



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT BUNGOMA**  
**MISCELLANEOUS APPLICATION NO. 3 OF 2019**

**(Before Hon. Justice Mathews N. Nduma)**

**FRED NYAMBERA.....APPLICANT**

**VERSUS**

**KENYA POST OFFICE SAVING BANK.....RESPONDENT**

**RULING**

1. Applicant seeks to be granted leave to file suit out of time. The Applicant deposes that his contract of employment came to an end in the year 2014. He was charged with a criminal offence of stealing on 9<sup>th</sup> March 2015 which was determined on 14<sup>th</sup> December 2016. The case was dismissed. That the applicant instructed his advocate to file suit upon conclusion of the criminal case but the advocate did not do so.
2. The application is opposed vide a replying affidavit of Hanington Ouko filed on 27<sup>th</sup> May 2019. The respondent deposes that the intended suit is barred by *dint of Section 90 of the Employment Act, 2007* which bars any filing of a suit founded on Employment after expiry of three (3) years period. Respondent further states that one need not await outcome of a criminal trial to file an employment suit.
3. That court lacks jurisdiction to enlarge time on causes founded on employment contract.

**Determination**

**4. In Kisumu ELRC Misc. Application No. 12 of 2015 Dennis Kisang Ripko vs Kenya Commercial Bank**, Justice Maureen Onyango found that:

“Section 90 of the Employment Act provides that claims under the Act must be made within 3 years. The Section is an exception to Section 4(1) of the Limitation of Actions Act which provides that claims in contract must be made within 6 years. The Limitation of Actions Act provides for extension of limitation period at par III. Thereof only in cases of disability, acknowledgement and part payment fraud, mistake and ignorance of material facts”

**5. The Court of Appeal in Nyeri Civil Appeal NO. 21 of 2015, between The Hon. Attorney General and another vs Andrew Maina Githinji and another (2016) eKLR** held that:

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint”

6. In the present matter, the applicant was suspended from employment on 11<sup>th</sup> March 2015 having been arrested and charged with a criminal offence which was determined in his favour on 14<sup>th</sup> December 2016.
7. The applicant instructed the advocate to file suit in 2017 but same was not done until this application was filed on 29<sup>th</sup> March 2019. The employer did not terminate the employment of the claimant but only kept him under suspension pending the outcome of the criminal case.
8. The criminal case was concluded in the claimant’s favour on 14<sup>th</sup> December 2016. It follows that the cause of action crystalized upon acquittal of the claimant on 14<sup>th</sup> December 2016 since he had not been dismissed from employment.
9. It is held by Rika J. in James Mugeria Igat case:

“The claim rests on the question whether the respondent was bound by the outcome of the criminal proceedings in the Nairobi Chief Magistrate’s Criminal case Number 1602 of 2005”

10. It would appear the respondent herein suspended the claimant from employment pending the conclusion of the criminal trial.

11. The employer did not terminate the employment of the applicant and the applicant became aggrieved once the suspension was not lifted upon conclusion of criminal case on 14<sup>th</sup> December 2016. That is the time the applicant instructed the advocate to file suit but the advocate has defaulted.

12. The three years period has not elapsed since. The suit is not time barred. Three years will run out on 14<sup>th</sup> December 2019.

13. Accordingly the application to file the suit is granted since time has not run out. The suit is not yet time barred.

**Ruling Dated, Signed and delivered this 24<sup>th</sup> day of October, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Wamalwa for Applicant

M/S Ochieng Opiyo for Respondent

Chrispo – Court Clerk