



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO. E087 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

GEKONDO OMARI.....CLAIMANT

VERSUS

MINISTRY OF INDUSTRY, TRADE AND CO-OPERATIVE.....1ST RESPONDENT

DIRECTOR OF PENSIONS.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. Vide an application dated 31st March 2021 the Applicant seeks the following orders:

- i) *THAT, leave do issue to the ex-parte Applicant to file suit out of time against the Respondents.*
- ii) *THAT the period limited for filing a suit between the Applicant and Respondents herein be extended.*
- iii) *THAT, the costs be in the cause.*

2. The Application is premised on the following grounds:

- a. *THAT, the Applicant herein was employed by Co-operative Development (as it then was) now being the Ministry of Industry, Trade and Cooperatives since the year 1974 as a senior Sub-ordinate staff but later in the year 1974 his post was upgraded from job group C to job group D.*
- b. *THAT, in the year 2004 the Applicant was admitted by the Ministry under permanent and Pensionable Establishment having worked at the said Ministry for Thirty Two (32) years.*
- c. *THAT the Applicant retired from service in the year 2005, having been served with retirement notice by the ministry, and promised to be paid his retirement benefits by the 1st Respondent.*
- d. *THAT for the last 15 years, the Applicant been pursuing his retirement benefits from the 1st Respondent with no success.*
- e. *THAT when the Applicant finally realized that he would never be paid, he engaged his Advocates on record to file suit against the Respondents.*
- f. *THAT the 1st Respondent, through verbal promises through its officers, hoodwinked the Applicant to believing that his pension matter would be solved only to fail to pay him within the limitation of actions period; so that at the time the Applicant approached its advocates on record for purposes of suing, time for filing has already run out.*
- g. *THAT the Applicant's failure to file suit in time was not deliberate nor was it his making, but as a result of having been duped by the 1st Respondent in that the 1st Respondent had falsely (albeit verbally) indicated that it will pay the Applicant his retirement benefits.*

- h. THAT the Applicant has also been sick, experiencing financial constraints, unable to seek legal representation in time.
- i. THAT further, the Applicant is novice in matters touching timelines in filing suits of this nature hence the delay.
- j. THAT the Applicant now prays for extension of time to lodge claim against the Respondents herein.
- k. THAT Article 159 of the Constitution requires this Court to proceed and administer justice without undue regard to procedural technicalities.
- l. THAT it will be in the interest of justice for the Applicant to be granted leave to file suit out of time.
- m. THAT this application is made in good faith and in the sole interest of justice.
- n. THAT no prejudice shall be suffered by the Respondents.

3. In the affidavit in support of the Application sworn by the Applicant on 31st March 2021, he reiterates the averments on the grounds in support of the applicants.

4. Section 90 of the Employment Act provides as follows:

90. Limitations

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.

5. Further, Sections 22, 23, 26 and 27 of the Limitation of Actions Act provide for extension of limitation period only in cases of disability, acknowledgment and part payment, fraud, mistake and ignorance of material facts, all of which are not applicable in this case.

6. In the case of **Divecon Ltd v Shirkhand Sandrudin Samani Civil Appeal No. 142 of 1997**, Kwach, Akiwumi and Pall, JJA stated as follows in respect of extension of limitation period:

“To us, the meaning of the wording of section 4(1) ... is clear beyond any doubt. It means that 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. In 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.”

7. Further, in the case of **Dhanesvar Mehta v Manila M. Shah [1965] EA 321** the Court explained the object of limitation thus:

“The object of any limitation in enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand to protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

8. In the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR**, the Court was of the opinion that:

*“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**, a decision relied upon by Radido, J. 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.”*

9. The Applicant has urged the court to allow this application under Article 159 of the Constitution of Kenya 2010. As has been held in many decisions of this and other superior court, the Limitation of Actions Act is substantive law. The Court of Appeal aptly captured this in **Kenya Civil Aviation Authority v WK & 2 Others [2019] eKLR** where the Court stated:

“Firstly, because there is always a general presumption that every Act of Parliament is constitutional. Courts should therefore presume a statute or statutory provision to be constitutional unless the contrary is established, and it is the duty of the person who alleges that a statute or statutory provision is unconstitutional to prove such unconstitutionality.

*Secondly, the section is not a technical or procedural provision but a substantive one occupying pride of place in the body of the statute. Even if it was a procedural provision, we would do well to recall the caution of this Court in the **Mumo Matemu case (supra)** against derision of procedural provisions and indiscriminately riding on Article 159(2)(d) of the Constitution. Thirdly, it has*

been consistently stated by the courts that Article 159(2)(d) is not a panacea for all ills. We go back to the Supreme Court decision in **Raila Odinga v Independent Electoral and Boundaries Commission & Others [2013] eKLR** where the Court stated: -

"... Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law. In the instant matter before us, we do not think that our insistence that parties adhere to the constitutionally decreed timelines amounts to paying undue regard to procedural technicalities. As a matter of fact, if the timelines amount to a procedural technicality; it is a constitutionally mandated technicality."

In our view, the timeline set in Section 7 E (d) of CAA goes to the jurisdiction of the court and cannot be termed as a mere technicality. The Court of Appeal for East Africa dealing with the policy behind statutory limitation periods in the **Mehta case (supra)** expressed itself as follows:

"The overriding purpose of all limitation statutes is based on the maxim interest reipublicae ut sit finis litium, and it has been the policy of the courts to lean against stale claims. There is no reason why the legislature in this particular instance should enlarge the time within which the personal representative of a deceased plaintiff should have himself brought on the record. Such a construction as canvassed by counsel for the respondent would not only make article 175A nugatory or redundant in the 1877 Act, but would also operate to the prejudice of a defendant who has been lulled into a false sense of security and who would have lost all evidence for his defence...The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case. It is most desirable that legislation which prejudicially affects the rights of citizens should be readily accessible".

This Court too, in the case of **Haron Onyancha v National Police Service Commission & Another [2017] eKLR** considered the effect of a statutory bar to a case and applied the case of **IGA v Makerere University [1972] EA 65**, where it was held: -

"A Plaintiff which is barred by limitation is a Plaintiff "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the Court "shall reject" his claim. The appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief sought."

10. Article 159 can therefore not come to the aid of the Applicant as it is only applicable in procedural technicalities. The actual wording of Article 159(2)(d) are **"justice shall be administered without undue regard to procedural technicalities;"**

11. **For the foregoing reasons, this Court has no jurisdiction to grant the orders sought by the Applicant herein. The result is that the application is dismissed.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF JANUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE