



REPUBLIC OF KENYA



KENYA LAW
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**Adulo v Wassuna (Civil Suit 1440 of 2015)
[2025] KEELRC 415 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 415 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL SUIT 1440 OF 2015**

JW KELI, J

FEBRUARY 12, 2025

BETWEEN

KIPSON GWEYAN ADULO APPLICANT

AND

AGGREY OMONDI WASSUNA RESPONDENT

RULING

1. The claimant /applicant vide originating summons dated 16th February 2024 brought under the Employment & Labour Relations Court (Procedure) Rules 2016; the *Limitation of Actions Act*; Order 37 (6) of Civil Procedure Rules; Article 25, 48, 50, 159 of Constitution and any other enabling provisions of law sought the following order of the court: -
 - a) Spent.
 - b) Spent.
 - c) That this application be consolidated and heard together with the Claimant's application dated 09/10/2023.
 - d) That the Court be pleased to re-open the Claimant's case.
 - e) That this Court be pleased to extend time to admit the Claim herewith on such terms as this Court may deem fit as per the annexed draft.
 - f) That the Respondent be cited for perjury; and be declared an unfit witness.
 - g) That the Claimant do file a further list of document and witness statement as per the annexure herewith.
 - h) That any other orders that meet the interest of justice do issue.



- i) That the costs of this application be in the cause.
2. The application was premised on the grounds on the face of the application supported by an Affidavit sworn by Kipson Gweyan Adulo, the Applicant. The grounds in the application are set out in verbatim as:-
1. That during the hearing the Respondent via an unfair ambush raised an objection on limitation of time in filing this claim.
 2. The despite protest by the Claimant and following Court's directions, the parties closed their hearing and the matter is due for judgment.
 3. It is in the interest of justice that the proceedings are stayed pending hearing of this application to avert prejudice.
 4. That the Claimant wherefore wishes that his claim is re-opened to enable the application herewith.
 5. That the Claimant further wishes that this application is consolidated and heard together with the application dated 09/10/2023.
 6. That the Claimant wishes that this Honourable court exercises his discretion to extend time for filing/admitting this claim.
 7. That during the period for filing the case there was judicially noticed moratorium following several ongoing petitions/disputes on whether the lower Court had the jurisdiction to hear employment and land disputes.
 8. That the said pending disputes/ causes caused confusion/ chaos /indecision on the access to justice /courts following the back and forth on the court with jurisdiction to hear employment and land matters.
 9. That the dispute was eventually settled in 2018 when the Appellate court upheld the Gazette Notice of the Chief Justice directing that Magistrate Courts could hear some employment and land dispute causes.
 10. That the during the aforesaid period the Claimant a lay person had no determined/ascertained avenue thereby was denied access to justice and fair hearing Thereof the Claimant's non-derogable right to a fundamental freedoms and a fair hearing were infringed.
 11. That the delay in filing this suit was therefore excusable.
 12. That the delay in filing the suit was not undue/excessive.
 13. That the Respondent has not suffered any prejudice; was notified and has put up a defense with witnesses.
 14. That it is therefore in the interest of justice that the application herewith is allowed in the interest of justice.
 15. 12.That during the aforesaid hearing; the Respondent lied under oath despite warning.
 16. The Respondent wilfully misrepresented that he never employed the Claimant; whereas the facts are that the Claimant ceased being employed by Radar Security in 2004 and had a new verbal agreement with Respondent who paid him directly by cash and for a period of over eight (8) years.



17. That indeed Radar have issued a certificate of service indicating that the Claimant ceased being their employee in 2004.
 18. That it is therefore in the interest of justice that the Respondent is impeached for the wilful false testimony and obstruction of justice; causing further prejudice to the Claimant.
 19. That further that after close of pleadings the Respondent without leave of court filed a witness statement and the Claimant was denied an opportunity to respond to it and wishes to vide a further statement and list of documents.
 20. That this shall enable a fair hearing.
 21. The prayers herewith shall enable a multiplicity of suits and are in conformity with the overriding objectives of the Honourable Court.
 22. That unless the prayers herewith issue, the Claimant/Applicant shall suffer hardship.
 23. That the Claimant/Applicant has demonstrated sufficient cause to allow the prayers sought.
 24. That no prejudice shall befall the Respondent if the prayers sought herewith are issued.
 25. That it is in the interest of justice that the prayers sought herewith are issued.
3. The applicant sought that the earlier application dated 9th October 2023 be heard together with the instant application where he sought the following orders:-
- a. Spent
 - b. Spent
 - c. That this court be pleased to extend time to admit the claim herewith on such terms as this court may deem fit as per the annexed draft
 - d. That the respondent be cited for perjury and be declared an unfit witness
 - e. The claimant do file a further list of documents and witness statement as per the annexure herewith.
 - f. That the costs of thus application be in the cause.
4. The applicant filed supporting affidavit dated 9th October 2023 and annexed memorandum of claim dated 13th August 2015 and received in court on the 17th august 2015 and a certificate of service of 2004 by RADAR Limited.
5. The court directed that the application dated 6th February 2024 be canvassed by way of written submissions. Both parties filed

Determination

6. Both parties identified the issue for determination to be whether the application was merited.

Whether the application was merited.

7. The application was filed under a certificate of urgency on the basis that the matter was due for judgment and the claimant wished to obtain a stay of proceedings.



8. The trial court heard the claimant's case on the 10th July 2023 and on even date the defence case and the parties took directions on written submissions. The court only found the respondent's submissions to the claim.
9. The claimant instead of filing written submissions on the claim filed *ex parte* originating summons dated 9th October 2023 seeking for stay of judgment pending hearing of the application and for the court to extend time to admit the claim. The applicant also sought for the respondent to be cited for perjury and be declared unfit witness, to file further list of documents and witness statements as per the annexure therein. There were no interim orders issued.
10. While that application was pending the claimant filed another application dated 16th February 2024 adding a prayer to re-open the claimant's case.
11. The court discerned from the application that the issue of the claim being statute barred was raised during cross-examination by the respondent.
12. The respondent filed a replying affidavit sworn on the 16th of October 2024 where he opposed the application stating the claim was time-barred for the claimant had alleged in his claim to have had his service terminated on 1st May 2012 and filed suit on 17th August 2015 being 3 months and 17 days after expiry of 3 years under section 90 of the *Employment Act*.

Appellant's submissions

13. The applicant submitted that he was ambushed unfairly with objection on the limitation of time in filing the claim and despite the protest of his advocate, following the direction of the court parties closed their hearing and the matter is due for judgment. He wishes the court to extend the time for filing and admitting this claim (KGA 1 was the memorandum of claim dated 15th August 2015 and filed in court on the 17th August 2015).
14. The applicant submitted that during the period he filed the claim there was a moratorium following ongoing petitions/ disputes on whether the lower court had jurisdiction to hear employment and land disputes which he stated caused confusion/ indecision on the access to justice. That the said dispute was settled in 2018 when the appellate court upheld a gazette notice of the chief justice directing magistrate courts to hear employment disputes which was also confirmed by the Supreme Court. That as a lay person he had not ascertained the avenue thereby was denied access to justice and fair hearing. That the delay in filing the suit was excusable.
15. That the respondent misrepresented facts that the Applicant had never employed the applicant whereas the facts were after the applicant ceased employment with RADAR Limited he was verbally employed by the respondent for a period of 8 years. To buttress his case the applicant relied on the decision in *John Nahashon Mwangi v Kenya Finance Bank Limited (in liquidation)*(2015)e KLR where the court stated as follows on reinstatement of a suit:- "The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial "Sword of the Damocles" which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate



a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated. ‘

16. The applicant further relied on several authorities cited by Dr. Gakeri J in *Johnson Orina Otieno v Intersecurity Limited* (2021)e KLR as follows:-

‘ In *Rose Wanjiru Kamau v Tabitha N Kamau & 3 others* [2014] eKLR the Court observed that –

“The court has the discretion to set aside judgment or order and there are no limitations and restrictions on the discretion of the Judge except of the judgment or order is raised. It must be done on terms that are just.”

In *Lochab Bros. Limited v Peter Kaluma t/a Lumumba Mumma & Kaluma Advocates & 2 others* [2013] eKLR the Court stated that –

“The main concern of the Court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by rules.”

In *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR the Court held that –

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

Finally, in *Ivita v Kyumbu* [1975] eKLR the Court stated that –

“... the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

The words of Apaloo J. A (as he then was) in *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR were also relied upon. The Judge stated that

“... Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for



the purpose of deciding the rights of the parties and not the purpose of imposing discipline." Relying on the foregoing decisions the applicant submitted that the discretion of the court to admit the claim out of time was unfettered. That the statement by the Respondent that the claim was time barred was an afterthought.

Respondent's submissions

17. The respondent submitted that the court had no discretion to exercise in enlargement of time and relied on decision of this court in *Butali Sugar Mills v Charles Shari & another* 2023(e KLR) to extent the court could not extent time to file claims. In *Rift valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & another* (2016)e KLR where he court stated:- " By craft and innovation the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time. That is what the court stated in *Divecon v Samani* (1995 – 1998) I EA 48 at p. 54

"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.

Despite section 4 (1) (a) of the *Limitation of Actions Act*, which sets the limitation of actions in respect of contracts to six years, section 90 of the *Employment Act*, which is a latter statute limits actions on employment contracts or contracts of service in general to three years. "

Decision

18. The Court held that the issue of the claim being time-barred and whether or not the Respondent's witness statement contained perjury or was ambush are issues placed before the trial judge. The Applicant had not adduced documentary evidence to support the alleged confusion on the avenue to file the claim and the alleged judicially noticed moratorium. The court perused the proceedings before the trial court and did not find any objection to the said Respondent's witness statement during the hearing. The hearing proceeded as scheduled and the parties took directions on the filing of final submissions. Only the Respondent complied.
19. The application was brought under Order 37 Rule 6 of the Civil Procedure Rules to wit:- "6. Extension of limitation period [Order 37, rule 6]
- (1) An application under section 27 of the *Limitation of Actions Act* (Cap. 22) made before filing a suit shall be made ex parte by originating summons supported by affidavit.
 - (2) Any such application made after the filing of a suit shall be made ex parte in that suit."
20. The court holds that on face of the said Order 37 Rule 6, the same concerns application under section 27 of the *Limitation of Actions Act* (Cap. 22) which is titled:- 27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc." The Rule concerns causes of action based on torts. The court held that the application was fatally defective the cause of action being employment dispute.



21. The application sought to arrest delivery of judgment parties, the case having been heard *vide viva voce* evidence on the 10th July 2023 and directions for filing written submissions issued. The rules of The court are silent on arrest of judgments. The power to arrest judgment is one to be exercised sparingly as guided in *Musa Misango – vs – Erica Musigire & other* [1966] EA 390, where Hon Sir Udo Udoma Chief Justice of Uganda stated as follows:- “The court has properly considered this power of arresting an action and deciding it without trial as one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure.” The decision was cited with approval by Justice Maureen Odero in *Re Estate of Bernard Kariuki Thoronja (Deceased)* [2022] KEHC 12850 (KLR) where the court stated :- “Clearly, thereof the powers granted to a court to arrest a decision ought to be used very sparingly and only in order to avoid injustice or hardship to a litigant. Such power ought only be exercised in cases of inadvertence or excusable mistake or error, but not to assist a litigant who is intent on abusing the court process or who is invoking said power merely in an attempt to obstruct and/or delay the course of justice.”
22. In the instant case the issue of the claim being statute barred was raised at trial. At the trial the respondent relied on his witness testament dated 15th June 2023 which is now alleged to be perjury. The applicant seeks for the court to reopen his case and admit out of time his memorandum of claim filed on 17th August 2015. This the same claim which was heard on merit on the 10th July 2023 and is pending judgment of the court.
23. The court considered the authorities relied on by the Applicant and all were about reinstatement of dismissed cases. That was not the case here. The court discerned that the application sought to defeat the defence of time limitation. The Court of Appeal took the position that under section 90 of the *Employment Act* (Rev. 2024 to read section 89) time cannot be enlarged to file a claim outside the three years. In *Rift valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another* (2016) e KLR the Court of Appeal stated:-“By craft and innovation the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time. That is what the court stated in *Divecon v Samani* (1995 – 1998) I EA 48 at p. 54
- “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.”
- Despite section 4 (1) (a) of the *Limitation of Actions Act*, which sets the limitation of actions in respect of contracts to six years, section 90 of the *Employment Act*, which is a latter statute limits actions on employment contracts or contracts of service in general to three years. “
24. The court held that it lacked jurisdiction to extent/enlarge time for filing employment claims outside the three years under section 89 of the *Employment Act* to wit:-

“ 89. 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.” The enlargement of time was the germane of the instant application and



even the one of 9th October 2023. The issues of alleged indecisive/dispute on the avenue of filing employment claims and alleged judicial notice moratorium are strange to the court. The court's discretion to enlarge time under section 89 of the *Employment Act* is fettered by the law itself as held by the Court of Appeal in Rift valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & another (2016)e KLR(supra).

25. The court in the upshot held that the application dated 16th February 2024 was brought under the wrong provisions of the law, the court had no jurisdiction to grant the orders sought of enlargement of time to file a claim out of time, and further there was no justification to arrest the delivery of judgment after the full hearing inter-parties and after the issuance of directions to file final submissions by the trial court .The application is held as an abuse of court process and is dismissed. The same fate applies to a similar application dated October 9, 2023. Costs of the applications in the cause.
26. The parties are directed to appear before the trial judge (Justice Ocharo Kebira) for issuance of judgment date on February 27, 2025.
27. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2025.

**J.W. KELI,
JUDGE.**

In the presence of:

Court Assistant: Otieno

Claimant/applicant : - Absent

Respondent: Kache h/b Ooge

