



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

MISC. APPLICATION NO.E065 OF 2021

PETER KATITHI KITHOME APPLICANT

VERSUS

LABORATORY & ALLIED LIMITED RESPONDENT

RULING

The applicant filed application dated 4th March, 2021 under the provisions of section 90 of the Employment Act, Article 41(1) and 165(b) of the Constitution, Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and seeking for orders that;

This court be pleased to grant the applicant leave to institute proceedings out of time against Laboratory & Allied Limited following unlawful termination on 11th January, 2017, the applicant was lawfully employed by the respondent as a general worker.

The application is made on the ground that the requisite period for filing proceedings has expired due to circumstances beyond the applicant’s control and only fair and just that leave be granted to file suit out of time as otherwise irreparable loss and damage will result to the applicant.

The application is supported by the applicant’s affidavit and who avers that on 3rd January, 2011 he was employed by the respondent as a general worker and worked until 11th January, 2017 when his employment was terminated verbally and the gatekeeper instructed not to allow him into the premises. At the time the applicant was under a fixed term contract dated 5th January, 2017.

On 11th January, 2017 the applicant submitted his complaint to the National General Secretary of Kenya Chemical Workers Union and who submitted a dispute to the Minister for dispute resolution. On 7th November, 2018 the Minister wrote to the union with regard to conciliation and on 22nd June, 2020 a Certificate of Unresolved Dispute was issued. Despite the applicant being apprehensive on the slow pace of conciliation, the union assured him that he would get compensation and by which time to file suit had lapsed hence application is made in good faith having arisen out of events beyond the applicant’s control.

Determination.

The single issue herein is whether leave to file suit out of time should be granted.

The applicant’s case is that he was unable to file suit in time following termination of employment on 11th January, 2017 because he reported the matter to his trade union, Kenya Chemical Workers Union which in turn reported a dispute with the Minister and who engaged in conciliation proceedings and kept the applicant under the belief that the matter would be resolved amicably but a Certificate of Unresolved Dispute and by which time to file suit had lapsed. Such events were beyond the applicant’s control.

Section 90 of the Employment Act, 2007 provides that;

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.

These provisions are couched in mandatory terms.

Previously, and before application of section 90 of the Employment Act, 2007 the statutory limitation period for causes of action based on

breach of employment contract or contract of service was that provided for contracts in general, in section 4(1) of the Limitation of Actions Act, and it was 6 years. under the same regime, no extension of time to file suit out of time was permissible as held in the case of **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.

Section 90 of the Employment Act, 2007 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, 2007. this Court neither has the statutory jurisdiction nor discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out of the Employment Act, 2007.

This is aptly summed up by the Court of Appeal in the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR** 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**, ... 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.*

The conciliation process undertaken by the application did not stop time running. Such period does not apply in tabulation of time under section 90 of the Employment Act, 2007.

In the case of **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** the court held that;

*The statutory framework on the conciliation process is as provided for by the provisions of the Labour Relations Act, 2007. Section 62 (3) of the Labour Relations Act, 2007 provides that a trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister **within 90 days of the dismissal** or any longer **period** that the Minister, on good cause, permits. ...*

*Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law. and in the case of **Rift Valley Railways (Kenya) Ltd V Hawkins Wagonza Musonye and another [2016] eKLR** the court held that;*

While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service.

Accordingly, this court is denied jurisdiction to extend time to file suit out of tie pursuant to section 90 of the Employment Act, 2007 read together with section 15 of the Employment and Labour Relations Court Act, 2011.

In the circumstances I do decline to accept the invitation by the applicant to grant leave to file suit out of time and dismiss the application dated 4th March, 2021 with no order as to costs

Delivered in open court at Nairobi this 31st day of May, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi