

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

MISCELLANEOUS APPLICATION NO. 2 OF 2013

BONIFACE INONDI OTIENO..... APPLICANT

- VERSUS -

MEHTA ELECTRICALS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th February, 2022)

RULING

The applicant is acting in person and which fact explains the unique circumstances of this ruling. The respondent appointed Kisilu Wandari & Company Advocates to act in the matter and Ms. Wangari Advocate appeared in that regard. The claimant filed the present miscellaneous application by the notice of motion filed on 21.02.2013 and praying for an order that the Honourable Court exercises its discretion and allow the applicant to file his memorandum of claim out of time to claim for unfair termination, compensation and terminal dues. The application was determined by the Court's ruling (Radido J) delivered on 12.04.2013. The Court found that it lacked jurisdiction or discretion to extend time or grant leave to file the claim out of time and the notice of motion filed on 21.02.2013 was dismissed with no orders as to costs.

The applicant then filed another notice of motion on 21.01.2021 whose prayer was to the effect that it is the plaintiff's contention that the Court exercises its discretion to allow him file a claim out of time for a cause of action on 18.10.2006 being an injury sustained while on duty and in the respondent's employment.

The respondent opposed the application by filing on 24.02.2021 the notice of preliminary objection upon grounds that the application was *res judicata* in view of the ruling of 12.04.2013; the proposed suit would be time barred under section 4 (1) (a) and 4(2) of the Limitation of Actions Act; and litigation should come to an end.

The matter came up on 15.07.2021 for hearing of the preliminary objection and by consent of the claimant and the respondent's Counsel it was ordered:

- 1) The application for leave was fully and finally determined by Radido J and the Court will not revisit that matter.
- 2) The respondent to confirm if Kshs. 463, 070.00 due to the claimant per Judgment by Honourable Tanju SRM in Civil Case No. 559 of 2007 at Mombasa has been paid or not and if not paid, he gets paid accordingly because he is entitled to the payment.
- 3) Mention 14.10.2021 at 9.00am to confirm payment and further orders.

The consent order was recorded in circumstances that the applicant had in the said suit in the lower Court sued the respondent with respect to his injury claims and the Kshs. 463, 070.00 had been part of the amount awarded so that by the consent order, the applicant was entitled to be paid as awarded if he had not yet been paid by the respondent that amount - and which the claimant stated was outstanding.

The matter was mentioned severally to accord the respondent a chance to confirm if that payment had been effected at all. Parties filed and exchanged affidavits towards establishing the status of the payment in issue. Subsequently the applicant gave oral evidence on that issue. The Court has considered the affidavits filed for both parties and the claimant's oral evidence.

The replying affidavit by Kiran Bhatia, the respondent's General Manager, was filed on 26.01.2022. The replying affidavit by exhibit KB-1 being the letter dated 22.06.2010 from GA Insurance to the respondent's then Advocates Inamdar & Inamdar Advocates, shows that GA Insurance forwarded to the said Inamdar & Inamdar Advocates Cheque No. 015085 for Kshs. 468, 070.00 in favour of H.N Njiru & Company Advocates for onward transmission in settlement of general and special damages with respect to **SRMC No. 559 of 2007 at Mombasa, Boniface Inondi Otiemo –Versus- Mehta Electricals Ltd.** Exhibit KB-2 on that replying affidavit is a copy of the said Cheque for Kshs. 468, 070.00 and drawn in favour of H.N Njiru & Company Advocates and dated 10.06.2010. Exhibit KB-3 is the bank statement showing that on 28.06.2010 the Kshs. 468, 070.00 with respect of the cheque No. 015085 which had been deposited with the bank was withdrawn in favour of H.N Njiru & Company Advocates.

In his testimony the applicant admitted that H.N Njiru & Company Advocates were his appointed advocates in the suit in the lower Court. The claimant further testified thus, **“Honourable Tanju awarded me 800, 000.00. I received 336, 930.00. I say I claim Kshs. 468, 070.00 from Mehta Electricals Ltd (the respondent). I claim plus interest. That is all.”** In cross-examination he stated that he had demanded from the respondent the evidence of payment of the Kshs. 468, 070.00 to H.N Njiru & Company Advocates so as to enable him claim the money from the Advocates.

The Court has considered the evidence and returns that in view of the evidence, the respondent has established on a balance of probability, that the Kshs. 468, 070.00 was indeed paid to the applicant's Advocates in the lower Court proceedings being H.N Njiru & Company

Advocates. The consequence is that the respondent does not owe the applicant that money and the applicant would be entitled to lawfully pursue recovery of Kshs. 468, 070.00 from his former Advocates, H.N Njiru & Company Advocates if indeed, the Advocates had not transmitted the money to him. The issue for determination as was stated by consent of the parties is hereby determined accordingly with orders that the proceedings herein are now marked determined with finality.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH FEBRUARY, 2022.

BYRAM ONGAYA

JUDGE