

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT ELDORET**

**MISC. APPLICATION NO. E001 OF 2025**

**KIPKEMBOI K. A. KIMORNA & 207 OTHERS .....**  
**APPLICANTS**

**VERSUS**

**KERIO VALLEY DEVELOPMENT AUTHORITY ..**  
**RESPONDENT**

**RULING**

1. The application herein is dated 20<sup>th</sup> January, 2025 and seeks orders that: -
  - i. That this Honourable Court be pleased to grant the Applicants leave to file suit against the Respondent out of time.
  - ii. That the costs of this application be provided for.
2. The application is filed by way or originating summons under Article 159 of the Constitution, section 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules.

3. The application is supported by the affidavit of **KIPKEMBOI K. A. KIMORNA** and the grounds on the face of the application to wit:

- a) That the Respondent is a Regional Development Authority (RDA) in Kenya established under the Kerio Valley Development Authority (KVDA) Act Cap 441 of the Laws of Kenya while the Applicants are its former employees.
- b) That sometimes in 2018, the Respondent rolled out a programme known as Voluntary Early Retirement (VER) in which it invited its employees, the Applicants included to participate.
- c) That under the said VER programme each employee who accepted the offer to retire early was entitled to retirement benefits which included 3 months payment in lieu of notice, severance pay, encashment of leave and off days, transport allowance and golden handshake.

- d) That after accepting the terms of the offer, the Applicants retirement benefits were varied to their disadvantage as a result of which the Respondent paid them less the amounts they had accepted.
- e) That the Applicants were aggrieved by the turn of events as a result of which they sought audience with the office of the Commission of Administrative Justice (CAJ) vide a complaint letter sometimes in 2019.
- f) That the office of CAJ held deliberations between the Applicants and the Respondent from 2019 until 31 July 2024 when the CAJ sent an email to the Applicants advising them that it lacked the mandate to handle the matter and proceeded to close the file.
- g) That the aforesaid deliberations kept the Applicants under the belief that the matter would be resolved amicably and by which time the time to file suit had lapsed.

- h) That the delay in filing suit was occasioned by the said deliberations in which the Respondent participated and in the circumstances the instant application is made in good faith having arisen out of events beyond the Applicant's control.
  - i) It is in the interest of justice and fairness that the application be allowed as prayed.
  - j) No prejudice will be occasioned on any of the parties if the orders sought are granted.
4. In the supporting affidavit Mr. Kimorna he reiterates the grounds on the face of the application.
5. The Respondent filed grounds of Opposition dated 7<sup>th</sup> April, 2025 in which it raises the following grounds:
- a) THAT the Application is time-barred as the claim arises from an employment dispute concerning voluntary early retirement benefits, which is governed by the Employment Act, 2007, and the Limitation of Actions Act (Cap 22, Laws of Kenya).Section 90 of the Employment Act, 2007, expressly provides that all claims based on a

contract of service must be filed within three (3) years from the date the cause of action arises. And is emphasized in *Gatobu v Roy Trans motors Ltd* (Cause E663 of 2023) [2024] KEELRC 745 (KLR) (8 April 2024)(Ruling).

- b) THAT the alleged deliberations before the Commission on Administrative Justice (CAJ) do not suspend or extend the limitation period under any statutory provision. The doctrine of continuing breach does not apply in this case, as the cause of action arose upon the Applicants' retirement in 2018, and any subsequent discussions did not revive an expired cause of action.
- c) THAT the Applicants had the duty to file suit on time and had an obligation to pursue their legal rights within the prescribed timelines. They cannot claim laches or indulgence due to their failure to act within the legally permitted period. Ignorance of the law is not a valid excuse for delay, and participation in negotiations does not

bar a litigant from taking steps to protect their legal rights in a timely manner.

d) THAT the Application is an abuse of court process as it seeks to unjustifiably override clear statutory provisions under the Employment Act, 2007, and the Limitation of Actions Act (Cap 22, Laws of Kenya). The Applicants, having failed to act within the prescribed legal time limits, cannot now use the court to resurrect a claim that is legally extinguished.

e) That on the foregoing we pray that the application be dismissed with costs to the respondents.

6. The application was disposed of by way of written submissions.

7. The Applicant submitted under the following heads:

a. Whether the court should grant leave to the Applicants to file their claims out of time, and

b. Whether the Applicants' intended claims are based on fraud against the Respondent hence are not time barred

8. On the first issue the Applicants contend that their cause of action is of a continuing nature and falls under the exceptions to section 90 of the Employment Act. They submit that they are not seeking remedy for unfair termination as their claim is in respect of Voluntary Retirement Benefits (VER) program rolled out by the Respondent and they are yet to receive their full dues.
9. The Applicants rely on the decision in ***The German School Society v Hega Ohany [2023] KECA 894*** as cited with approval in ***Thuri v Equity Bank Ltd (Cause E127 of 2023) [2024] KEELRC 1133 (KLR)*** where the court observed that one of the exceptions to the limitation of actions.
10. The Applicants further urged the court to consider the application against the provisions of Article 159(d) of the Constitution which requires the court to administer justice without undue regard to procedural technicalities and Article 159(b) which provides that justice should not be delayed. The Applicants further urged the court to apply section 1A and 3A of the Civil procedure Act which state that the overriding objective of the Court is to facilitate

just, expeditious, proportionate and affordable resolution of all disputes governed by the Act. According to the Applicants the overriding objective principles are applicable to extension of time.

11. The Applicants submit that in the case of ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR*** as cited with approval in ***Endarasha Farmers Cooperative Society Limited v Gichuki (Misc. Application No. E020 OF 2023)*** the Supreme Court established the principles to guide courts on applications for extension of time as follows:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

- 12. The Applicants submit that they have demonstrated that failure to file their claim earlier was accessioned by ongoing negotiations between 2019 and 31<sup>st</sup> July, 2024.
- 13. They submit that no prejudice would be suffered by the Respondent as a result of the exercise of discretion by this court in their favour which cannot be compensated with costs. They further submit that the Applicants came to court without unreasonable delay.
- 14. On the second issue the applicants submit that they were employees of the Respondent and were invited to participate in a Voluntary Early Retirement (VER) program.

That under the program each of them was entitled to 3 months' pay in lieu of notice, severance pay, encashment of leave, transport allowance and off-days and golden handshake.

15. The Applicants submit that after accepting the offer under VER their retirement benefits were varied to their disadvantage as a result of which the Respondent paid them less than what they had accepted. That in addition they were entitled to tax waiver on the VER package which was not paid to them by the Respondent.
16. The Applicants contend that this constitutes fraud which was discovered on 31<sup>st</sup> July, 2024 when the Commission of Administrative Justice to whom the issue was reported informed that Applicants that it lacked mandate to handle their grievances against the Respondent.
17. The Applicants contend that in light of the fraud their claims fall under the exceptions in section 26 of the Limitation of Actions Act.
18. For emphasis the Applicants placed reliance on the decision in ***Justus Tureti Obara v Peter Koipetai Nengiso [2014] eKLR.***

19. The Respondent filed submissions dated 23<sup>rd</sup> May, 2025. The Respondent raised a preliminary issue over the form of the application being that the Applicant **KIPKEMBOI K. A. KIMORNA** who is suing on behalf of others has not appended signed consents by the 207 persons he acts on behalf of. This in my view is a technicality that can be cured should the application succeed. It cannot be a ground to banish the Applicant out of the seat of justice. I will therefore not venture any further on the same.
20. On the substantive issues in the Application, the Respondent submits on 2 issues: whether the court should grant leave to the Applicants to file their claims out of time; and, whether the Applicants' intended claims are based on fraud hence not time barred.
21. On the first issue the Respondent submits that section 90 of the Employment Act provides in unqualified terms that no action under the Act or arising from a contract of service may be instituted after three years from the act complained of or after 12 months from cessation of continuing injury. The Respondent relies on the decision in ***Maria Mochocho v Total Kenya Ltd [2013] KEERLC***

**577** where the court observed that there is neither statutory jurisdiction nor discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out of the Employment Act.

22. The Respondent further relied on the decision in ***Michira & 41 others v Aegis Kenya Ltd t/a Leopard Beach Hotel***, where the court reiterated that it has no jurisdiction to extend time for filing suit out of time.
23. On the definition of continuing injury the Respondent relied on the decision in ***The German School Society v Hega Ohany*** (supra) which the Applicants have also relied on, where the court held that a claim premised on continuing injury must be filed within 12 months from cessation thereof. The Respondent submits that the breach complained of by the Applicants who retired in 2018 was a one-time event and does not constitute continuous injury. The Respondent points out that the Applicants went to the Commission on Administrative Justice (CAJ) where they filed their complaint.

24. The Respondent further relied on the decision in ***G4s Security Service (K) v Joseph Kamau & 468 others [2018] KECA 827 (KLR)*** where the court stated that unpaid terminal benefits do not constitute continuing injury and further that continuing injury claims must be filed within 12 months from the date the injury ceased.
25. The Respondent submits that the argument that the Applicants were waiting for CAJ to finalize deliberations before filing suit cannot aid them as the law is clear on the role of CAJ and on where claims such as those by the Applicants ought to be instituted. That ignorance as alleged by the Applicants does not amount to an excuse for an application for leave to file suit out of time.
26. The second issue as addressed by the Respondent in its submissions is whether the intended claims are based on fraud. The Respondent submits that the email attached to the application dated 9<sup>th</sup> July, 2024 does not disclose any fraud. That the email only communicated that judgment was entered in another suit and the CAJ did not have jurisdiction to handle the issue.

27. It is submitted that the Applicants have not pleaded any particulars of fraud that concealed the cause of action and that their reference to fraud or ignorance fall short of the level of proof required.

***Analysis and Determination***

28. I have considered the application together with the grounds in support thereof. I have further considered the grounds of opposition and the rival submissions of the parties. There is in my view only one issue that arises for determination, that is, whether the Applicants have persuaded the court that they are deserving of the orders sought for leave to file suit out of time.

29. Section 90 of the Employment Act provides for limitation of actions in claims arising out of the Act or related to employment relations as follows:

***90. Limitations***

***Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three***

**years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.**

30. Section 4 of the Limitation of Actions Act provides for limitation of actions in contracts as follows:

*Actions of contract and tort and certain other actions*

*(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—*

*(a) actions founded on contract;*

*(b) actions to enforce a recognizance;*

*(c) actions to enforce an award;*

*(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;*

*(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.*

31. The Act provides for extension of limitation period under sections at Part III thereof in the case of disability,

acknowledgement and part payment, fraud, mistake and ignorance of material facts.

32. The Applicants herein have applied for extension of limitation period on two grounds. The first is that their claim is a continuing wrong and therefore not affected by limitation period, and second, on grounds of fraud.
33. In the case of ***The German School Society v Hega Ohany*** the court stated that *“a claim premised on a continuing injury must be filed within 12 months after cessation.”*
34. The Applicants have stated that their claim arises out of a VER rolled out by the Respondent in 2018 and that their claim is in respect of discriminatory payments to those who were over 50 years and tax exemption on the payments made to them. The claims therefore arise out of terminal benefits paid in 2018.
35. In the words of Kipkemoi K. A Kimorna vide his affidavit in support of the application, there were deliberations between the parties which kept the Applicants under the belief that the matter would be resolved amicably and by

the time CAJ informed them that it lacked mandate the time for filing suit had lapsed.

36. The explanations given by the Applicants in the grounds in support of the application and in the supporting affidavit do not demonstrate either fraud or continuing injury.
37. Miscalculation or underpayment of terminal dues do not constitute a continuing injury. Such payments are an event and the cause of action accrues on the date of payment.
38. Even if the claims constituted a continuing injury, section 90 of the Act is clear that the limitation period would lapse 12 months from cessation thereof which is 12 months from the date of payment of the terminal dues.
39. I find that the claims of the Applicants herein do not constitute continuing injuries as they were terminal dues payable upon their retirement on VER program.
40. The second ground, that is fraud, was not sufficiently explained by the Applicants. The averment by the Applicants that the payments made to them was fraudulent has not been explained. No mention is made of

the actions that constituted fraud or the person(s) alleged to have committed the fraud.

41. I find that this a normal contractual employment claim for payment of terminal dues which should have been brought to court within 3 years as provided in section 90 of the Employment Act. There is no provision for extension of limitation period as has been held in numerous decisions of this court and in the Court of Appeal.
42. In the case of ***Divecon v Samani (1995-1998) EA 48*** the Court of Appeal made a definitive and binding position on extension of time in relation to limitation. The Court of Appeal stated as follows: -

***....to us, the meaning of the wording of section 4(1) 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'. (Underline mine)***

43. For these reasons I find no merit in the application and dismiss the same with no order as to costs.

**DATED, DELIVERED AND SIGNED  
THIS 9<sup>TH</sup> DAY OF OCTOBER, 2025.**

**M. ONYANGO  
JUDGE**