



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munyua v ABSA Bank Kenya PLC (Miscellaneous Cause E157 of 2023)  
[2023] KEELRC 2941 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2941 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CAUSE E157 OF 2023**

**B ONGAYA, J  
NOVEMBER 17, 2023**

**BETWEEN**

**OLIVER THANDI MUNYUA ..... APPLICANT**

**AND**

**ABSA BANK KENYA PLC ..... RESPONDENT**

**RULING**

1. The applicant filed the application dated 03.10.2023 through J.A. Guserwa & Company Advocates. It was under Articles 41 and 47 of the Constitution and Rule 17 of the Employment & Labour Relations Court (Procedure) Rules 2016 and all other enabling provisions of law. The prayer is for grant to the applicant leave to file his petition out of time and the annexed petition be admitted by the Court for hearing and determination, and, costs of the application.
2. The application is based upon the annexed applicant's supporting affidavit and is urged as follows:
  - a. The applicant was in the lawful employment of the respondent as the Branch Operations Officer since 2008.
  - b. By letter dated 23.03.2018 the respondent terminated the applicant's position unlawfully and contrary to his right to fair labour practices. He applied for a review by his letter dated 29.03.2018 but the appeal against the summary dismissal was upheld by the respondent's letter dated 10.05.2018.
  - c. The applicant was subjected to criminal proceedings that were determined on the 25.05.2023 long after the time for filing the instant suit had expired. It was a decision upon appeal before the High Court (Grace L. Nzioka J).
  - d. The applicant seeks to be compensated by the respondent, his former employer.



3. The respondent filed the replying affidavit of Mikah Gachanja, respondent's Legal Counsel sworn on 18.10.2023 together with grounds of opposition both filed through Mboya Wangongu'u & Waiyaki Advocates. The grounds of opposition were as follows:
  - a. Section 90 of the *Employment Act* does not admit of any leave to file a petition out of time of limitation of 3-years for disputes relating to contracts of employment.
  - b. Part III of the *Limitation of Actions Act* Cap 22 does not apply as to permit leave as prayed for to file the petition.
  - c. The petitioner has not advanced a good reason for not filing the petition or claim prior to lapsing of the time of limitation.
  - d. The application is unduly delayed filed 130 days after the decision in the criminal appeal delivered on 25.05.2023.
  - e. The cause of action accrued more than 5-years ago. It is prejudicial to require the respondent to defend such action but for the applicant's indolence.
  - f. The proposed suit has low chances of success because the summary dismissal was with due procedure and a fair reason. Further, the Court in the criminal appeal judgment found the applicant had not conducted due diligence and was negligent. No material is exhibited to support the proposed petition.
4. Submissions were filed for the parties. The Court has considered the material on record.
5. The only issue is whether the Court should exercise discretion in favour of the applicant to grant leave for filing of petition belatedly and the time of limitation under section 90 of the *Employment Act*, 2007 having lapsed. As urged for the respondent there is no disabling ground established why the applicant failed to file suit prior to lapsing of the time of limitation in section 90 of the *Act*. It is that a petition to enforce fundamental freedoms and rights can be entertained belatedly despite statutory time of limitation provided the petitioner establishes the disabling circumstances that may have made it impossible to move the Court within the prescribed time lines. Such factors have not been established and even if they existed, the procedure would be to simply file the petition as merited and any objections in that regard established and urged in the petition if objections on time of limitation are raised.
6. The Court considers that where petitions are entertained despite periods of limitation, it is not that the Court is then granting leave but that in the circumstances the cause of action in the petition is found valid as urged and, in the circumstances, not being urged on the basis of leave granted. The Court finds that no provision of law has been urged granting the Court the jurisdiction or power to extend time or grant leave as prayed for.
7. It appears that, as submitted for the respondent, after the summary dismissal and rejection of the administrative appeal or review, the cause of action crystallised but the applicant offers no explanation why he failed to promptly move the Court.
8. The Court has considered all the circumstances including the acquittal in the criminal appeal and returns no orders on costs.

The application is hereby dismissed with no orders on costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 17<sup>TH</sup> NOVEMBER, 2023.**

**BYRAM ONGAYA**



**PRINCIPAL JUDGE**

