



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

MISCELLANEOUS APPLICATION NO. 133 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

DAVID KIHIO NDURU.....CLAIMANT

VERSUS

CHIEF OF GENERAL STAFF, KENYA DEFENCE FORCES....RESPONDENT

RULING

Vide a Notice of Motion filed on 6th November 2018 the Applicant seeks the following orders:

1. Spent.
2. That leave be granted to the Applicant to file an employment and labour relations suit on unfair termination out of time.
3. That costs be in the cause.

The application is premised on grounds that:

1. The delay in filing the suit for unfair termination was occasioned by reasons beyond the Applicant. He was continuously intimidated by successive oppressive regimes from the year 1982 and only until the recent handshake between the President and the former Prime Minister did he feel safe enough to air his grievances.
2. The suit has high chances of success and it is only fair and just for the Applicant to be allowed an extension of time to file the suit out of time.

The application is supported by the Applicant's affidavit sworn on 6th November 2018 which he reiterates the grounds on the face of the applications.

In response to the application, the Respondent filed a replying Affidavit sworn by Major Emmanuel Wandera Makokha, a Staff Officer II at the Kenya Defence Headquarters on 27th February 2019. Major Makokha deposes that the application has been filed 34 years since the cause of action arose and that the applicant has failed to specifically state his frustrated attempts to initiate a suit against the Respondent.

He deposes that the applicant has failed to disclose the reason for his termination and further that the Respondent cannot trace the records pertaining the Applicant due to the lapse of time. He deposes that no proceedings founded on contract should be brought against the Government after the end of three years from the date which the cause of action accrued.

He deposes that the Applicant has not met the threshold for extension of time as provided under Section 6 of the Public Authorities Limitations Act. He further deposes that the court should evaluate the length of the delay, reasons for delay, the chances of the suit and if the Respondent will suffer prejudice if the Court was to allow the extension sought before allowing the application.

The Applicant filed a Supplementary Affidavit sworn on 16th April 2019. He deposes that he is not in a position to give the reasons for his termination as he is not aware of them and that the political eras within which his services were terminated did not provide for a conducive environment to file the suit. He deposes that owing to the circumstances of the matter the provisions of section 6 of the Public Authorities Limitations Act should not be invoked.

Directions were given for the disposal of the application by way of written submissions but only the Respondent filed its submissions.

Respondent's Submissions

The Respondent submitted that Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules give the Court the discretion to enlarge time. It submitted that the grounds for enlargement of time were laid down in the case of *Nicholas Kiptoo Arap Korir Salat -V- Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR*.

The respondent submitted that it is only responding to the application based on the facts on the face of the application and the Supporting affidavit without any substantive evidence. It submitted that the Applicant avers he was employed by the then Kenya Armed Forces on a contract of employment thus the provisions of Section 3(2) of the Public Authorities Limitations Act that no proceedings founded on contract should be brought after 3 years from the date of the cause of action, apply. It therefore submitted that the Applicant's right to sue was shut 28 years ago.

That the Supreme Court in *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others [2014] eKLR* held that once the Court had formed the opinion that the applicant was making diligent efforts in the quest for justice, in spite of the obstacles in the judicial process, then it should be proper to extend time. It submitted that the Applicant herein had not made any efforts to file a suit or seek justice for more than 34 years and the only allegation was that the handshake made it convenient for him to file the application. In respect of this, it relied on Article 160 of the Constitution and submitted that the Judiciary is an independent arm of government.

It relied on section 114 of the Armed Forces Act and Rule 97 of the Armed Forces Rules of Procedure (repealed) and submitted that the record of the court martial was to be kept for 6 years from the conclusion of the trial. With respect to this, should the court martial have been convened and concluded by 1983 the Respondent was to keep custody of the record till 1989.

The respondent submitted that the doctrine of laches seeks to prevent a party from ambushing someone else by failing to make a legal claim in a timely manner. In support of this, the respondent relied on the decision in *Edward Akong'o Oyugi & 2 Others v Attorney General [2019] eKLR*.

It submitted that the applicant has not met the requirements set out in the *Nicholas Kiptoo Arap Korir* Case (supra). It urged the Court not to exercise judicial discretion by dismissing the Applicant's application.

Determination

The main issue for determination is whether this court can enlarge time for the applicant to file a claim for unfair termination out of time.

The applicant wrongly brought this application under Section 349 of the Criminal Procedure Code. He avers that the failure to institute a suit at the right time was due to oppressive regimes and it became possible to do this due to the political handshake. The Respondent contends that the application is not meritorious as Section 3(2) of the Public Authorities Limitations Act provides that no proceedings can be brought against the government after 3 years from the date of the cause of action.

This Court appreciates that Section 3(2)(a) of the Employment Act provides that the Employment Act does not apply to the defence forces. Thus, it would be unnecessary for the Court to delve into the limitation period under Section 90 of the Employment Act. However, as rightly stated by the Respondent, by virtue of Section 3(2) of the Public Authorities Limitation Act this Court cannot enlarge time to file the claim out of time as the claim would most likely be dependent on a contract between the applicant and the Respondent.

Section 3(2) of the Public Authorities Limitation Act provides:

“No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.”

In *Julius Katana Kithi v Ministry of State for Defence and Another [2017] eKLR* Rika J. held:

“The position on extension of time given under Section 90, to file employment Claims is now well settled by the Court of Appeal. That position, as stated in the Case of Justice Torgbor relied on by the Respondents, is that Courts do not have the power to extend time given in a statute, on filing of Claims. The position has been restated in several other decisions of this Court, relying on Court of Appeal decisions. It is also noted that under Section 3 of the Employment Act, the Act does not apply to armed forces, as defined in the Armed Forces Act. Even if this Court had the power to extend time, it would not apply the Employment Act 2007, to the dispute.”

I thus find that this court has no jurisdiction to enlarge time on the grounds stated in the application. The result is that the application fails and is accordingly dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE