



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 163 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF APPLICATION FOR LEAVE TO FILE SUIT OUT OF TIME BY

ELVIS KIPKORIR TOO.....APPLICANT

VERSUS

COOPERATIVE BANK LIMITED..... RESPONDENT

RULING

1. Before me for determination is the Ex-parte Originating Summons application dated 4th November, 2019 and filed in Court on 18th December, 2019 seeking the following orders:

- a) *That the Applicant be granted leave to file suit against COOPERATIVE BANK OF KENYA LIMITED out of time.*
- b) *That such other or further orders to be made as are just in the circumstances of this Application.*
- c) *That costs of this Application be in the intended suit.*

2. The application is brought under Section 4(1), 27 and 28 of the Limitation of Actions Act, Cap 22, Laws of Kenya, Order 3(6) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya and Section 90 of the Employment Act, 2007.

3. The Application is premised on the grounds **THAT**: -

a) *The Applicant herein was employed by the Cooperative Bank of Kenya Limited for the period between 23rd October, 2006 to 2nd February, 2009 worked in different capacities and rose through the ranks from being a clerk to the capacity of a Security Officer where he worked faithfully until his services were summarily dismissed on baseless allegations that he was implicated in theft that occurred in the Bank.*

b) *The Applicant was thereafter charged in Court for conspiracy to commit a felony in Kibera Criminal Case number 4317 of 2010.*

c) *The Applicant has since been acquitted of the criminal charges by the Honourable Court in its Judgment of 4th July, 2019, having taken about 10 years for it to come*

into completion.

d) *However, by the time the applicant herein was acquitted the statutory period for bring the Claim had since lapse.*

e) *The Applicant did instruct his advocate representing him in the criminal case to get copies of proceedings and judgment that would assist him in filing his case for unfair and unlawful dismissal.*

f) Unfortunately, the registry in Kibera Law Court took long and it was until 11th October 2019 that the Applicant was able to get certified copy of the Judgment in Kibera Criminal Case no. 4317 of 2010.

g) By the time the Honourable Court in Kibera Criminal Case no. 4317 of 2010 concluded the criminal case the statutory period for filing his Claim had since lapsed.

h) The advocate the applicant instructed to file this application also took leave and has now instructed the current firm of advocates to take conduct and file this application.

4. The Application is further supported by the Affidavit of **ELVIS KIPKORIR TOO**, the Ex parte Applicant herein sworn on 16th December, 2019 in which he reiterates the grounds on the face of the motion.

5. The Application proceeded by way of written submissions.

Applicant's Submissions

6. The Applicant submits maintained that this Court has unfettered discretion to allow his Application for leave to file suit out of time relying on the Court findings in the case of **In re John Mwangi Ng'ang'a alias John de Matthew [2016] eKLR** where it was held that the power to extend time is discretionary and is not fettered at all, save that such power ought to be exercised judiciously and upon defined principles of law.

7. The Applicant further relies on the case of **Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR** on the Court's discretion to extend time within which to file an appeal.

8. The Applicant further submitted that his failure to file suit in time was not intentional but was occasioned by the delay in conclusion of the criminal case against him, which were factors beyond his control. He further maintained that he had no option but to wait for the conclusion of the criminal case before instituting this Claim.

9. The Applicant maintains that he has a valid reason to warrant the extension of time to enable him file his claim out of time and relied on the Court findings in the case of **Nation Media Group Limited & 2 Others v Margaret Kamene Wambua [2021] eKLR** on enlargement of time for emphasis.

10. He further maintained that it is in the interest of Justice that this Court allows his application. To buttress this argument the Applicant relied on the case of **In re John Mwangi Ng'ang'a alias John de Matthew (supra)** where the Court held that

“Courts of justice should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had, despite the delay.”

11. In conclusion the Applicant urged this Court to find merit in his application and allow it as prayed.

Analysis and Determination

12. I have considered the Application dated 4th November, 2019, the Affidavit in support to the Application, the submissions filed by the Applicant and Authorities cited therein and note that the only issue for determination is whether the Applicant can be granted leave to file suit out of time. 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.

13. In the case of **Divecon Ltd v Samani (1995-1998) 1 EA 48**, the Court of Appeal was categorical that: -

“To us, the meaning of the wording of section 4(1) that ... 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.

14. The reason advanced by the Applicant for his failure to institute his case was that he could not file the matter before conclusion of the **Criminal Case Kibera Criminal Case No. 4317 of 2019** and the issuance the certified copies of proceedings and judgment.

15. Under the Limitation of Actions Act, the provisions for extension of limitation period relate only to cases of **disability, fraud, mistake and ignorance of material facts or where there is acknowledgment and part payment.**

16. This Court has pronounced itself on the issue of enlargement of time for filing suits out of time. It is a firmly entrenched principal of law that has been affirmed by precedent over an

17. The cases that the Applicant has relied upon do not relate to extension of limitation period as set out in Section 90 of the Employment Act or Section 4 of the Limitation of Actions Act upon which the application is premised. They are therefore not applicable to the instant application as they relate to procedural rather than substantive law.

18. The Applicant has further relied on Sections 27 and 28 of the Limitation of Actions Act. These two are not relevant as they only relate to extension of limitation period in respect of claims arising for torts.

19. **In conclusion, I find no merit in the application dated 4th November, 2019 and it is accordingly dismissed.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF APRIL 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