



**Kosgei v Wells Fargo Limited (Miscellaneous Application E009 of 2024)
[2024] KEELRC 2731 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2731 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
MISCELLANEOUS APPLICATION E009 OF 2024
MA ONYANGO, J
NOVEMBER 7, 2024**

BETWEEN

SAMMY KIPRONO KOSGEI APPLICANT

AND

WELLS FARGO LIMITED RESPONDENT

RULING

1. The Application before me is dated 16th October 2023 and has been brought under section 27 of the Limitations of Actions Act, Order 37 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules 2010, Section 3 and 3A of the *Civil Procedure Act*, section 89 of the *Employment Act*, Article 159(2)(d) 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's employment.
2. The Application is supported by the affidavit of the Applicant where he avers that the cause of action arose sometime in July, 2020 when the Claimant's employment was terminated by the Respondent without paying the Applicant his terminal dues. That he was not able to institute his claim against the Respondent in court within the statutory timelines owing to the outbreak of COVID-19 that saw court operations scaled down and also sickness of his wife who stayed in hospital for a long period thereby eating into his time.
3. The Applicant further states that he was drained financially by the hospital bill and as such lacked the financial resources to institute his claim within the statutory timeframe.
4. The Applicant pleads that he has an arguable case against the Respondent which he should be allowed to prosecute, that should the application not be granted he will be locked out of the seat of justice, and will be occasioned to suffer great loss, damage and prejudice.
5. He states that the delay is not inordinate or so great as to be inexcusable and that the application has been brought in good faith and in the interest of justice.



6. The Applicant's affidavit in support of the Application reiterate the grounds on the face of the Application.
7. The Application, being an originating summons under section 27 of the *Limitation of Actions Act* made before commencement of suit, was heard ex parte as provided under section 28(1) of the Act which provides:
 28. Application for leave of court under section 27
 - (1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.
8. The application was disposed of by way of written submissions. The Applicant submitted that under Article 159(2)(d) of the *Constitution* the court has powers to administer justice without undue regard to procedural technicalities, relying on the decision in *Allan Otieno Osula v Gurdev Engineering & Construction Ltd* [2015] eKLR.
9. The Applicant submitted that the reasons he was unable to file suit within the statutory timelines were excusable and beyond his control, citing the decision in *Njoroge v Kimani KECA 1188(KLR) (RULING)*. The court in that case stated that excusable delays are those that are enforceable and beyond the control of the party while non-excusable delays are those that are forceable or within the party's control.
10. It was further submitted that the applicant genuinely believed that the Respondent would rehire him together with other technicians when the pandemic subsided and did not seek redress during the 3-year period. For this the Applicant relied on the decision in *Rosemary Wanjiru Kungu v Elijah Macharia Githinji & Another* [2014] eKLR where the learned Judge stated:

“In the result, where the defendant or his representative such as the insurance company leads the plaintiff to believe that the claim is capable of being settled and in reliance thereof the plaintiff or his advocate refrains from filing the suit until after the limitation has run its course, that may constitute a good ground for extending time notwithstanding the provisions of section 27 aforesaid.”

Determination

11. The only issue for determination in this application is whether the application is merited and whether it should be allowed.
12. 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.

13. 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.

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

15. 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.”

16. 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*.”



17. 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](#).
18. 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.
19. 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.
20. 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.

21. Consequently, the application dated 16th October 2023 is without merit and is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF NOVEMBER, 2024.

MAUREEN ONYANGO

JUDGE

