



**Kireki v Kenya Pipeline Company Limited (Miscellaneous Application  
E051 of 2022) [2022] KEELRC 3953 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3953 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E051 OF 2022  
MA ONYANGO, J  
SEPTEMBER 20, 2022**

**BETWEEN**

**BILLIAH NYABOKE KIREKI ..... CLAIMANT**

**AND**

**KENYA PIPELINE COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. By an application dated April 7, 2022 made under sections 27, 28, 29 and 30 of the *Limitation of Actions Act* (chapter 22 of the Laws of Kenya), order 37 rule 6 of the *Civil Procedure Rules* and section 1A, 1B and 3A of the *Civil Procedure Act*, cap 21 Laws of Kenya and all other enabling provisions of the law, the applicant seeks the following orders:
  - a. Spent
  - b. That this honourable court be pleased to grant leave to the applicant to file suit against the respondent out of time.
  - c. That the intended application and suit annexed herein be deemed to have been filed within the time specified.
  - d. That the costs of this application be provided for.
2. The application is based on the grounds that: -
  - a. The applicant was employed by the respondent on or about August 2007 until August 15, 2016 when she was dismissed summarily.
  - b. That the delay in filing the suit was occasioned by the applicant's former advocates whom she instructed on to pursue the claim for unfair termination on or about the year 2018.



- c. That the applicant made several visits and calls to the advocates' chambers to get the progress of the matter but all in vain as the advocates were taciturn on the issue.
  - d. That the applicant lost touch with advocates as she relocated upcountry and only visited the advocates' office on or around December 2021 when she was handed her unfiled documents.
  - e. That it is in the interests of justice that the orders sought herein be granted.
  - f. That the advocates failure to follow the alien's instructions and prosecute the matter and failure to communicate to her should not be punished on her.
3. The application is further supported by the affidavit of Billiah Nyaboke Kireki, the applicant sworn on April 7, 2022. In the affidavit she reiterates the grounds on the face of the application and further states that she worked for the respondent from August 14, 2007 until August 14, 2016 when she was summarily dismissed.
  4. That while she was working for the respondent at its terminal P510 she got injured on October 26, 2015 by the respondent's motor vehicle registration no KBN 603E and had to cater of her treatment at Mama Lucy Hospital as she was not a permanent employee and was not covered by the respondent's medical scheme. That while on treatment she used to go to work to request for treatment leave.
  5. That on August 15, 2016 she resumed work after treatment but the senior supplies manager one Nancy Rono informed the applicant that her services were no longer needed and that she should cease working with immediate effect.
  6. That upon the said dismissal, she instructed her former advocates to institute an employment claim on her behalf against the respondent.
  7. That she was invited to the advocates offices where she signed witness statements in readiness for filing suit. Thereafter she visited the advocate's office severally until she relocated upcountry following which she lost contact with the advocates.
  8. That the failure of her former advocates to follow her instructions and prosecute the matter and their failure to communicate with the applicant on the way forward should not be punished against her.
  9. It is her prayer that this court grants her leave in the interest of justice to file suit out of time against the respondent as her claim is meritorious.
  10. She states that she is ready and willing to prosecute this matter and will abide by any conditions that may be set by the court.
  11. The application, by its nature, as provided in section 28(1) of the Limitations of Actions Act, was disposed of *ex parte*. Counsel for the claimant argued the application in court on July 6, 2022 when she reiterated the averments in the applicants affidavit.

### **Analysis and determination**

12. Sections 27, 28, 29 and 30 of the [Limitation of Actions Act](#) provide for extension of limitation period in cases of ignorance of material facts in actions for negligence. Section 27 provides as follows –
  27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.
    1. Section 4(2) does not afford a defence to an action founded on tort where—



- a. The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
  - b. The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
  - c. the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
  - d. the requirements of subsection (2) are fulfilled in relation to the cause of action.
2. The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—
- a. either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
  - b. in either case, was a date not earlier than one year before the date on which the action was brought.
3. This section does not exclude or otherwise affect—
- a. any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
  - b. the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.
- [Emphasis added]
13. Section 28 of the *Limitation of Actions Act* provides that the court shall grant leave only if on the evidence adduced by the applicant it appears to the court that had such action been brought in time on the same evidence in the absence of any defence to the contrary, it would be sufficient to establish the cause of action and the facts that establish the cause of action were at all times outside the actual or constructive knowledge of the applicant.
14. Section 29 of the Act is applicable only where the claim is in respect of injury and the injured person has died.
15. In the instant case, the applicant was at all times aware of all the facts relevant to this case. She has pleaded in the grounds in support of the application and in her supporting affidavit that she instructed a lawyer and then relocated and lost touch with the lawyer. She was thus at all times aware of the facts constituting the cause of action.
16. Under the Limitation of Actions Act the only circumstances when time does not run are set out under section 26 as follows: -
26. Extension of limitation period in case of fraud or mistake Where, in the case of an action for which a period of limitation is prescribed, either—



- a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- b. the right of action is concealed by the fraud of any such person as aforesaid; or
- c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- ii. in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

17. The *Employment Act* under which the cause of action on unfair termination of employment of the claimant would lie provides at section 90 that:

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.

18. There is no provisions under section 90 of the Employment Act for extension of limitation period in respect of a claim under either the said Act or under the Limitation of Actions Act.

19. In *Divecon v Samani* [1995-1998] 1 EA 48 the Court of Appeal in addressing the question of the court’s jurisdiction to extend time beyond the limitation period under the Limitation of Actions Act 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.

20. In *Maria Machocho v Total Kenya Limited* [2013] eKLR the court held as follows;

“... 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.’”

21. Similarly, in *Beatrice Kahai Adagala v Postal Corporation of Kenya* [2015] eKLR where the claimant’s suit was dismissed for being time barred and opted to lodge an appeal, the Court of Appeal held as follows;

“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.”

22. The above put into account, this court has no jurisdiction or discretion to extend time or grant leave to file a claim based on employment contract, oral or written out of time in respect of causes of action based on breach of employment contract.
23. The upshot is that the application herein fails and is accordingly dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF SEPTEMBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

