



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.196 OF 2016**

**BETTY OSIAKO.....CLAIMANT**

**VERSUS**

**TIMSALES LIMITED.....RESPONDENT**

**RULING**

The respondent, Timsales Limited filed Notice of Preliminary Objections on 23<sup>rd</sup> May, 2017 on the grounds that the court lacks jurisdiction herein as the claims filed are barred by limitation by operation of section 90 of the Employment Act, 2007 and on the basis that employment terminated on 15<sup>th</sup> May, 2013 and the claim was filed herein on 31<sup>st</sup> May, 2016 outside the 3 years period stipulate din law.

The claimant filed application and Notice of Motion dated 18<sup>th</sup> May, 2018 seeking leave to enlarge time in order to file claim out of time and the Memorandum of Claim filed be deemed as properly filed. The application is supported by the claimant's affidavit and on the grounds that the claim was filed 3 months after the lapse of 3 months. The claimant was arrested and charged in **criminal Case No.240 of 2013** with the offence of stealing by servant and which caused termination of employment. The criminal case was heard and determined on 22<sup>nd</sup> October, 2015 with an acquittal and thereafter the claim herein was filed and for justice to be achieve, time be enlarged to file the claim out of time.

Both parties filed written submissions.

The court has put into account the written submissions and the case law relied upon.

The claimant by filing application seeking for the enlargement of time is conceding there is a statutory lapse in terms of the notice filed by the respondent. Employment having terminated on 15<sup>th</sup> May, 2013 she ought to have filed the instant claim on or before the lapse of 3 years pursuant to the provisions of section 90 of the Employment Act, 2007 but this was not done until 3 months later on 31<sup>st</sup> May, 2016.

From the records, the claimant filed the Memorandum of Claim on 31<sup>st</sup> May, 2016.

The issue in dispute is that her employment was unfairly terminated by the respondent. that on 10<sup>th</sup> February, 2013 he respondent preferred malicious complaints to the police leading to the arrest and charges under Molo Criminal Case No.240 of 2013 on 12<sup>th</sup> February, 2013.

The claimant was hence not at work as of 12<sup>th</sup> February, 2013. She was acquitted in the criminal case on 22<sup>nd</sup> October, 2015.

The explanation for the delay is that the claimant was changed under Criminal case No.240 of 2013 where she was acquitted on 22<sup>nd</sup> October, 2015.

The period from 22<sup>nd</sup> October, 2015 to 11<sup>th</sup> February, 2016 when time lapsed is not accounted for. Save in her affidavit in support of the Notice of Motion the claimant avers that upon her acquittal in Criminal case No.240 of 2013 she applied for typed proceedings hence the delay in filing the instant suit.

Is the suit thus statutory time barred? Should the court enlarge time to file suit?

The first question is in the affirmative as under section 90 of the Employment, 2007 no suit should lie with the court upon the expiry of 3 years since the cause of action arose and where there is a continuing injury within 12 months from the date of cessation.

In **Regent Management Limited versus Wilberforce Ojiambo Oundo [2018] eKLR** the Court of Appeal held that;

*It is also settled that the institution of criminal proceedings is not a bar to civil proceedings on similar facts. See this Court's*

decision in **Geoffrey Kiragu Njogu vs. Public Service Commission & 2 others [2015] eKLR**. With the foregoing in mind we concur with the majority decision of this Court in **Attorney General & another vs. Andrew Maina Githinji & another [2016] eKLR** that a dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal before challenging such a dismissal. Consequently, we find that the learned Judge did not err in entertaining and determining the respondent's suit during the pendency of the criminal proceedings

The rationale is aptly captured in the case of **Thomas B. Miningwo versus Egerton University** that;

*The purposes and objectives of a criminal trial are different from disciplinary proceedings within the employment relationship. Different legal principles apply.*

Section 90 couched in mandatory terms denies the court the jurisdiction to enlarge time for a party to file suit upon the lapse of the statutory period.

The Court of Appeal in the case of **Beatrice Kahai Adagala versus Postal Corporation of Kenya [2015] eKLR** 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, ... 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.*

**Accordingly, the court is without jurisdiction to hear the instant suit; there is no jurisdiction to allow application dated 18<sup>th</sup> May, 2018 seeking to enlarge time and the objections by the respondent are with merit. The claim is hereby struck out. No orders on costs.**

Delivered at Nakuru this 27<sup>th</sup> day of February, 2020.

**M. MBARU**

**JUDGE**

**In the presence of:**

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