



Lichuma v Kiambaa Tea Factory Company Limited & another (Cause E471 of 2022) [2022] KEELRC 13053 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13053 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E471 OF 2022
L NDOLO, J
NOVEMBER 3, 2022**

BETWEEN

FLORENCE ANYONA LICHUMA APPLICANT

AND

KIAMBAA TEA FACTORY COMPANY LIMITED 1ST RESPONDENT

**KENYA PLANTATION & AGRICULTURAL WORKERS UNION 2ND
RESPONDENT**

RULING

1. By her Notice of Motion dated June 24, 2022, the Applicant seeks leave of the Court to file suit out of time.
2. The Motion is supported by the Applicant's own affidavit and is based on the following grounds:
 - a. That the Applicant was a member of the 2nd Respondent throughout her employment and despite being a unionisable employee did not benefit from the salary increments stipulated in the Collective Bargaining Agreements and thereafter approached and entrusted the 2nd Respondent to take up her trade dispute;
 - b. That the 2nd Respondent lodged and took up the trade dispute at the labour office but along the way abdicated its statutory duty of care to honestly and diligently manage the trade dispute, by being unresponsive to the Applicant's urge to move the dispute to its conclusion;
 - c. That despite the Applicant's determination to follow up on the matter, she was let down by the 2nd Respondent's refusal and unwillingness to proceed with the matter and thus the delay in filing the suit;
 - d. That the Applicant's prayer for leave to file suit out of time is attributable to the 2nd Respondent's negligence in handling the Applicant's dispute;



- e. That under these circumstances, it is in the interest of justice that the Court exercises its discretion in favour of the Applicant by allowing the application.
3. The 1st Respondent's response to the application is contained in a replying affidavit sworn by Mathews Odero, who describes himself as the Acting Group Company Secretary for Kenya Tea Development Agency Holdings Ltd, the holding company of the managing agent-KTDA Management Services Ltd.
 4. Odero depones that the Claimant's employment terminated on June 15, 2015, following her resignation, which was accepted by the 1st Respondent.
 5. He further depones that the Claimant's claim is based on a contract, being the Collective Bargaining Agreement and as such any claim based on the agreement regarding her employment is now statute barred pursuant to the provisions of Section 90 of the *Employment Act*.
 6. Odero asserts that the 1st Respondent is not privy to any actions, inactions or dealings between the Applicant and the 2nd Respondent.
 7. The Applicant and the 1st Respondent urged their respective cases by way of written submissions. In her submissions dated August 31, 2022, the Applicant seeks to persuade the Court that her intended claim is based on the tort of negligence. In pursuing this argument, the Applicant relies on her assertion that the 2nd Respondent was to blame for the delay in filing suit.
 8. This was an ingenious argument by the Applicant but the Court was not convinced. I say so because the Applicant's ultimate plea is against the 1st Respondent who was her employer. Further, the remedies sought in the proposed claim emanate from the Applicant's employment with the 1st Respondent. The claim therefore falls squarely within the province of contracts with the attendant limitation of actions.
 9. The cause of action herein arose in 2015 and consequently, the applicable limitation law is Section 90 of the *Employment Act* which provides as follows:
 90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, 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 after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.
 10. As to whether the Court has power to extend time under Section 90 the law is clearly settled. In its decision in *Beatrice Kabai v Postal Corporation of Kenya* [2015] eKLR the Court of Appeal handed down the reality in the following words:

“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...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,...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*.”
 11. If the hands of the Court of Appeal are tied, those of this Court are doubly bound; first, by statute and second, by the doctrine of stare decisis.
 12. In the end, I find and hold that I have no jurisdiction to extend time in favour of the Applicant. The application dated June 24, 2022 therefore fails and is dismissed with no order for costs.



13. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2022.

LINNET NDOLO

JUDGE

Appearance:

Mr. Lichuma for the Applicant

Mr. Muriithi for the 1st Respondent

No appearance for the 2nd Respondent

