



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 130 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

PASCAL LOLE MAKOVO.....APPLICANT

VERSUS

ORIFLAME EAST AFRICA LIMITED.....RESPONDENT

RULING

By miscellaneous application made by way of chamber summons dated 16th September 2019, the applicant seeks leave to file suit out of time and prays that costs of the application be provided for. In the grounds in support of the application and in his supporting affidavit, Pascal Lole Makovo, the applicant states that he was in the employment of the respondent from October 2008 until April 2009 holding the position of Logistics Manager. That he was dismissed in April 2011 following allegations of theft. Consequent upon the dismissal, he was charged in Nairobi Chief Magistrates Criminal Case No. 510 of 2011. That the case was concluded and judgment delivered on 2nd November 2018 wherein he was acquitted.

He states that the delay in filing suit was occasioned by severe financial challenges as during the duration of the hearing of the criminal case he had to shuttle between Nairobi and his rural home.

The respondent filed grounds of objection to the application dated 18th November 2019. It raises the following grounds of objection—

1. The Application is fatally incompetent and untenable.
2. The Application is extremely nebulous and does not disclose a justiciable or reasonable cause of action. The Applicant has failed to disclose any alleged benefits that are due to him; therefore, neither the Respondent nor the Court can establish the bona fides of the claim or intended suit.
3. The Applicant is being deliberately vague in order to test the waters and to see whether the Respondent will negotiate on the threat of a suit.
4. The Application and intended suit are an abuse of court of process.
5. The Application is bad in law, embarrassing and prejudicial for want of essential and/or material particulars. The Respondent cannot decipher what case it may be required to meet and how to react to the matter. The Respondent is therefore forced to shoot or grope in the dark.
6. Without prejudice, the Applicant has not taken any steps or previously sought or claimed from the Respondent any of his alleged benefits; which the Respondent has a right to be given an opportunity to consider and respond to.
7. The Applicant is seeking a backdoor channel to sue for claims which cannot be brought out of time regardless of the reason(s) for delay.

The application was heard on 26th November 2019. Ms. Wanjiku holding brief for Mr. Muoka instructed by the firm of Philip Muoka and Company Advocates was present for the applicant. Ms. Soweto instructed Soweto and Company Advocates appeared for the respondent.

Ms. Wanjiku reiterated the grounds in support of the application as set out the face of the application and in the supporting affidavit. She

submitted that the applicant's funds were depleted by Criminal Case No. 520 of 2011. Relying on Article 159 of the Constitution, she submitted that an innocent litigant should not be denied a chance to ventilate his case. She submitted that in the grounds of objection the respondent admits that the claimant was its employee and that the criminal proceedings were concluded in 2018. She urged the court to grant the orders sought in the application.

Ms. Soweto submitted that besides seeking leave to file suit out of time, the applicant does not disclose the nature of the suit in his application so that the respondent does not know how to determine the justifiability of the claim. That it is only in paragraph 5 of the supporting affidavit that the nature of the claim by the applicant is mentioned in one line. That even then, the respondent is left to guess what prayers the applicant intends to seek if granted leave to file suit out of time.

Ms. Soweto submitted that there was nothing to stop the application from claiming his terminal dues after he was dismissed in 2011 as the criminal case did not prevent him from demanding his benefits, should that be what he intends to claim. She submits that the application is an abuse of court process for the said reason.

Ms. Soweto submitted that Article 159 deals only with procedural technicalities but does not do away with rules of procedure that are supposed to guard the fair administration of justice. She submitted that under Order 2, Rule 15 of the Civil Procedure Rules, the court can strike out proceedings on grounds that it discloses no reasonable cause of action or defence, or is an abuse of court process, or may prejudice, embarrass or delay the fair course of justice. That the present application does not disclose any cause of action and would embarrass the fair hearing of the matter as the respondent does not know how to respond.

Ms. Soweto further submits that the applicant did not even communicate with the respondent before coming to court. That he should only have come to court after his demand had been rejected by the respondent. That for this reason the application is *malafides*.

Ms. Soweto referred to Section 90 of the Employment Act which she submitted does limit claims arising from employment to a limitation period of 3 years. That the case of the applicant lapsed in 2014. She submitted that the applicant did not require money to approach the employer for his benefits if there was any.

Ms. Soweto prayed that the application be dismissed with costs.

Determination

Section 90 of the Employment Act provides that all claims in respect of employment be made within 3 years except continuing claims which must be brought to court within 12 months of cessation thereof. Section 90 has been interpreted in numerous decisions of this court as well as in the Court of Appeal.

In the leading authority of **Divecon v Samani**, the Court of Appeal held that no court can extend limitation period in a contract. In the case of **Augustine Odhiambo Abiero v K. K. Security Limited**, the court held that a suit that is time barred is bad in law. The same was also held in the case of **Charles Musa Kweyu v Wananchi Marine Products**.

In the present suit, there are several reasons why the application has no chance of success. The first is that it seeks orders that this court has no jurisdiction to grant as was held in **Divecon v Samani**. Secondly limitation is a matter of substantive law and a party seeking extension of limitation period cannot avail himself of the benefit of Article 159 which only refers to procedural technicalities. Thirdly, lack of money cannot be a bar to filing suit under this court as there are provisions for pauper suits.

Finally, the application as framed does not disclose any cause of action as the applicant did not file a draft of the pleadings it intends to file nor state the cause of action or prayers it would be seeking should the application be granted.

Even if the court had jurisdiction to grant the prayers sought being the extension of limitation period, the court would have no basis to determine if the applicant has any claim against the respondent that it is worth being considered by the court.

Finally, the reason given by the applicant that his criminal case was not concluded between 2011 and 2018 is not a valid reason for extension of limitation period. As pointed out by Counsel for the respondent, the pendency of a criminal suit is not a bar to filing an employment claim.

For the forgoing reasons I find the application without merit and dismiss the same.

In view of the claimant's averments with relation to his financial status, I make no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st 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