



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

MISCELLANEOUS APPLICATION NO. 36 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

A A A.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

By application dated 26th March 2018 filed under certificate of urgency, the applicant seeks the following orders –

1. That the application be certified as urgent and heard ex-parte in the first instance.
2. That the court grants leave to the applicant to file claim against the respondent out of time.
3. That costs of the application be in the cause.

The application is made under Section 4(1) and 22 of the Limitation of Actions Act, Section 12 of the Employment and Labour Relations Court Act and Rule 16 of the Employment and Labour Relations Court Rules 2010, Article 50 and 159 of the Constitution and all other enabling provisions of the law. The application is grounded on the affidavit of **A A A** the applicant and on the following grounds –

1. That the applicant was a P1 teacher of TSC No. [particulars withheld] employed by the respondent.
2. That the applicant was dismissed from employment on 3rd August 2009 by the respondent on an allegation of having carnal knowledge with a child.
3. That soon after his dismissal from the respondent's employment the applicant suffered from a mood disorder known as schizoaffective from late 2010 to 19th December 2017.
4. That during the said period the applicant was under mental disability, lacked the requisite legal capacity to pursue his claim of wrongful and unfair termination against the respondent.
5. That it is in the interest of justice and fairness that the application be allowed as prayed.

In the supporting affidavit the applicant states that he was sick between 2010 and 19th December 2017 and was first treated at Mandera District Hospital for 7 months, then Mathare National Teaching and Referral Hospital from 12th July 2010 to 19th December 2017. He annexed copies of treatment records to the affidavit. He deposes that during the period of his mental disability he did not have legal capacity to pursue his claim for unfair termination hence the present application.

The respondent opposes the application and filed grounds of opposition as follows –

1. The application lacks merit, is misconceived, bad in law and fatally defective.
2. The application is an abuse of the process of the court

3. The court has no jurisdiction or discretion to extend time or grant leave to file suit out of time in respect of claims arising out of employment contracts.

The application was by consent of parties disposed of by way of written submissions.

Applicant's Submissions

The applicant submits that Section 22 of the Limitation of Actions Act provides for extension of limitation period in case of disability among others. The applicant relies on the case of **KITHURE M'MWENDA NYAGA -V- TEACHERS SERVICE COMMISSION** in which Ndolo J. allowed an application in circumstances similar to the present application. The applicant further relied on the case of **KALEB KARIBA -V- KENYA DEPOSIT INSURANCE CORPORATION** in which Ndolo J. again allowed application for extension of time on grounds of disability.

On the grounds of opposition, the applicant submitted that the 1st and 2nd grounds are unsubstantiated while on the 3rd ground the applicant submits that this court has jurisdiction to grant the orders in the circumstances of this case where the applicant was suffering from disability.

For the respondent it is submitted that in the case of **KENYA ELECTRICAL TRADES AND ALLIED WORKERS UNION -V- KENYA POWER AND LIGHTING COMPANY LIMITED [2015]** the court declined to extend limitation period stating that limitation is a jurisdictional and therefore substantive issue and not just a procedural right, holding that the court has no right or power to entertain what cannot be done. The respondent further relied on the case of **DENNIS KSANG RIPKO -V- KENYA COMMERCIAL BANK** in which the court dismissed an application for extension of time citing the decision of the Court of Appeal in **DIVECON -V- SAMANI** in which the court stated -

"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..."

On the application of Section 22 of the Limitation of Actions Act, the respondent submitted that although the applicant was dismissed on 3rd August 2009, he fell sick and was diagnosed with a mental disorder for the period between 2010 and December 2017 and therefore had ample opportunity to file suit before he fell sick.

The respondent relied on the decision in **B.M.O -V- ECOBANK KENYA** in which the court held that for a person to rely on Section 22, he must have been under incapacity on the date when the right of action accrued relying on the Law of Contracts, Cheshire and Fifoot 8th Edition at page 616 that states:-

"It must be observed that there is no extension of time unless the disability exists when the cause of action accrues: When time has once begun to run it is not stopped by the subsequent occurrence of some disability, as for example where the plaintiff becomes insane soon after the accrual of the cause of action..."

That though the Applicant suffered from the mental disorder after the dismissal consequently, his subsequent mental disorder did not stop time from running since it started running at the time of dismissal.

The respondent further relied on **CHITTY ON CONTRACTS; GENERAL PRINCIPLES, TWENTY - SIXTH EDITION** at paragraph 1957 that states as follows: -

"If on the date when any right of action accrued for which a period of limitation is prescribed by the Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date on which he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired. This does not apply to actions for which a period of limitation is prescribed by or under any other enactment. It will be observed that the period allowed after the cesser of disability or death is (subject to the exception discussed below) six years, and this is so even though the action is on a specialty. There is no extension of time under this section if the right of action first accrues to some person not under a disability, even if that person is one through whom the person under a disability claims, in other words, the disability must exist when the cause of action accrued: subsequent disability is of no effect."

That the court held in **B.M.O -v- Ecobank Kenya** (supra) that –

"The Claimant cannot avail himself of extension of time on grounds of incapacity under Section 22 of the Limitation of Actions Act on two grounds. The first is that he was not under incapacity on the date when the right of action accrued... The result is that the application has no merit and is hereby dismissed."

The respondent further submitted that the delay was inordinate and relied on **RE JOHN KIPKEMBOI MUTAI [2016]** in which the court stated –

... I find that delay by the applicant in filing suit was inordinate. Filing suit seven (7) years after the date of the cause of action may become a stumbling block in the gathering of evidence by the intended defendants. Consequently, I find no merits in the application and dismiss the same with costs."

The respondent submitted that the decision in the case of **KALEB KARIBA -V- KENYA DEPOSIT INSURANCE CORPORATION** is distinguishable as the applicant was unwell at the time of accrual of cause of action while the ruling in case of **KITHURE M'MWENDWA NYAGA -V- TEACHERS SERVICE COMMISSION** is not binding on this court.

Determination

Section 90 of the Employment Act provides for limitation of three years in cases arising out of employment relationship. In the present case, the applicant was dismissed from employment on 3rd August 2009. Section 90 of the Employment Act is not applicable because he was dismissed before the enactment of the Act. The relevant law is therefore Section 4(1) of the Limitation of Actions Act and the relevant limitation period is 6 years. The claimant filed the present application for extension of limitation period on 9th April 2018, some 9 years and 8 months after the cause of action accrued and more than 3 years after the limitation period lapsed. His grounds for seeking extension of limitation period is that he was suffering from what was diagnosed as schizoaffective, a mood disorder. In the psychiatrist report dated 19th December 2017, Dr. Joseph Jimba states that the applicant who had suffered from mood disorder schizoaffective since 2010 is now fit to resume his previous functions. The reports states that during the period of intense illness the applicant had lost cognitive functions.

Disability on grounds of insanity is one of the few instances when the law permits extension of limitation period. The qualifier is that the disability must have set in at the time of accrual of the cause of action. In the instant case, the claimant was first treated from his condition, which qualifies as insanity, on 7th March 2010. It is therefore possible that the condition started earlier and was only diagnosed at the time the treatment started.

I will therefore give the applicant the benefit of doubt and grant him leave to file his claim out of time on grounds that he was suffering from a disability from the date of accrual of the cause of action on 3rd August 2009 when his employment was terminated.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF SEPTEMBER 2018

MAUREEN ONYANGO

JUDGE