



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**MISCELLANEOUS APPLICATION NO 36 OF 2016**

**ALEX MAITHA GOWE.....APPLICANT**

**VS**

**STEEL MAKERS LIMITED.....RESPONDENT**

**RULING**

1. By his *Ex Parte* Notice of Motion dated 29<sup>th</sup> November 2016, the Applicant seeks leave to file suit against the Respondent out of time, on account of injuries sustained by the Applicant on 24<sup>th</sup> October 2013 and 30<sup>th</sup> October 2013, while in the course of employment with the Respondent.

2. The application, which is supported by an affidavit sworn by **P. Cynthia Onyango, Advocate** is based on the following grounds:

- a) That the statutory period set for filing work injury suits against an employer has lapsed;
- b) That the Applicant issued instructions to his Advocate on 18<sup>th</sup> July 2016 to file suits against his employer for injuries sustained on 24<sup>th</sup> October 2016 and 30<sup>th</sup> October 2016;
- c) That Counsel advised the client concerning a suit pending before a 3 Judge Bench in **Malindi Petition No 3 of 2016** touching on jurisdiction of the lower courts in work injury claims;
- d) That the Advocate, whilst aware of the implications of the suit pending before the 3 Judge Bench, advised against filing suit pending judgment in the Petition;
- e) That delivery of the judgment in the said Petition was postponed severally hence occasioning the delay in filing the intended suits;
- f) That judgment in **Malindi Petition No 3 of 2016** was delivered on 11<sup>th</sup> November 2016, where the learned Judges declared that only the Employment and Labour Relations Court has jurisdiction to handle work injury claims;
- g) That such delay in bringing suit, was not intentional but inadvertent given the facts surrounding **Petition No 3 o 2016**;
- h) That the Respondent will not suffer any prejudice if the Application is allowed;
- i) That in the interest of justice it is right and fair that the orders sought herein are granted.

3. In his written submissions filed on 25<sup>th</sup> July 2017, the Applicant relies on Sections 26 and 27 of the Limitation of Actions Act. Section 26 provides for extension of limitation period in cases of fraud or mistake while Section 27 deals with extension of limitation period in cases of ignorance of material facts in actions for negligence.

4. Reading the Applicant's Application together with the affidavit in support sworn by his Advocate, it appears that the Applicant decided not to file suit because there was a pending petition touching on the jurisdiction of the Magistrate's Courts to handle work injury claims. That cannot, in my view, be categorised under any of the provisions in Sections 26 and 27 of the Limitation of Actions Act.

5. At any rate, the question to ask is why the Appellant did not file his claims within the obtaining law at the time. If he did that, he would have saved his claims which could then be transferred to the right forum. Instead, he took his Advocate's advice to await the outcome of a Petition over which he had no control.

6. Whatever would be the outcome of the Petition, there was the existing law which provided adequate cover for the Applicant to file his claims in time. The Applicant however, upon the advice of his Advocate chose to sit on his rights.

7. As it turns out, the Applicant's inaction was ill advised as this Court finds no reason in law to extent time in the circumstances.

8. The Applicant's application dated 29<sup>th</sup> November 2016 is therefore dismissed with no order for costs.

9. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF DECEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Onyango for the Applicant

No appearance for the Respondent