



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

**IN THE MATTER OF: LEAVE UNDER SECTION 27 OF THE LIMITATION OF ACTIONS
ACT (CAP. 22, LAWS OF KENYA)**

-AND-

IN THE MATTER OF: LEAVE TO FILE SUIT OUT OF TIME

-BETWEEN-

NAPOLEON ODIDA.....APPLICANT

-AND-

- 1. MALINDI PROPERTIES LIMITED [formerly trading as Blue Marlin Hotel, Malindi]**
- 2. MALINDI INVESTMENTS LIMITED [formerly trading as Lawfords Beach Club]**
- 3. CARSLAKE NOMINEES LIMITED [t/a Diani Sea Resort]
.....RESPONDENTS**

RULING

The plaintiff moved the Court by *ex parte* Originating Summons dated **17th March, 2010**, brought under Order XXXVI, Rule 3C(1) of the earlier edition of the Civil Procedure Rules, s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya), and s.27 of the Limitation of Actions Act (Cap.22, Laws of Kenya).

The application carries the following three prayers:

- (i) the Court do grant leave to the applicant to file suit out of time;*
- (ii) the annexed draft plaint (Marked "A") be deemed to have been duly filed, upon payment of the requisite Court fees;*
- (iii) costs be provided for.*

The grounds for the application are stated as follows:

- (a)the applicant’s suit is time-barred, under the provisions of the Limitation of Actions Act (Cap.22);*
- (b)the applicant is desirous to pursue his claim against the respondent, which claim has high chances of success;*
- (c) the delay in filing suit was caused by proceedings taken out by the applicant through the Advocates*

Complaints Commission, on a misunderstanding that was, in the event, amicably resolved;

(d)the applicant’s determination to pursue the claim against the respondent is manifest.

Relevant evidential information is set out in the applicant’s supporting affidavit, sworn on **17th March, 2010** – the content of which may be summarized herein.

The deponent deposes that the claim in question had arisen in **2002**, when he left the employ of the respondent without being paid his terminal dues and, since then, a period of *six years* has elapsed. He had lodged a complaint against his Advocates on record, with the Advocates Complaints Commission whose motions took time, rendering it impossible to lodge suit timeously. The respondent had been aware of the gravamen, through the deponent’s Advocate’s letter of **25th May, 2007**; and through the applicant’s letter to the respondent of **9th October, 2009** which indicated that the problem of representation by counsel in this matter had now been resolved.

The deponent avers that the delay in lodging his claim was “*not deliberate and [he is] still intent on pursuing [his] claim as against the defendants.*”

Learned counsel, **Dr. Khaminwa** who presented the applicant’s case in Court, defined the cause of action as a claim for severance pay “*totalling Kshs.157,000/= being 15 days’ salary for each of the 9 years [of service].*” The applicant intends to sue the three respondents jointly and severally: for the three entities share directorships, and the plaintiff gave his service to any of the respondents, as directed.

Learned counsel urged that while the suit is certainly time-barred, the applicant “*is desirous of pursuing his claim against the respondents*”; and, the delay in filing suit “*is justified on the key factor that the applicant had instituted extra-judicial proceedings before a statutory tribunal, being the Complaints Commission.*” By the time the proceedings before the said Commission were determined, “*a substantial period of time out of the statutory [time-limit].....had lapsed.*”

Counsel proposed that in the calculation of time, the time taken before the Complaints Commission be excluded. Counsel set possible base-lines for the calculation of time as follows:

(i) date when cause of action arose – 2nd October, 2002;

(ii) date when matter was referred to Advocates Complaints Commission – 3rd March, 2008;

(iii) date when applicant reinstated his instructions to his Advocates – 9th October, 2009;

(iv) date when this application was brought – 16th March, 2010.

The cause of action, which is *contract*, would have been barred *six years* from **2nd March, 2002** – i.e., as at **2nd March, 2008**.

While **Dr. Khaminwa** has proposed specific time-frames to guide this Court in respect of the running of time, as *per* the Limitation of Actions Act (Cap.22), his invocation of the Court’s discretion under s.3A of the Civil Procedure Act (Cap.21) dictates that the line of *principle* be accorded a premium.

The applicant has shown concern for issues of *rights* by confronting actions of the employer bearing on contractual terms; and he also committed his time to the resolution of issues in the Advocate-client relationship, insofar as this touched on the grievance herein. Firstly, the original grievance *should*, in principle, be tested and resolved – as this strengthens a “rights” culture, apart from clearing the applicant’s own gravamen. While the Limitation of Actions Act (Cap.22) is an important guide in the field of play, in the exercise of justiciable rights, the Court is entrusted with a *discretion* to grant exceptions, for cause. I have considered the fact that the applicant is clearly intent on pursuing the justiciable issues in his grievance, and the fact that delay in lodging suit arose from the motions of a

statutory body regulating the Advocate-client relationship. On that basis I consider that it is more constructive to err on the side of an opportunity to resolve the question, than on the side of inaction.

I will make Orders as follows:

(1) Leave is hereby granted to the applicant to file suit out of time.

(2) The applicant's draft plaint annexed to this application and identified by the mark "A", is hereby adopted as the applicant's cause herein, subject to payment of the requisite Registry charges within 21 days of the date hereof.

(3) The costs of this application shall be costs in the cause.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 12th day of March, 2012.

**MAUREEN ODERO
JUDGE**