this Court has no jurisdiction

nor discretion to extend time or grant leave to file a Claim out of time in respect of causes of action based on breach of employment contract.

9. In the *Milisi* case I stated thus:

A case which will clarify the position under discussion is the Court of Appeal decision in Divecon v Samani (1995-1998) EA 48. I must however mention that the cause of action in this instant was brought under tort though, the Court of Appeal mentioned that the trial Court had found that the cause of action was founded on both tort and contract. The Court of Appeal nevertheless went ahead to consider the grant of leave or extension of time in respect of causes of action based on contract.

In the Samani case which I hold is binding upon this Court, the Court of Appeal stated that

to us, the meaning of the wording of section 4(1) that:.....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”. (emphasis mine)

In the final analysis the Court of Appeal held that ‘the trial judge erred in holding that the wording of section 4(1) of the Limitation of Actions Act implied that a court had the discretion to extend time in deserving cases regarding actions in contract. The words of section 4(1) were clear beyond any doubt and meant that no one had the right or power to bring an action founded on contract after the end of six years from the date on which the cause of action accrued....’.

In my considered opinion, the holding by the Court of Appeal stated the correct legal principle applicable in this type of case and I therefore do hold that this Court has no jurisdiction nor discretion to extend time or grant leave of Court to file a case grounded on breach of employment contract where the limitation time set out in section 90 of the Employment Act has expired.

10. In the *Maria Machocho* case I stated that

*In my view sections 27 and 28 of the Limitation of Actions Act are not applicable in the case under discussion because the cause of action is not based on negligence, nuisance or breach of duty. I take comfort in holding thus by the very brief ruling by Justice Visram in *Timothy M Mukalo v Reuben Alubale Shiramba & 3 others* [2005] eKLR to the effect that sections 27 and 28 of the Limitation of Actions Act are only applicable on actions based on negligence. I would add to actions based on negligence, actions based on nuisance and breach of duty.*

11. The Applicants cause of action being based on breach of the employment contract in my view therefore falls squarely under the discussion in the cited cases.

12. The consequence of the foregoing is that it is my considered view that I don't have the jurisdiction or discretion to extend time or grant leave to file the Claim out of time.

13. The Notice of Motion filed in Court on 21 February 2013 is therefore dismissed with no order as to costs.

Dated, delivered and signed in open Court in Mombasa on this 12th day of April 2013.

Justice Radido Stephen
Judge

Appearances

Boniface Inondi Otieno

Claimant in person