



**Ogutu v Kenya Airports Authority (Miscellaneous Application
E001 of 2024) [2024] KEELRC 558 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 558 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E001 OF 2024**

**S RADIDO, J
MARCH 13, 2024**

BETWEEN

BENARD ODHIAMBO OGUTU APPLICANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

RULING

1. Through an Originating Motion dated 8 January 2024, Benard Odhiambo Ogutu (the applicant) seeks the grant of leave of Court to institute action against the Kenya Airports Authority (the Respondent) out of time.
2. The Respondent filed Grounds of Opposition on 15 February 2024, asserting that the Court did not have the jurisdiction to grant the leave sought in light of section 90 of the *Employment Act*, 2007.
3. The applicant filed his submissions on 26 February 2024, and the Respondent also filed its submissions on the same day.
4. A brief background to the application is that the applicant was employed by the Respondent on 2 January 2012 as an engineer and he was diagnosed with a mental illness in April 2014.
5. On or around 16 January 2018, the Respondent summarily dismissed the applicant. The reason for the dismissal was that the applicant had been convicted of a criminal offence (the applicant was convicted of manslaughter on 29 November 2017, and sentenced to 2 years' imprisonment).
6. To support the application for leave, the applicant contended that he had been diagnosed with a mental illness and that after release from prison in 2019, he could not afford the medication to manage his condition and this impacted his cognitive ability to make decisions, and thus the disability made it difficult for him to make a decision(s).



7. The applicant cited section 22 of the *Limitation of Actions Act* and AAA v Teachers Service Commission (2018) eKLR to urge the Court to find that it had the discretion and jurisdiction to grant leave.
8. The Respondent on its part asserted that section 90 of the *Employment Act* left no discretion to the Court to admit stale actions. The Court's attention was drawn to the case of Divecon v Samani (1995-1998) 1 EA 48.
9. The Respondent has not disputed that the applicant was under a medical disability or that he is still under medical management. The cause of action sought to be advanced by the applicant accrued when he was under a medical disability.
10. Section 22 of the *Limitation of Actions Act* which formed the foundation for the instant application provides:
 22. Extension of limitation period in case of disability
If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired:
Provided that—
 - i. this section does not affect any case where the right of action first accrues to a person who is not under a liability and through whom the person under a disability claims;
 - ii. when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under disability, no further extension of time is allowed by reason of the disability of the second person;
 - iii. an action to recover land or to recover money secured on a mortgage of land may not be brought by a person by virtue of this section after the end of thirty years from the date on which the right of action accrued to that person or to some person through whom he claims;
 - iv. this section does not apply to an action to recover a penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law;
 - v. in actions for damages for tort-
11. Section 22 of the *Limitation of Actions Act* contemplates the filing of an action where the limitation period has expired in circumstances of disability without distinction whether the cause of action is founded upon tort or contract. The section does not envisage the grant of prior leave (see dissent by Platt, ag Judge in David Stephen Gatune v Headmaster, Nairobi Technical High School & Ar (1986) eKLR).
12. And for purposes of context disability is defined in section 2(2)(b) of the Act as:
 - 2) For the purposes of this Act—
 - (a) proceedings by or against the Government includes proceedings by or against any Government department or public officer as such;



- (b) a person is under a disability while he is a minor or of unsound mind; and, without prejudice to the generality of the foregoing, a person is conclusively presumed to be of unsound mind while he is detained in pursuance of some written law authorizing the detention of persons of unsound mind or criminal lunatics;
13. The Respondent did not counter the applicant's evidence that his medical condition affected his cognitive competence.
14. The Court of Appeal decision in *Divecon v Samani* did not expressly address the question of extension of time where disability was raised and proved under section 22 of the *Limitation of Actions Act*. The case was addressing an appeal founded on tort but with arguments that contractual action was also implicated.
15. In the said decision, the Court of Appeal stated:
- A perusal of Part III shows that its provisions do not apply to actions based on contract. In the 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.
16. Further, the Court did not delve into an analysis of the interpretation and application to be given to section 22 of the *Limitation of Actions Act*.
17. The cause of action herein accrued when the applicant was under a medical disability.
18. In the humble view of the Court, the Court has the discretion to extend time to initiate an action alleging breach of contract if there is satisfactory proof that due to a disability, the applicant could not bring an action within time.

Conclusion and Orders

19. Flowing from the above, the Court will allow the application and order:
- i. The applicant is granted leave, if necessary, to commence an action against the Respondent alleging unfair termination of contract and/or breach of contract within 21 days.
20. Each party to bear own costs of the Originating Motion.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 13TH DAY OF MARCH 2024.

RADIDO STEPHEN, MCIArb

JUDGE

Appearances

For applicant Bruce Odeny & Co. Advocates

For Respondent Federation of Kenya Employers

Court Assistant Chemwolo

