



Fwamba v Agricultural Finance Corporation (Miscellaneous Application E013 of 2024) [2024] KEELRC 13208 (KLR) (25 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13208 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
MISCELLANEOUS APPLICATION E013 OF 2024
MA ONYANGO, J
NOVEMBER 25, 2024**

BETWEEN

GODFREY WAFULA FWAMBA APPLICANT

AND

AGRICULTURAL FINANCE CORPORATION RESPONDENT

RULING

1. Vide an Application dated 4th June 2024 the Applicant seeks leave to file suit against the Respondent out of time. The grounds in support of the Application as set out at the foot of the application are that:
 - a. That the Applicant was employed by the Respondent some time on the 24th September, 2007.
 - b. That on or about the 10th April, 2018 the Respondent caused and made a report to the Police accusing the Applicant with a charge of theft by servant.
 - c. That the Applicant was thereafter charged in Eldoret Chief Magistrate's Court, in a criminal case, proceedings which took four years.
 - d. That upon the conclusion of the criminal proceedings, the Applicant and the Respondent engaged in negotiations to have the Applicant reinstated to his previous position.
 - e. That the negotiations took long and already the criminal proceedings had taken a period of 4 years hence eating into the mandatory statutory provisions on the time within which to file a suit for unfair termination and reinstatement.
 - f. That the said intended suit raises serious friable issues and has high chances of success.
 - g. That unless the orders herein sought are granted, the Applicant stands to suffer irreparably.
 - h. That the application has been brought in good faith and without undue delay.



2. The application is brought under sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, section 27 and 28 of the Limitations of Actions Act and Order 37 Rule 6 of the Civil Procedure Rules and all Other Enabling Provisions of the Law.
3. The Application is supported by the affidavit of the Applicant in which he deposes that in 2018 the Respondent caused a false report of theft by servant to be made to the police against him leading to his arrangement in court on trumped up charges.
4. That prior to his being charged the Respondent unprocedurally terminated his employment on 28th September, 2018.
5. That he was acquitted by the Chief Magistrates Court without being placed on his defence.
6. That upon his acquittal he was engaged in lengthy negotiations with the Respondent which were in the form of oral, telephone and written communication through which the Respondent promised to through its agents to reinstate the applicant to his previous position only later to renege on the promises.
7. The Applicant states that the criminal case took 4 years hence the delay in filing the intended suit. That the delay in filing suit was an inadvertent mistake on the applicant's part, being an innocent litigant oblivious of court process and the law and he ought not to be punished for the mistake.
8. That his case raises serious triable issues and it is only fair, just and in the interest of justice that the court should grant the orders sought. That should the orders not be granted the Applicant will suffer irreparable loss.
9. The applicant attached the ruling in Eldoret CM Criminal Case No. 4377 of 2018: Republic against Vincent Kiplagat Rotich, Godrey Wafula Fwamba and Rose Jepchirchir Cheboi delivered on 22nd March, 2022.
10. The Applicant filed a supplementary affidavit sworn on 13th September, 2024 in which he attached a Plaint dated 26th October, 2022 filed on 7th November, 2022 in which he had prayed for special damages, general, punitive and aggravated damages for false imprisonment and malicious prosecution against Agricultural Finance Corporation and the Attorney General.
11. The Respondent filed grounds of opposition dated 24th August, 2024 in which it raised the following grounds:
 - a. That the application is without merit and does not meet the grounds for the grant of the orders sought.
 - b. That the Applicant in the instant suit is the Plaintiff in another suit filed in Eldoret Chief Magistrate's Court Civil Case No. E842 of 2022 which suit touches on the same parties herein and is yet to be heard and determined.
 - c. That the Applicant is simply doing forum shopping and therefore this is a clear demonstration of abuse of the court process.
 - d. That it is in the interest of justice that the application be dismissed with costs.
12. The Application was disposed of by way of written submissions. In his submissions dated 13th September, 2024 the Applicant submits that his claim for unfair termination relies heavily on his acquittal on 22nd March, 2022. That he was therefore unable to file suit before the acquittal. That the



- ruling was delivered more than 4 years after the limitation period for filing suit had lapsed. That the Applicant was a victim of circumstances.
13. It is submitted that the doctrine of discretion gives this court wide latitude to make orders in the interest of justice. That there are also clear provisions of the law that give the court authority to grant the orders sought. The Applicant refers to section 3 of the [Employment and Labour Relations Court Act](#) which provides:
3. Principal Objective
- (1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.
- (2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).
- (3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.
14. The Applicant further refers to section 20(1) of the [Employment and Labour Relations Court Act](#) which provides:
- In any proceedings to which this Act applies, the court shall act without undue regard to technicalities.
15. The Applicant further refers to section 3A of the [Civil Procedure Act](#) which provides as follows:
- 3A. Saving of inherent powers of court.
- Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
16. It was submitted that the Applicant was neither careless nor irresponsible, that he acted in utmost good faith, that there was no inordinate delay in filing the instant application.
17. The Applicant further relied on the decision in *Boru v Mengisha & 3 Others* Misc. Application No. E009 of 2023 [2024] KEELRC 1002 (KLR) (12 APRIL 2024) where the Supreme Court restated the principles to guide the court when entertaining applications for extension of time, and in *Njoroge v Kimani* [2022] KECA 1188 where the court defined excusable delay as those beyond a party's control or those that are unforeseeable.
18. The Applicant further referred to the decision of the Court of Appeal in *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR where the Court stated that even though discretion is unfettered the same ought to be guided by consideration of factors stated in case law including but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted and whether the matter raises issues of public importance which factors are in consonance with the overriding objectives in civil litigation being the just, expeditious, proportionate and affordable resolution of disputes before courts.
19. The Applicant prayed that the application be allowed.
20. The Respondent filed its submissions dated 15th October, 2024 in which it submits that there is an ongoing suit in Eldoret Chief Magistrate's Court Civil Case No. E842 of 2022, a competent court



- with competent jurisdiction, between the same parties and which touches on the same subject matter, that is yet to be heard and determined. The Respondent submits that this suit is therefore sub judice.
21. For emphasis the Respondent relies on the decision in *Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex Parte Law Society of Kenya* where Mativo J (as he then was) defined sub judice.
 22. The Respondent further relied on the decision in *Olow v Arale & Another Arale (Interested Party)* [2024] KEELC 946 (klr) where Mtungi J defined sub judice.
 23. The Respondent submitted that the application is incompetent and an abuse of court process and would result in this court and the magistrates court reaching conflicting decisions which would amount to an injustice for the Respondent.
 24. The Respondent further referred to the cases of *Kennedy Otieno Odiyo & 12 Others v Kenta Electricity Generating Company, Limited, Nguruman Limited v Jan Bonde Nielsen, Bundotich v Managing Director Kenya Airports Authority & Another* and several others on the same subject.
 25. On whether the suit is statutorily barred the Respondent submitted that section 4 of the *Limitation of Actions Act* requires all actions on contract to be filed within 6 years relying on the decision in *Salim Mohamed Salim Tweshe v Khalid Salim Naaman, Said Salim Naaman, Abdunnassir Naaman, Tobani Salim Naaman, Farid Salim Naaman & Al Amin Salim Naaman* [2020].
 26. The Respondent submitted that the Applicant was discharged from the criminal charges in 2018 hence he is estopped from filing suit after 6 years as the suit is statute barred.
 27. The Respondent further submits that the applicant violates the principles of equity by filing suit out of time citing the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and Others* [2014] KESC 12 (KLR).

DETERMINATION

28. The issues for determination in this application are whether the instant suit is sub judice, whether the application by the Applicant is merited and whether the application should be allowed.
29. On the first issue it was the Respondent's argument that the suit herein is sub judice as there is another matter in the Chief Magistrates Court between the same parties on the same subject matter.
30. The Applicant filed a copy of the Complaint dated 26th October, 2022 filed on 7th November, 2022 in which he had prayed for special damages, general, punitive and aggravated damages for false imprisonment and malicious prosecution against Agricultural Finance Corporation and the Attorney General. In the instant suit he seeks leave to file suit against Agricultural Finance Corporation for unfair termination. Even though some of the parties are the same, the cause of action in the intended suit is obviously different from the suit pending at the magistrates Court. The principle of sub judice is thus not applicable.
31. On the second issue whether the Applicant is entitled to an order of extension of the limitation period, 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.

32. 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.

33. The two sections read together provide that claims arising out of employment must be commenced within 3 years.

34. 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.’”

35. 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*.”



36. 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*.
37. 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.
38. 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.
39. It is further important to note that limitation is not a technicality that can be cured under Article 159(2)(d) of *the Constitution*. Limitation has the effect of extinguishing the right of a party to the benefit sought in the suit. It has the effect of an estoppel against the person who holds the right as to



deny such a person the right to make the claim. Limitation therefore goes to the root of the jurisdiction of the court to hear and determine the issue. A matter that is time barred by virtue of limitation can only be entertained under the very specific circumstances provided for in section 26 and 27 of the *Limitation of Actions Act*. The applicant herein has not brought the application under those provisions.

40. The statutory provisions and cases relied upon by the Applicant do not address the provisions of the *Limitation of Actions Act* but procedural extension of time which courts have discretion to extend.
41. Consequently, the application dated 16th October 2023 is without merit and is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

