



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

MISCELLANEOUS APPLICATION NO. 160 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

STEPHEN MUNYUA WAIYALI.....APPLICANT

-Versus-

KENYA TEA DEVELOPMENT AGENCY....RESPONDENT

RULING

Before me for determination is an Originating Summons (OS) dated 9th November 2017. It is filed under the provisions of Order 37, Rule 6 of the Civil Procedure Rules 2010, Section 27 and 28 of the Limitations of Action Act, Section 3A of the Civil Procedures Act and all other enabling provisions of the law. The applicant seeks the following orders–

1. That the court be pleased to grant leave to the applicant to file suit out of time against the respondent.
2. That costs of this application be in the cause.

The applicaton is supported by the affidavit of the STEPHEN MUNYUA WAIYAKI the applicant and the following grounds

1. That the applicant was an employee of the respondent vide an offer of employment letter dated 19th October 1981 and which the applicant accepted on 23rd October 1981.
2. That on 15th June 2007, the applicant was summarily dismissed from the employ of the respondent without being granted an opportunity to be heard.
3. That the applicant contends that the termination of his employment by the respondent was wrongful and unlawful.
4. That the applicant is desirous of filing suit against the respondent for compensation for unfair termination but is statutorily time barred from commencing such suit since a period of over six years has lapsed since the date on which the cause of action arose.
5. That the court has power to grant extension of limitation period and or to grant leave to file suit out of time.
6. That the failure on the part of the applicant to file the intended suit in time was due to material facts of a decisive character being outside of his knowledge.
7. That the applicant has a strong case with high probability of success and should therefore be granted an opportunity to file the intended suit.
8. That this application is filed in the interest of justice and fairness and request that it be allowed as prayed.

In the affidavit, the applicant reiterate the matters set out in the grounds and has annexed the letter of offer of employment dated 19th October 1981, letter of salary review dated 19th December 2004, letter of termination dated 15th June 2007 and an internal office memorandum addressed to him from the Manger, Internal Audit dated 30th April 2007 on Procurement of Printed FDS Bags asking the claimant to state what he knew about the issues raised in the internal memorandum.

The applicant has further attached a copy of letter dated 12th June 2007 reference "MISCONDUCT" accusing him of manipulation and collusion facilitating procurement of FDS bags at inflated prices and requiring him to submit his written explanation within 48 hours showing cause why disciplinary action should not be taken against him.

The application, which was *ex parte*, was argued by way of written submissions filed on 22nd January 2018.

In the written submissions, the applicant states that he was summarily dismissed without a hearing, that Sections 12 (2), 12 (3) (viii) and 12 (4) of the Labour Relations Act clothes this court with jurisdiction to grant the orders sought in the application as follows –

12. Jurisdiction of the Court

(1)

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i)

(vii)

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

The applicant further relies on the decision in the case of **Mudave Gogo -vs- G4S Security Services (K) Limited [2014] eKLR** in which the court stated that

"..... This time can be extended upon the court being moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist parties who for good reasons are unable to come to court in good time....."

It is submitted that the applicant was unaware that he could seek legal services and did not have funds to seek services of an advocate. It is submitted that there are high chances of success and that the court has discretionary powers to grant the prayers sought.

Determination

Limitation period for actions in employment cases arising before the enactment of the Employment Act 2007 was 6 years as provided under Section 14 (1) of the Limitation of Actions Act. Section 4(2) referred to in the applicant's submissions relates to cases on tort. Sections 27 and 28 referred to in the application and which no reference is made of in the submissions provide for extension of limitation period in cases of ignorance of material facts in actions for negligence, nuisance or breach of duty.

As was stated in the cases of **James Muriithi Ngotho -vs- Judicial Service Commission [2012] eKLR** and **Nyanamba O. Steve -vs- Teachers Service Commission [2016] eKLR**, limitation is not a mere technicality but goes to the substance of claim. Limitation is provided for by substantive legislation and affects jurisdiction of the court. This means that the court has no jurisdiction to hear a claim that is statute barred. Without jurisdiction, the court must down its tools as was held in the case of **Owners of Vessel Lillian 'S' -vs- Caltex Oil (K) Ltd.**

Section 28 of the Limitation of Actions Act allows for extension of time in respect of actions founded on tort only and only in the specific circumstances as set out therein. In the case of **Divecon -vs- Samani** quoted in **E.Torgbor -vs- Ladislaus Odongo Ojuok** the Court of Appeal stated that "*A perusal of Part III shows that its provisions do not apply to actions based on contract*" and further that "*In light of the 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'*". In that case the Court of Appeal held 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...*" More recently, the Supreme Court in the case of **In Re The Matter of the Interim Independent Electoral Commission S.C. Constitutional Application No. 2 of 2011; [2011] eKLR** and in **Samuel Kamau Macharia & Another -vs- Kenya Commercial Bank Limited & 2 Others S.C Application No. 2 of 2012 [2012] eKLR** held that jurisdiction is a matter regulated by the Constitution, statute law and judicial precedent.

For the foregoing reasons, the application herein must fail, as this court has no jurisdiction to grant the order sought. I accordingly dismiss the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF APRIL 2018

MAUREEN ONYANGO

JUDGE