



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT**

**NAKURU**

**MISC. APPLICATION NO.25 OF 2017**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**BETWEEN**

**SAMSON WANYOIKE KIMANI .....CLAIMANT**

**VERSUS**

**BLISS FLORA LIMITED.....RESPONDENT**

**RULING**

The claimant by application and Notice of Motion dated 21<sup>st</sup> September, 2017 and brought under the provisions of Article 159(2) of the constitution, 2010, section 4(1) of the Limitation of Actions Act, section 90 of the Employment Act, 2007, section 1A, 1B and 3A of the Civil Procedure Act and seeking for orders that;

- 1. The Applicant be granted leave to file suit out of time.*
- 2. The costs of this application be provided for.*

The application is supported by the claimant's affidavit and on the grounds that he was an employee of the respondent where he was charged with the offence of stealing motor vehicle Registration No.KBR 686K from the respondent in Criminal Case No.209 of 2013 and was discharged of his duties when he was granted bond. The applicant had been told by the respondent that his reinstatement was dependent on how the criminal case was decided. He has since been acquitted but the respondent failed to reinstate or paid terminal dues.

In his affidavit, the claimant avers that on 28<sup>th</sup> January, 2013 he was arraigned in court and charge with the offence of stealing and was released on bond on 13<sup>th</sup> February, 2013 when he went back to work with the respondent. He was refused work and asked to wait for the outcome of the criminal case. He was not issued with a termination letter or paid the salary due.

The criminal matter ended with an acquittal on 2<sup>nd</sup> December, 2015 but the respondent refused to take him back at work. Due to the on-going criminal case, the claimant could not institute the claim herein as he had expected to be reinstated by the respondent upon acquittal. It is now over 3 years since termination of employment hence the application seeking leave to file suit out of time for the reasons set out in the application and supporting affidavit.

The respondent entered appearance and filed Grounds of Opposition that the application filed by the claimant is incompetent and in gross abuse of the court process. The court has no jurisdiction to extend time or grant leave to file suit out of time with respect to claims arising out of employment contracts and should be dismissed.

Both parties filed their written submissions.

The claimant as the applicant submits that section 90 of the Employment Act, 2007 limits filing of claims based on employment contract within 3 years and in the case of **Attorney General & Another versus Andrew Maina Githinji & another [2016] eKLR** the court addressed the question of limitation and when a cause of action arises in an employment claim and the court held that where there are criminal proceedings, time starts running when an employee is issued with a letter terminating employment. The applicant herein has not been issued with a letter terminating his employment. Though the claimant stopped undertaking his duties with the respondent on 13<sup>th</sup> February, 2013 after he was released on bond, he was orally advised by the respondent to await the outcome of the criminal case. The claimant innocently chose to take the word of his employer and upon acquittal he reported back to work but the respondent has refused to reinstate him hence the application herein seeking leave to file suit out of time.

The respondent on their part submits that time limitation touch on the jurisdiction of the court which must be addressed first. Section 90 of the Employment Act, 2007 gives a mandatory 3 years' time within which claims arising out of employment contract should be lodged in court. The claimant has confirmed that he was relieved of his duties on 13<sup>th</sup> February, 2013 after being charged with criminal offences. Time to file suit started running from such date. No suit can be lawfully filed after the lapse of 3 years pursuant to the provisions of section 90 of the Act.

The respondent also submits that that Court of Appeal in **Attorney General & Another versus Andrew Maina Githinji & another [2016] eKLR** addressed similar question and held that even where there are on-going criminal proceedings, in a claim arising out of employment contract, the cause of action arise from the date employment is terminated. Similarly in **Attorney General & Another versus Andrew Maina Githinji & another [2016] eKLR; Peter Nyamai & 7 others versus V.M. Clarke Limited, Cause No.78 of 2012 (ELRC Mombasa)**, the court held that the court has no jurisdiction or discretion to extended time or grant leave to file an employment claim filed outside of the 3 years limitation period.

The respondent also submits that In this case, the court having no jurisdiction should dismiss the application with costs.

It is not in dispute that the claimant was charged in Criminal case No.209 of 2013. He was granted bond and on 13<sup>th</sup> February, 2013 he reported back to work and was advised to await the outcome of the criminal proceedings against him. The last day at work was therefore the 13<sup>th</sup> February, 2013.

The application filed on 27<sup>th</sup> September, 2017 is seeking leave to file suit out of time.

Does the court have jurisdiction and or discretion to extend time for a party to file suit out of time?

The Court of Appeal in **Divecon versus Samani [1995-1998] 1 EA 48** in addressing the question of the court jurisdiction to extent time beyond the limitation period under section 90 of the Employment Act, 2007 held as follows;

*No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is 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. A perusal of Part III shows that its provisions do not apply to actions based on contract.*

Though the above suit cited above was based on tort, the Court of Appeal held that that the cause of action was founded on both tort and contract. This is the finding in **Peter Nyamai & 7 others versus V.M. Clarke Limited, Cause No.78 of 2012 (ELRC Mombasa)**, to which I am in agreement.

In **Maria Machochi versus Total (K) Industrial Cause No. 2 of 2012** the court held as follows;

*... Section 90 of the Employment Act has now amended the Limitation of Actions Act to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the Employment Act. I now have to determine whether this Court has the jurisdiction to grant leave or extend time in respect to causes of action based on breach of contract generally and breach of contract of service or actions arising out of the Employment Act specifically. The precedent in this regard was set out by the Court of Appeal in Divecon Ltd v Samani [1995-1998] 1 EA 48 at 54 that section 4(1) of the Limitation of Actions Act was clear beyond any doubt and that the section meant that no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is 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.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these 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.*

Similarly, in a case where the claimant's suit was dismissed for being time barred and opted to lodge an appeal, the Court of Appeal in **Beatrice Kahai Adagala versus Postal Corporation of Kenya [2015] eKLR** held as follows;

*Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of **Divecon Limited -vs- Samani [1995-1998] 1 EA P.48**, a decision relied upon by Radido, J. in **Josephat Ndirangu - vs - Henkel Chemicals (EA) Limited, [2013] eKLR**, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act.*

**The above put into account, this Court has no jurisdiction or discretion to extend time or grant leave to file a Claim based on employment contract, oral or written out of time in respect of causes of action based on breach of employment contract. Ordinarily an application such as this ought to be filed ex parte though the respondent was served and responded hereto. The questions addressed herein serve to advance jurisprudence.**

**Each party shall therefore bear own costs.**

Delivered in open court at Nakuru this 15<sup>th</sup> day of May, 2018.

**M. MBARU JUDGE**

In the presence of:

Court Assistants: Nancy Bor & Martin Oletiyana

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