



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT NAIROBI**  
**MISCELLANEOUS APPLICATION NUMBER E073 OF 2020**

**BETWEEN**

**JOSEPH WAFULA MASIBO .....APPLICANT**

**VERSUS**

**THE KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT**

**RULING**

1. The Applicant seeks through the Application dated 4<sup>th</sup> December 2020, filed on 9<sup>th</sup> December 2020, leave to file the Claim out of time and/or enlarge time within which to file the Statement of Claim.
2. He explains in his Supporting Affidavit sworn on 4<sup>th</sup> December 2020, that he was retired by the Respondent on 2<sup>nd</sup> April 2015. Retirement was unconstitutional, in contravention of the Respondent's Human Resource Manual and the prevailing CBA.
3. He instructed his Advocates to file the Claim on 4<sup>th</sup> February 2016, but was unable to proceed with the Claim, because he was diagnosed with severe prostate cancer. He was weak and compelled to travel frequently in search of treatment.
4. His main prayer in the Draft Statement of Claim, is for payment of severance pay, at the rate of 2 months' pay for every complete year of service, amounting to Kshs. 17,500,000.
5. The Respondent opposes the Application through a Notice of Preliminary Objection, dated 27<sup>th</sup> January 2021. The main objection is that the Court does not have jurisdiction to extend time, as the Intended Claim is time-barred under Section 90 of the Employment Act.
6. Parties recorded a consent order on 12<sup>th</sup> February 2021 to have the Application and the Preliminary Objection considered and determined on the strength of the record. They confirmed to the Court, filing and exchange of Submissions on 12<sup>th</sup> March 2021.

**The Court Finds: -**

7. The Draft Statement of Claim, at paragraph 8, states that among other laws the Applicant holds to have been violated by the Respondent in retiring him, is the Employment Act 2007, Section 5 and 26.
8. The Intended Claim is based on a contract of employment under the Employment Act 2007. Section 90 of the Employment Act, placing a time-bar of 3 years from the date the cause of action accrues, is applicable to the contract of employment subject matter of this Application. The issue is whether the Court can grant leave to the Applicant to file his Claim, despite the expiry of the time allowed under Section 90 of the Employment Act. Should the Court assume jurisdiction and disregard limitation?
9. The Court of Appeal in *Rift Valley Railways [Kenya] Limited v. Hawkins Wagunza Musonye & Another [2016] e-KLR*, held that there is no exception to the 3-year limitation period, save for cases of continuing injury or damage. Where a statute limits time for bringing an action, no Court has power to extend time, unless the statute itself allows extension of time. The Court of Appeal in its decision above, cited with approval, *Divecon v. Samani [1995-1998] 1 EA 48 at p.54*.
10. In *Kenya Ports Authority v Cyrus Maina Njoroge [2018] e-KLR*, the Court of Appeal held that Section 66 of the Kenya Ports Authority Act, which states that an action or legal proceedings against the Authority shall not lie or be instituted unless it is commenced within 12 months next, after the act complained of, or in the case of continuing injury or damage, 6 months next after cessation thereof, is a mandatory and jurisdictional law. Section 66 was held to apply to Employees of the KPA, which lowers the period within which they can bring

employment Claims against the KPA, to 12 months, way below the 3-year period given under Section 90 of the Employment Act. This decision is in concurrence with **Rift Valley Railways [Kenya] Limited v. Hawkins Wagunza Musonye**, holding that time cannot be extended, unless the relevant statute itself, provides for extension.

11. In **Kenya Civil Aviation Authority v WK & 2 Others [2019] e-KLR**, the Court of Appeal seems to have abandoned its orthodoxy on statutory limitation on filing of Claims, espoused by the Court of Appeal in Appeals involving **Rift Valley Railways, Kenya Ports Authority** and **Divecon**, cited above.

12. The Court of Appeal was in this instance, dealing with Section 7E of the Civil Aviation Act, which is similar to Section 66 of the Kenya Ports Authority Act. It cited with approval, **Nzoia Sugar Company Limited v Kenya Ports Authority [1990] KLR**, where it was held that, Section 66 of the Kenya Ports Authority Act is deemed to have incorporated Part 111 of the Limitation of Actions Act which allows for extension of time in three instances:

[i] as provided in Section 22 in case of disability.

[ii] as provided in Section 26 in case of fraud or mistake.

[iii] as provided for in Section 27 in case of ignorance of material facts in actions for negligence

It was held that the period of limitation in Section 66 of the KPA Act and Section 7E of the CAA Act, can be extended if the Application falls in any of the three categories. The Court of Appeal therefore allowed 1<sup>st</sup> and 2<sup>nd</sup> Respondents time to file an Application for extension of time, in light of objection raised by the Appellant before the Trial Court, based on Section 7E of the Civil Aviation Act. The Court stated that the Application for extension of time, would afford the 1<sup>st</sup> and 2<sup>nd</sup> Respondents a fair hearing.

13. The majority of decisions of the Court of Appeal, and the E&LRC on Section 90 of the Employment Act, hold that the Court does not have jurisdiction in granting leave to file expired Claims. The Court of Appeal has upheld this position with regard to other statutory provisions on limitation of time. In **Rift Valley Railways v Hawkins Wagunza Musonye**, the Court of Appeal was of the view that the E&LRC had employed judicial craft in granting the Employees leave to bring an expired Claim against the Employer, under the Employment Act. The Court, in the current Application is persuaded it does not have jurisdiction to grant leave to the Applicant to bring his Claim, outside the 3 –year period prescribed under Section 90 of the Employment Act. It is unfortunate that the Applicant, who was delayed by prostate cancer from presenting his Claim on time, cannot be facilitated by this Court in accessing justice through grant of the desired leave.

**IT IS ORDERED: -**

**a. The Application dated 4<sup>th</sup> December 2020 is declined.**

**b. No order on the costs.**

**Dated, signed and released to the Parties at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 18<sup>th</sup> day of June 2021.**

**James Rika**

**Judge**