



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 83 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 27th April, 2018)

DAVID MWONI KIEMA.....CLAIMANT

VERSUS

KENYA DEFENCE FORCES

THE PRINCIPAL SECRETARY MINISTRY OF DEFENCE

THE HON. ATTORNEY GENERAL.....RESPONDENTS

JUDGEMENT

1. The Application before Court is one dated 18th July 2017 brought under Article 48, 159 (2) of the Constitution of Kenya 2010, Order 37 Rule 6(2) and Order 51 Rule 6 of the Civil Procedure Rules 2010, Section 12(2), 20(1) and 36 of Employment and Labour Relations Act and Section 90 of the Employment Act of the Laws of Kenya and all other enabling provisions of the law seeking orders that:

- a. Leave be granted to the Applicant to file suit out of time against the Respondent herein after the expiry of the limitation period since the cause of action arose.
- b. The annexed Draft Memorandum of Claim be deemed as duly filed.
- c. Costs of this application be in the cause.

2. The Application is supported by the annexed affidavit of one David Mwoni Kiema and based on the grounds that:

1. *The delay in filing suit was not intentional.*
2. *The Claimant has a plausible explanation for the delay.*
3. *Unless leave is granted the Claimant may not be compensated his terminal dues and for the loss incurred as a result of the violation and or infringement of his constitutional rights.*
4. *It is the interest of justice that the sought orders are granted.*

3. In their Replying Affidavit, the Respondent avers that the matter was scheduled for a mention to confirm filing of submissions and allocation of a ruling date but unfortunately the Court was not sitting, the Respondent had filed and served their submissions and the Claimant never took further action again in the matter until the Respondents were served with a hearing notice dated 20th November 2017 which was served minus the application dated 14th July 2017.
4. From the Application and annexures attached, the Respondent/ Applicant submit that the Claimant withdrew cause number 1500 of 2016 vide notice of withdrawal of suit dated 29th March 2017 without serving the Respondents herein. Turning now to the allegations raised in the Notice of Motion application dated 14th July 2017, the Respondents/Applicant avers that the only applicable law is Section 90 of the Employment Act 2007 and the rest of the Sections cited therein are not applicable.
5. They further aver that the Applicant withdrew cause number 1500 of 2016 after realizing that it had no defense to the Respondents' defense of time bar.
6. They submit that the Applicant has not demonstrated continuing injury or damage that was continuous immediately he was terminated from employment on 19th July 2013 up and until 18th July 2017 when he filed the present application.
7. They aver that the allegations at paragraph 4 of the Claimant's supporting Affidavit are total lies as the Claimant was removed from service on 19th July 2013 and there are no medical records to show that immediately he was removed he suffered high blood pressure that left him bedridden for three years that he could not file a suit within the stipulated period.
8. The Respondents have submitted that they stand to suffer great prejudice if the Claimant who slept on his rights and has clearly come up vide this application with misleading and fabricated evidence is granted the orders sought.
9. The Claimant seeks to invoke Articles 48, 159(2) and 160(1) and the Respondents have submitted that these provisions do not apply to the Claimant's case. They aver that the application lacks merit, is an abuse of the Court process and brought in bad faith.
10. The Claimant filed their submissions in which they stated that, the orders being sought are discretionary and they are equitable remedies that may only be available upon a reasonable and proper examination. They relied on the case of **Edward Kamau and another vs Hannah Mukui Gichuki and another [2015] eKLR**, in which the Hon. Justice R.E. Aburili cited the Supreme Court of Kenya decision of **Nicholas Kiptoo Arap Korir vs IEBC and 7 others, SC Application No. 16 of 2014** on the underlying principles for exercise of discretion to extend time.
11. The Claimant avers that the Applicant has advanced a reasonable explanation for the delay in filing the suit due to the illness he ailed from for four years as it was beyond his control.
12. In their submissions, the Respondents stated that since the Claimant withdrew cause number 1500 of 2006, then it is treated that the Claimant is moving Court for the first time vide the present application such that the period that has lapsed since the cause of action arose on 19th July 2013 to 18th July 2017 when this application was filed is a record of 4 years and 11 days.
13. They aver that the Claimant has brought the present application 12 months later after the three years period within which to file suit lapsed.
14. They submit that the Claimant has not demonstrated any continuing injury that prevented him from moving to Court immediately his services were terminated. He has not offered any justification why it took him 4 years to make the present application and pray that the same be dismissed with costs to the Respondents, as well as costs of cause 1500 of 2016, which was withdrawn without the Respondents' knowledge.

15. I have examined the submissions of both parties in this application. The issue of the period within which a suit should be filed under the Employment Act 2007 is settled under Section 90 of Employment Act 2007 which states as follows:-

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof”.

16. By virtue of this law, the Applicant employee is duty bound to file his claim within 3 years unless there is a continuing injury.

17. The Court of Appeal in the case of **KAA vs Shadrack Abraham Kisongochi Appeal No. 6/2015** (Kisumu) held that the Employment & Labour Relations Court does not have jurisdiction to extend time in Employment and Labour Relations matters.

18. The Court’s hands are therefore tied in this matter even if the Applicant has a valid reason as to why he did not file suit within 3 years as envisaged under the Act.

19. I therefore find that this Application has no merit and I therefore dismiss it and the entire suit for being time barred.

Dated and delivered in open Court this **27th day of April, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss BenBella holding brief for Musyoki for Claimant – Present

Odukenya for Respondents