



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 157 OF 2020

ROSEMARY KANYUA GITONGA.....APPLICANT

v

KENYA POWER & LIGHTING CO LTD.....RESPONDENT

RULING

1. On or around 27 March 2015, the Kenya Power & Lighting Co. Ltd (Respondent) informed its staff of a Voluntary Early Retirement package.
2. Rosemary Kanyua Gitonga (applicant) opted to take up the offer and made an application on 2 April 2015. The Respondent accepted the application on the same day.
3. On 22 March 2016, the applicant and some 14 other staff who had taken the voluntary early retirement offer caused an advocate to make a demand of the Respondent alleging that the terms of the offer were discriminatory and in breach of contract.
4. The applicant also caused another demand to be sent to the Respondent on 14 January 2020, and the demand was followed with the instant motion seeking orders
 1. ...
 2. **THAT** the Honourable Court be pleased to grant the applicant leave to file suit out of time.
 3. **THAT** the Claim herein be deemed to be duly filed.
 4. **THAT** the costs of this application be provided for.
5. The Respondent filed Grounds of Opposition on 16 June 2020 and on 23 June 2020, the Court directed the filing and exchange of submissions.
6. The applicant filed undated submissions while the Respondent filed its submissions dated 22 July 2020.
7. The Court has considered the motion, affidavits and submissions.
8. The cause of action sought to be advanced by the applicant is contractual.
9. In terms of section 90 of the Employment Act, 2007, the applicant should have commenced the action within 3 years, i.e on or before 2 April 2018. She did not meet the deadline.
10. However, in seeking leave, the applicant contended that the Court had the jurisdiction under section 12(3)(vii) of the Employment and Labour Relations Court Act to grant leave/extend the time to file suit out of time (*Beatrice Kahai Adagala v Postal Corporation of Kenya* (2014) eKLR was cited).
11. Explaining why a suit was not filed within the prescribed time, the applicant asserted that she had faced major health challenges (diabetes and dyslipidemia. A medical note was produced) which required rigorous treatment within and outside the country, and the health conditions had prevented her from filing suit in time.
12. The question whether the Court has the power to grant leave to file suit out of time in contractual claims was considered by the Court of

Appeal in *Divecon v Samani* (1995 -1998) EA 48 wherein the Court held

to us, the meaning of the wording of section 4(1)is clear beyond any doubt. It means that no one shall have the right or power to bring 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 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.

13. And in a decision which directly arose from an employment contract where the Employment and Labour Relations Court granted leave to appeal out of time, the Court of Appeal in *Kenya Airports Authority v Shadrack Abraham Kisongochi* (2016) eKLR held

The fundamental issue is whether the trial court had jurisdiction to extend time to enable the respondent to file the suit in the first place. The answer must be in the negative. The trial court simply acted without jurisdiction.

14. The Court of Appeal in *Attorney General & Ar vs Andrew Maina Githinji & Ar* (2016) eKLR came to a similar conclusion.

15. Regrettably, the Court finds that it has no power to do what the applicant seeks, the grant of leave to sue out of time.

16. The motion is dismissed.

17. Costs in the cause.

Delivered through Microsoft teams, dated and signed in Nairobi on this 25th day of September 2020.

Radido Stephen

Judge

Appearances

For applicant Mr. Museve instructed by J.A. Guserwa & Co. Advocates

For Respondent Mr. Makori instructed by Hamilton Harrison & Mathews

Court Assistant Judy Maina