



**Losiru v Kutoh & another (Sued as legal representatives of the Estate of the Late Petronila Jesang) (Miscellaneous Application E040 of 2023) [2024] KEELRC 2600 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2600 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**  
**MISCELLANEOUS APPLICATION E040 OF 2023**  
**MA ONYANGO, J**  
**OCTOBER 24, 2024**

**BETWEEN**

**JOHN LOSIRU ..... APPLICANT**

**AND**

**MATHEW KIPRUTOH KUTOH & ALEXANDER KOSKEI (SUED AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE PETRONILA JESANG) ..... RESPONDENT**

**RULING**

1. The Application before me is dated 16<sup>th</sup> October 2023 and has been brought under section 27(2), 28 and 30 of the Limitations of Actions Act, Order 37 Rule 6(2) of the Civil Procedure Rules 2010, Article 48 and 50 of *the Constitution* of Kenya. It seeks that leave be granted to the Applicant to file suit out of time against the Respondents in respect of alleged unfair dismissal of the Applicant from employment.
2. The Application is supported by the affidavit of the Applicant where he avers that he worked as a herdsman in the deceased farm at Moiben from 1<sup>st</sup> March 2004 to the end of September 2016 without any salary or benefits from the deceased since the late Petronila Jesang and Raphael Kaplang had promised to compensate him with land for the dedicated service and commitment he readily offered to the family and the deceased; that he decided to seek compensation for his salary arrears and terminal benefits, filed an application for citation to accept or refuse Letters of Administration against Mathew Kipruto Kutoh and Alexander Kosgei being the beneficiaries of Petronila Jesang; that the citation was directed to the said Mathew Kipruto Kutoh and Alexander Kosgei to cause an appearance to be entered at the Eldoret Registry for purposes of accepting or refusing Letters of Administration of the Estate of the deceased where the Respondents then filed a Memorandum of appearance after being served severally with mention notices.



3. The Applicant states that he is desirous of instituting a suit to recover his salary arrears, terminal benefits and general damages against the Respondents. He contends that the failure to file the suit in time was occasioned by circumstances beyond his control and that he has been vigilant since the Respondents took out the Letters of Administration.

### **Determination**

4. The only issue for my determination is whether the application is merited and should be allowed.
5. Section 4(1) of the *Limitation of Actions Act* provides as follows:-
  4. 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.
6. Section 90 of the *Employment Act*, 2007 provides;

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.
7. The two sections read together provide that claims arising out of employment must be commenced within 3 years.
8. In the case of Maria Machocho –v- Total (K) Ltd, cause No. 2 of 2012 the court held that:-

“...Section 90 of the *Employment Act* has now amended the *Limitation of Actions Act* to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the *Employment Act*. I now have to determine whether this Court has the jurisdiction to grant leave or extend time in respect to causes of action based on breach of contract generally and breach of contract of service or actions arising out of the *Employment Act* specifically. The precedent in this regard was set out by the Court of Appeal in Divecon Ltd v Samani [1995-1998] 1 EA 48 at 54 that section 4(1) of the *Limitation of Actions Act* was clear beyond any doubt and that the section meant that no one shall have the right or power to bring an action 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 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.’

9. Further, in the case of *Beatrice Kahai Adagala v Postal Corporation of Kenya* [2015] eKLR, the Court of Appeal observed as follows;

“Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the *Employment Act* 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of *Divecon Limited -vs- Samani* [1995-1998] 1 EA P.48, ... in *Josephat Ndirangu - vs – Henkel Chemicals (EA) Limited*, [2013] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act*.”

10. From the above decisions, it is clear that this court is not clothed with jurisdiction to extend time to file suit out of time in employment related claims pursuant to section 90 of the *Employment Act*, 2007 as read with section 4(1) of the *Limitation of Actions Act*.

11. The sections 27, 28 and 30 of the *Limitation of Actions Act* relied upon by the Applicant do not provide for extension of limitation of actions for contracts. Specifically, section 27(1) starts as follows:

27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.

(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 (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
- (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
- (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
- (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
- (b) in either case, was a date not earlier than one year before the date on which the action was brought.



- (3) This section does not exclude or otherwise affect—
- (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
  - (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

12. The wording of section 27 of the *Limitation of Actions Act* show that it only applies to cases in respect of negligence and not contracts as in the instant case. Section 28 provides for the procedure for approaching court while section 30 deals with interpretations.

13. Consequently, the application dated 16<sup>th</sup> October 2023 is without merit and is dismissed. There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF OCTOBER, 2024**

**MAUREEN ONYANGO**

**JUDGE**

