



REPUBLIC OF KENYA



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**Boru v Mengesha & 3 others (Miscellaneous Application
E009 of 2023) [2024] KEELRC 1002 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1002 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
MISCELLANEOUS APPLICATION E009 OF 2023
ON MAKAU, J
APRIL 12, 2024**

BETWEEN

HELLEN DIRAMU BORU CLAIMANT

AND

WUBSHET MENGESHA 1ST RESPONDENT

HABIBA DIMA DUBA 2ND RESPONDENT

FELEKE TESHOWE BANTIDAGA 3RD RESPONDENT

GLOBAL HOPE NETWORK INTERNATIONAL 4TH RESPONDENT

RULING

1. The Applicant filed this application dated 29th September 2023 seeking the following orders:
 - a. That this Honourable Court be pleased to grant him leave to file suit out of time against Webshet Mangesha Amakelegne, Habiba Dima Duba, Feleke Teshowe Bantidaga and Global Hope Network International, the Respondents herein.
 - b. That costs of this Application abide the results of the intended suit.
2. The Application is accompanied by the Applicant's supporting affidavit sworn on 29th September 2023. The Application is premised on the grounds that:
 - a. That the 1st, 2nd and 3rd Respondents were the Claimant's Chairman, secretary, treasurer respectively, whereas the 4th Respondent is a Non-Governmental Organization registered with NGOs Coordination Board based within Isiolo County.
 - b. That in October 2009, the Respondents employed the Applicant as a transformative community worker but was never issued with a formal contract until year 2012.



- c. That the Respondents terminated the Applicant's employment vide the letter dated 9th January 2029 in a highly malicious, callous, insensitive, inhuman, unlawful, wrongful, illegal and unfair manner.
 - d. That by reason of the foregoing the termination was in breach of due process, fair hearing and/or rules of natural justice, and the Employment Act, 2007.
 - e. That after termination of the Applicant's employment, the Respondents refused, failed, refused and/or neglected to pay her benefits including but not limited to gratuity, redundancy, house allowance, annual leave and loss of employment.
 - f. That the Applicant reported the matter to the ministry of Labour and Social Protection, Isiolo County where the Respondents were charge with various charges in Isiolo Criminal Labour No. 1 of 2019 and on 3rd July 2023, the Court found the Respondents herein guilty of all the offences levelled against them and were thus convicted under section 215 of the Criminal Procedure Code.
 - g. That the Respondents were fined Kshs. 10,000/= on each count and in default to serve one-month imprisonment for each count.
 - h. That section 90 of the Employment Act, 2007 provides that no civil action or proceedings based or arising out of The Act or a contract of service in general shall lie or be instituted unless it is commenced within three years from the date of the cause of action.
 - i. That the Applicant's intended cause of action is statute barred and therefore she seeks leave from this Honourable Court to institute the intended suit against the Respondents.
 - j. That the delay in filing the suit was caused by Isiolo Criminal Labour Case No. 1 of 2019 which took over 4 years to be concluded.
 - k. That the Applicant has formally demanded for payments of her dues from the Respondents herein but they have arrogantly responded to her that they will not pay even a single coin.
 - l. That the Applicant has no other way of demanding for her rightful payments from the Respondents unless this Court allows her to institute the intended suit.
 - m. That the Applicant has reasonable fear that she will be gravely prejudiced and imminently shall suffer irreparable loss and damage if the summons application herein is not allowed.
 - n. That the Applicant has a good case against the Respondents with high chances of success and no prejudice will be caused to the Respondent if this application is allowed.
 - o. That the Court has discretion to grant leave to file suit after the limitation period and its only fair and just that this application be allowed to serve the ends of justice.
3. In her further affidavit sworn on 16th November 2023, the Applicant deposed that her application was well grounded as she had never filed any other suit before this Court over the same subject matter. She deposed that the matters in criminal and civil could not run concurrently as the outcome of the criminal case was material to the civil case. She therefore urged the Court to exercise its unfettered discretion and grant her the leave as she stood to suffer prejudice as she won't be able to claim her benefits.



4. The Respondents opposed the motion vide the Replying Affidavit of Habiba Dima Duma sworn on the 24th October 2023. He deposed that the Court's jurisdiction and discretion could only be exercised according to the law under part III of the Limitations of Actions Act. He averred that the grounds provided therein for extension of limitation were; disability, acknowledgement, part payment, fraud, mistake and ignorance of material facts. He deposed that the Applicant did not plead any of those grounds provided.
5. He deposed that section 193A of the *Criminal Procedure Code* provided that criminal and civil proceedings can proceed concurrently. He deposed that the Act provided for ignorance of material fact and not ignorance of the law. He deposed that if the criminal case was the bar to the filing of the suit, then the bar still exists as the appeal under Meru High Court Criminal Appeal No. E104 of 2023, is still pending. He deposed that the Applicant was hiding behind the criminal case with the sole aim of deriving civil remedies that were not granted. He deposed that the Applicant testified in the criminal court that she had filed case in Meru Court under Labour Case No. 1 of 2011, which she has failed to disclose to the court. He also deposed that the Applicant failed to disclose her salary which would form basis on jurisdiction of this court.
6. The 4th Respondent opposed to the Application vide the Replying Affidavit of its director Wubshet Mengesha Amakegne sworn on 31st October 2023. He deposed that the application was fatally defective and should be dismissed with costs. He contended section 90 of the *Employment Act* provides for the statutory period to be three years. He deposed that extension of time was not as of right as it is an equitable remedy for a deserving party, who must lay the basis to the satisfaction of the Court. He also deposed that section 27 on extension of time for filing suits is in relation to an action founded on tort and not breach of contract. He deposed that section 28 provides for the procedure for filing of applications under section 27 and as such the Application is fatally defective and ought not to be entertained by the Court.
7. He deposed that nothing barred the Applicant for filing the suit concurrently, with the criminal case. He deposed that limitation of time is put in place to prevent inordinate delay and miscarriage of justice. He deposed that there is no basis upon which this court can grant leave since Court's have interpreted section 90 to mean that there was no room for extension after the 3 years. This Court was therefore urged to dismiss the Application with costs to the 4th Respondent.

Submission

8. The Applicant filed her submissions dated 2nd February 2024 raising the following issues for determination: -
 - a. Does the Court have judicial discretion to extend time.
 - b. Was there a mistake by the Applicant for not filing this suit in the first instance.
 - c. Was there inordinate delay on the part of the Applicant in filing this case.
9. On the first issues, it was submitted that the Court has inherent and appellate jurisdiction donated to it by the *Constitution* under Article 162 (2). It was submitted that the Court has the power to grant extension of time in exercise of its duty under section 1A of the *civil Procedure Act*, which is, to facilitating just, expeditious, proportionate and affordable resolution of disputes. Reliance was placed on the case of *Allan Otieno Osula v Gurdev Engineering & Construction Ltd* [2015] eKLR.



10. It was submitted that section 1B of the *Civil Procedure Act* mandates the Court to further the overriding objective in dispute resolution. For emphasis, reliance was placed on the case of *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR.
11. It was submitted that, the leave sought is merited because the Applicant acted diligently, in instituting the suit as soon as the judgement in Isiolo Criminal case was delivered on 3rd July 2023.
12. On the second issue, it was submitted that failure to file the suit concurrently with the criminal case should be deemed as an honest mistake on the part of the advocate. Reliance was placed on the case of *Mwangi v Kariuki* [1999] LLR 2632 (CAK) and *Joseph Odide Walome v David Mbadi Akello* [2022] eKLR, where the court laid down the instances where the mistakes of counsel were excusable. It was submitted that the Applicant was neither careless nor irresponsible, but rather her actions have been prudent and in utmost faith.
13. It was also submitted that the applicant should not be condemned unheard, and as was held in the case of *Trust Bank Ltd vs Amalo Company Ltd* [2003] EA at 350.
14. On the third issue, it was submitted that the Applicant could not institute the case earlier as she was waiting for the outcome of the Isiolo case where the Respondents were charged for terminating the Applicant's employment. The Applicant justified the delay by indicating that had the criminal case been in the favour of the Respondents, then this Application would not have been necessitated.
15. In support of her argument, she relied on the cases of *Peter Kariuki Waweru v Kiambu County Government & another* [2015] eKLR and *Simon Wachira Nyaga v Patricia Wamwirwa* [2018] eKLR. Therefore, she urged the Court to grant her leave in the interest of natural justice and ensuring fair administrative process since she had demonstrated that there was no inordinate delay in filing the Application.
16. The 4th Respondent's submissions dated 3rd January 2024 raised the following issues for determination:
 - a. Whether the Applicant's ex-parte Originating summons dated 29th September 2023 is merited.
 - b. Who should bear the costs of the Application.
17. On the first issue, it was submitted that, extension of time can only be granted where the cause of action is founded on tort of negligence, nuisance or breach of duty, and where damages are in relation to personal injury. Reliance was placed on the cases of *Mehta v Shah* [1965] EA 321; *IGA V Makerere University* [1972] EA 65; *Divecon Ltd vs Shirinkbanu Sadrudin Samnani* [1995-1998] 1 EA 48; *Willis Onditi Odbiambo v Gateway Insurance Co. Ltd; Haron Onyancha v National Police Service Commission & Another* [2017] eKLR.
18. It was submitted that section 90 of the *Employment Act* is framed on mandatory terms. While relying on *Chitty on Contracts*, Sweet and Maxwell, 23rd Ed. Vol. 1 page 732 and *Maxwell v Kiiru* [1987] KLR 324, it was submitted that a cause of action founded on contract accrues when the breach takes place and not when damage is suffered.
19. It was further submitted that the time of the termination determines when the cause of action arose and which time lapsed in January 2022. Reliance was placed on the case of *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* [2013] eKLR and the case of *Samson Wanyoike Kimani v Bliss Flora Limited* [2018] eKLR where the court relied on the *Maria Machocho v Total (K) Industrial Cause No. 2 of 2012*.



20. It was reiterated that section 90 does not provide room for extension of the 3-year limitation period and placed reliance on the case of *Nicodemus Marani v Timsales Limited* [2014] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Court held that a Court's jurisdiction flows from either the *Constitution* or legislation or both.
21. The respondent maintained that the cause of action accrued upon termination and that the same was not held in abeyance until finality of the criminal case. Reliance was placed on the case of *John Kiiru Njiiri v University of Nairobi* [2021] eKLR. It submitted that nothing precluded the Applicant from pursuing a claim before this court before the lapse of the statutory limitation period. Consequently, it argued that the application was unmerited and ought to be dismissed with costs.

Issues for analysis and determination

22. Having considered the Application, affidavits and submissions, the only issues falling for determination is whether the court should grant leave to file suit out of time as prayed.
23. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR established the principles to guide the Courts when entertaining 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.”

24. In a nutshell, where a party wishes for the Court to exercise its discretion in such matters, it ought to prove to the satisfaction of the Court that; a reasonable reason exists for the delay, that there was no undue delay in the filing of the Application and that the Respondent shall not suffer prejudice.

Reasonable reason

25. The Court in *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) defined excusable delay as follows:

“Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party's control.”
26. In this case the reason for the delay in filing suit was allegedly a criminal case pending trial and the applicants counsel made the mistake of not filing the suit within statutory period. Such explanation is



not satisfactory as nothing bars a party from filing a civil claim to run parallel to criminal proceedings founded on the same dispute. Therefore, I concur with the Respondents' arguments that the cause of action was not suspended by the criminal proceedings and hence the Applicant had all the time to file suit but failed to so do.

27. I am convinced that the Applicant has not provided sufficient reason to warrant this Court to determine otherwise. Furthermore, the wording of section 90 of the Act is very specific and does not provide any room for extension of time after the limitation period of three years lapse. The reason being that employment contract is a contract for purposes.
28. I gather support from the case of *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another* [2016] eKLR where the Court held as follows:

“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.”

29. Based on the foregoing matters, this Court has no power to grant the leave sought and therefore I dismiss the Originating Summons dated 29th September 2023. Since the Summons is by nature an ex-parte court process, I decline to award costs to the Respondents.

Dated, signed and delivered at Nyeri this 12th day of April, 2024.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

