



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

**MISC. APPLICATION NO. 155 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**ABDULAHI BASHIR HUSSEIN.....CLAIMANT**

*VERSUS*

**DIRECTOR OF PENSION.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY,**

**MINISTRY OF MEDICALS SERVICES.....2<sup>ND</sup> RESPONDENT**

**RULING**

Vide a notice of motion filed under certificate of urgency on 13<sup>th</sup> February 2018 the applicant seeks leave to file suit out of time. The application is supported by the affidavit of the applicant and on the following grounds –

1. The claimant herein was taken ill hence never filed any suit due to his status.
2. The claimant shall stand loosing the money which could have assisted in everyday life.

In the supporting affidavit the applicant states that he was an employee of the Ministry of Health from 1986 to 2002. He was transferred to Kenya Medical Training College where he worked from 2002 until 2006 when he retired. He avers that before his retirement he attained Job Group J while at Kenya Medical Training College.

However he was retired by the Ministry of Health under Job Group F instead of Job Group G which he attained while still at the Ministry. He deposes that he raised a complaint with the Commission of Administrative Justice concerning his retirement benefits and pension dues but the response he received was not satisfactory. That the delay in filing suit was due to his ill health and the follow-up with the Commission.

The applicant deposes that his claim is genuine and he needs money to take care of himself and his family hence the reason for seeking leave to file suit against the respondent out of time. He deposes that he stands to suffer substantial loss and injustice should the orders sought not be granted.

The application was served upon the respondent who failed to file any response or attend court on 25<sup>th</sup> April 2018 when the court directed the applicant to proceed by way of written submissions.

In the submission the applicant reiterates the averments in his supporting affidavit. He further states that he has a valid claim which this court has jurisdiction to hear, that the respondent will not be prejudiced by the extension of time and that he has a constitutional right to make the application.

He relies on Article 159(2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities and that Section 3A of the Civil Procedure Act gives this court inherent powers to make such orders as may be necessary for the ends of justice to be met.

The applicant relies on the case of **John Mwangi Ng'ang'a alias John De Mathew - Misc. Application No. 283 "A" of 2015** (in the High Court Nairobi) and **Civil Suit No. 50 of 2007 PMN -V- KENYATTA NATIONAL HOSPITAL AND 6 OTHERS**. In the former the

court granted leave to the applicant to file suit out of time. While in the latter the court declined to dismiss a suit for having been filed out of time and granted the claimant leave to file an application for extension of time.

#### **Determination**

I have considered the application together with the grounds and affidavit in support thereof. I have further considered the submissions and authorities cited.

Limitation period for actions in contracts is provided for under Section 4(1) of the Limitation of Actions Act which provides as follows –

#### **4. Actions of contract and tort and certain other actions**

##### **(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—**

**(a) actions founded on contract;**

**(b) actions to enforce a recognizance;**

**(c) actions to enforce an award;**

**(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**

**(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.**

Section 90 of the Employment Act provides for Limitation period for actions filed under the Act at three years from the date of accrual of the cause of action.

**Misc. Application No. 283 “A”** cited by the applicant herein relates to the filing of suits under **Sections 3 and 6** of the Public Limitation of Actions Act, Section 38 as read with Part III of the Limitation of Actions Act, Order 37 of the Civil Procedure Act and all enabling laws. **Civil suit No. 50 of 2007** relates to extension of time under **Section 27** of the Limitation of Actions Act.

Under the Limitation of Actions Act there is no provision for extension of limitation period in contracts. Part III of the Act relates to extension of limitation period in cases of disability, acknowledgement and part payment, fraud, mistake and ignorance of material facts. The applicant herein has not pleaded any of these in his application.

In the case of **DIVECON -V- SAMANI** the Court of Appeals stated 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...”*

These sentiments have been expressed in many subsequent decisions of the Court of Appel including the decision in Kisumu Civil Appel No. 6 of 2015 between **KENYA AIRPORTS AUTHORITY -V- SHADRACK ABRAHAM KISONGOCHI**.

For these reason, I decline to grant leave to the applicant to file suit out of time. Having been retired from service in 2006 the applicant should have filed suit by November 2012 being the 6<sup>th</sup> anniversary of his retirement. The result is that the application is without merit and is accordingly dismissed.

**DATED AND SIGNED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JULY 2018**

**MAUREEN ONYANGO**

**JUDGE**