



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

MISC. CAUSE NO.12 OF 2018

JOHN KIPSANG MUTAL.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

RULING

The claimant (applicant) filed application and Notice of Motion under the provisions of Article 48, 159(2) and 160(1) of the Constitution, Order 50 Rule 6 of the Civil Procedure Rules and section 12(2), 20(1) and 36 of the Industrial Court Act and Section 90 of the Employment Act Cap 226 and seeking for orders that;

- a) *The application be heard ex parte and service thereof be dispensed with in the first instance.*
- b) *The applicant herein be granted leave to enlarge time in order to file suit out of time.*
- c) *The attached Draft memorandum of Claim be deemed as duly [filed].*

The claimant has attached his Supporting affidavit and also grounds in support of the application that his suit was not filed within the stipulated time due to circumstances beyond his control and he was rendered temporarily mentally unstable following a tragic road accident. Now the claimant has the right mental capacity to prosecute the suit and the respondent shall not suffer any prejudice if the suit is heard and determined by the court.

The claimant also avers in his affidavit that he was employed by the respondent in 1986 as a Teacher in Sigowet Primary School. On 18th January, 1991 he was involved in a traffic accident and admitted in hospital. The accident rendered him temporarily physically and mentally unfit and during hospitalisation he was interdicted by the respondent without being given a fair hearing.

The claimant also avers that he filed suit to recover damages from the road accident at Kisii Law Courts but has never been able to recover any damages as the insurance Company, Stallion Insurance went under receivership while suit was pending.

The claimant has sought registration with the Council for Persons With Disabilities as a result of the accident which rendered him physically and mentally unstable. He was unable to appeal against his interdiction with the respondent within the stipulated time but has kept in communication to show that the respondent is aware of his case.

Determination

An application of this nature is heard ex parte in the first instance. Once determined, the court can then direct service upon the respondent.

The claimant as the applicant has relied on the provisions of *Industrial Court Act* and the provisions of *Section 90 of the Employment Act Cap 226* which statutes have since been repealed and in place and instead there is the *Employment and Labour Relations Court Act, 2011* and the *Employment Act, 2007*. Both statutes relate to the constitutive Act for the court and the other relates to rights and duties, obligations and responsibilities in employment.

Section 90 of the *Employment Act, 2007* provides that;

90. Limitations

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based on 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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

No civil action arising out of rights set out under the Employment Act, 2007 or based on a contract of service or employment *shall* be made unless it is commenced three (3) years after the act complained of arose. Effectively, the date of termination of the employment relationship is fundamental. Based on such a date, a complaint must be lodged with the court within 3 years. After 3 years, the court has no jurisdiction or power to extend the set statutory time. See **Tabitha K Rutere versus Kenyatta University Cause No.89 of 2018**.

The claimant's case is that he was interdicted by the respondent in January, 1991 and due to a road accident that rendered him physically and mentally incapacitated, he was unable to lodge an appeal within the prescribed time. That he filed suit at Chief Magistrate's Court Kisii for damages through his advocates. He however did not move the court to secure his rights against the respondent when he was interdicted.

The claimant has not attached any record, document or evidence in his affidavit. The Notice of Motion is basically empty.

Such lapses cannot be cured by invocation of articles 48, 159 or 160 of the Constitution, 2010.

Since 1991 to date, the claimant has not taken action however remote against the respondent. such constitutes a lapse of over 27 years.

In addressing the question as to whether this court can extend time for a party to file suit out of time, the Court of Appeal in the case of **Willis Onditi Odhiambo v Gateway Insurance Co. Ltd (2014)** eKLR held that;

This section [section 27 of the Limitation of Actions Act] clearly lays down the circumstances in which the Court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort.... The parties could not confer jurisdiction on the judge by their consent.

Similarly the Court of Appeal in the case of **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**, ... 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.*

Effectively, this court lacks the requisite jurisdiction or discretion to extend time for the applicant to file suit out of time now 27 years since the cause of action arose.

Accordingly, application dated 10th August, 2018 is hereby dismissed. As this were ex parte no orders on costs.

Dated and delivered at Nakuru this 11th day of October, 2018.

M. MBARU

JUDGE

In the presence of: