



**Ng'onde v Abyssinia Group of Industries (Miscellaneous Cause
E189 of 2022) [2023] KEELRC 2151 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2151 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CAUSE E189 OF 2022
MA ONYANGO, J
SEPTEMBER 21, 2023**

BETWEEN

NELSON NYIKA NG'ONDU APPLICANT

AND

ABYSSINIA GROUP OF INDUSTRIES RESPONDENT

RULING

1. By an application dated November 7, 2022, the applicant seeks the following orders
 - a. That leave be granted to the applicant Nelson Nyika Ng'onduto file suit against Abyssinia Group of Industries after the limitation period.
 - b. That costs of this application be provided for.
2. The grounds in support of the application are:-
 - a. That the Applicant was employed by the respondent from October 15, 2014 as an Import and Export Manager based at the company's head offices for a period of two years.
 - b. That his contract of service was further renewed in October 2016 for a further two years until 2018 when the Applicant amicably severed employment with the respondent.
 - c. That however, the respondent withheld the claimant's dues namely accrued leave days for the year 2017 and 2018
 - d. That despite numerous communication between the applicant and respondent spanning from 2018 to 2021, the respondent engaged in dubious diversions and evasions of their obligations owed to the applicant frustrating him, which time he was already experiencing financial hardship.



- e. That the applicant's financial state worsened during the Covid 19 pandemic which denied him any chances at justice in filing a suit in this Honourable Court.
 - f. That the Applicant has a legitimate claim that may not see the light of day unless the orders sought herein are granted.
3. Directions were given that the parties dispose of the application by way of written submissions. The Respondent did not file any response to the application nor did it file its submissions.
 4. I have considered the application together with the grounds and affidavit of the applicant in support of the same which reiterates the grounds on the face of the application. I have further considered the submissions on record.
 5. The only issue for determination is whether the applicant is entitled to extension of time for filing suit against the Respondent.
 6. Section 90 of the *Employment Act* provides as follows:-

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. Further, 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.
 8. The two sections read together provide that claims arising out of employment must be commenced within 3 years.
 9. The *Limitation of Actions Act* provides for extension of limitation period only in the cases of disability, acknowledgement, part payment, fraud or mistake. None of these situations have been pleaded by the Applicant.
 10. In the case of *Divecon v Samani* Civil Appeal No. 142 of 1997, the Court of Appeal held as follows:-

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.

11. In *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.

12. Further, in the case of *Beatrice Kabai Adagala -v- Postal Corporation of Kenya* (2015] eKLR, the court held as follows:-

“Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—

- (a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and
- (b) to fulfill the requirements of section 27(2) of this Act in relation to that cause of action.

13. The above decisions put in context the position of the law on extension of limitation period in contracts, and specifically in employment contracts which is that the courts have no jurisdiction to extend limitation period.

14. The foregoing being the position, the fate of the application herein is sealed.

15. The only order I can make is an order of dismissal of the application. Since the Respondent did not file any response to the application, there shall be no orders for costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 21ST DAY OF SEPTEMBER 2023

MAUREEN ONYANGO

JUDGE

