



**Kathanga v Oigara & 2 others (Miscellaneous Application
E783 of 2023) [2024] KEHC 8966 (KLR) (Civ) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION E783 OF 2023

JN MULWA, J

JULY 25, 2024

BETWEEN

PETER KATHANGA PLAINTIFF

AND

JOSHUA OIGARA 1ST DEFENDANT

KCB GROUP PLC 2ND DEFENDANT

KCB BANK (K) LTD 3RD DEFENDANT

RULING

1. By a Motion dated 6/09/2023 the Applicant seeks courts leave to file an intended suit out of time as per a draft plaint annexed thereto. It is premised on provisions of Order 37 Rule 6 of the Civil Procedure Rules (CPR) and supported by a Supporting and Supplementary Affidavit sworn by the applicant on 6/09/2023 and, notably exhibit no. "PK1" being a judgment in Nairobi ELRC cause No. E 456/2021 delivered on 17/03/2023.
2. In opposition to the motion, the Respondents filed grounds of opposition dated 17/11/2023 and a replying affidavit sworn on even date.
The applicant is represented by MS J. A. Guserwa & Co. Advocates while the Defendants/ Respondents are represented by M/S Muriu Mungai & Co. Advocates.
3. The applicant's case and submissions is that the delay was because he was waiting for the determination of his employment case that was pending in the Employment and Labour Relations Court, cause No. 456 of 2021 whose judgment was delivered on 17/03/2023 in his favour and therefore the delay was not intentional.



4. I have perused the ELRC cause judgment. It was a claim for unlawful termination of the applicant by KCB Group PLC. The applicant sought reliefs inter alia for Kshs. 144,738,471.50 and a declaration that his termination was unfair, unjustified, illegal null and void as well as reinstatement to his employment among others. In the Judgement Justice Rutto J made a finding that the Applicant's termination claim was neither unfair nor unlawful and dismissed the claim.

The Applicant in the ELRC cause was represented by MS. J. A. Guserwa & Co. Advocates.

5. By his submissions the applicant fully relied on the ELRC cause whose dismissal has been lodged in the court of appeal and yet to be determined.
6. Further the applicant relies on two authorities Re: Joyce Wamuhu Gitau Hcc. Misc. Appln. No. 348 of 2024 and Alnoor Mustaqueen V. Officer Commanding Police Station Garbatu & 2 others Misc. Application No. 34 of 2014 for the proposition that if delay is explained to courts satisfaction, leave ought to be granted for filing suit out of time.
7. By its supplementary submissions dated 9/05/2024 reasons for delay are enumerated as a pending suit against the 2nd Respondent, and continued financial suffering by the applicant and reputational loss.
8. By the Respondents grounds of opposition dated 17/11/2023, they seek that the application be struck out for being inordinately long and unexplained therefore guilty of laches, the cause of action having arisen on 27/05/2021, further submitting that the applicant was at all material times aware of the internal audit report of 30/09 and 10/10 2020 from which knowledge he filed the Employment and Labour Relations Court cause No. E456/2021; and therefore urges that seeking leave to file the intended suit in this court is an afterthought.
9. Additionally, it is submitted that the issues raised in the intended suit vide the draft plaint ought to have formed part of the issues in the ELRC cause and therefore, the application is incompetent and an abuse of the court process as well as being Resjudicata interms of Section 7 of the Civil Procedure Act.
10. Further, the Respondents oppose the application on grounds that Section 27 and 28 of the Limitations of Actions Act do not incorporate extension of time in defamation claims citing the case of Beth Wambui Mugo v. Charles Hornsby & 3 others [2019]eKLR, and have urged the court to find that it has no jurisdiction to extend time in a defamatory suit pursuant to Section 4 (2) of the Limitations of Actions Act and further that Order 37 Rule 6(1) provides for filing of application by way of an ex parte originating summons supported by an affidavit, not by a miscellaneous motion.
11. Also cited is the court of Appeal case of Wycliffe a Swanya V. Toyota East Africa & Another [2009] eKLR for holding that time starts running in a defamation suit when the slanderous remarks are made or published, as well as Bosire Ogero v. Royal Media Services [2015] wherein it was held that Section 27 (1) does not provide for extension of time to file suit out of time in defamation cases, among others.
12. The Respondents further submit that the dispute having arisen from an employer-employee relationship, the applicant ought to have included his claims in the ELRC Case and that this court (High Court) lacks jurisdiction in view of Article 162(2) of the constitution.
13. Issues that arise for determination, in my view are :-
 1. Whether this court has jurisdiction to extend time to file suit out of time in defamation causes of Action.
 2. If answer to (1) above is in the affirmative whether reasons for the delay have been sufficiently explained to the satisfaction of the court



3. Who bears costs of the application.
14. This application is premised on Rule 6 of Order 37 of Civil Procedure Rules.
It provides:
 - 6(1) An application under Section 27 of the *Limitations of Action Act* made before filing a suit shall be made ex-parte by Originating Summons Supported by Affidavit.
15. The Limitations of Actions Act Cap 22 at Section 27, is the substantive legislation in matters of extension of time to file suit out of time. It provides:-
 - (1) Section 4(2) does not afford a defence to an action founded on tort where:-
 - (a) The action is for damages for negligence, nuisance or breach of duty (where the duty exists by virtue of a contract or of a written law or independently of a contract or written law and.....
The applicant's claim that he seeks leave to file is not based on negligence, nuisance or breach of contract.
16. Section 4(2) of the Limitations of Actions Act provides:-

An action founded on tort may not be brought after the end of the three years from the date of which the cause of action accrued.

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

It is trite that a cause of action in libel or slander is a tort of defamation and ought to be instituted within twelve months from the date of its publication. In addition,

Section 20 of *Defamation Act*, Cap 36 Laws of Kenya provides that an action for libel or slander may not be brought after the end of twelve months from such date – see also Amendment of Section 4 of Cap 22.
17. There is no dispute that the intended suit if leave is granted is one for damages arising from what the applicant states to be false audit report that he states was malicious and manipulated with sole intention of maligning the applicants reputation made in bad faith and tainted with falsehoods as evidently stated at paragraphs 7, 8, 9, 10 of his draft plaint.
18. An action or defamation is therefore excluded from actions under Section 27 of the *Limitation of Actions Act* by dint of Section 4(2) (a) and (b).

The above position has been adopted by superior courts among them Wycliffe A. Swaruya v. Toyota East Africa (supra); Bosire Ogero V. Royal Media Services (supra) wherein the court held that: - the issue of limitation goes to the jurisdiction of the court to entertain claims if the matter is statute barred.
19. The court may and has discretion to extend time to file suit in tort for personal injuries arising from negligence, nuisance or breach of duty or contract. The applicant steered away from the above legal provisions only relying on Order 37 Rule 6 *CPR* which is a procedural provision under the Limitations of Actions Act.
20. The court in Beth Wambui Mugo v. Charles Hornsby & 3 others held that Section 27 envisages extension of time to claims in tort for personal injuries arising from negligence, nuisance or breach of



duty. In my view, Section 4(2) of Cap 22 does not grant or donate discretion to the court to extend time in defamation suits and shuts the court's jurisdiction to entertain such claims.

21. In the case of Alnoor Al Mustagqueen (supra) cited by the applicant, the cause of action was an industrial dispute. It fell squarely on breach of Article 40 of *the Constitution* being deprivation of goods to the petitioner.

It is therefore not applicable in the circumstances of this application.

Also cited is the case of Re-Joyce Wamuhu (Supra). This was an application to file suit out of time in respect of a road traffic accident, a tort of negligence. It fell under courts discretion provided at Section 27 of the Limitations of Actions Act. As a tort of negligence, the leave was granted.

22. At all material times, the applicant had all the relevant material facts as he proceeded to prosecute his case at the ELC Court. He was ably represented by counsel as rightfully submitted by the Respondents, the issues pleaded in the intended draft plaint ought to have been pleaded in the ELRC cause to form part of the issues sought for determination in the intended suit.

23. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya bars a party from re-litigating a matter that was directly and substantially in issue in the following manner:-

(7) No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

24. This doctrine of Resjudicata thus bars this court from re-litigating the ELRC cause under the intended suit should leave to file it out of time is granted. The doctrine was reiterated by the supreme Court of Kenya in the case of *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 others [2017]eKLR*. See also *Kingsley Kariuki & 2 Others (suing in their capacity as Chairman, Treasurer and Secretary of PAA (resent) vs. Residents Association [2024]2KLR*.

25. For the foregoing, the court finds that it lacks jurisdiction to extend time for filing a defamation suit against the respondents either jointly and/or severally as prayed for by the Applicant.

It is a further finding that the applicant has failed to sufficiently explain reasons for the delay to the satisfaction of the court.

The application dated 6/09/2023 is therefore dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2024.

JANET MULWA

JUDGE

