



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR AND RELATIONS COURT AT KISUMU

MISC APP. No. 8A OF 2016

FELIX OTIENO & 18 OTHERS.....APPLICANTS

VERSUS

KENYA POWER LTD.....RESPONDENT

RULING

Before me for determination is an application dated 5th April, 2016 by way of an ex-parte originating summons brought under the provisions of section 27 and 28 of the Limitation of Actions Act. The applicants seek leave to file suit out of time. The application is supported by an affidavit of ANTONY MATANYI ISAJI sworn on 5th April, 2016 and his further affidavit sworn on 11th July 2016 pursuant to leave granted by the court.

The grounds in support of the application are stated on the face of the originating summons as follows:

1. That the applicants were all employees of Kenya Power and Lighting Company Limited now Kenya Power Limited with its western regional offices in Kisumu,
2. That on diverse days and months during the year 2012, the Respondent unilaterally terminated the employments of each of the applicants unlawfully and have never paid them their terminal dues,
3. That at the time of the termination, being a nationwide exercise, the applicants were made to believe by their union that the legal action would be taken and cases filed in Nairobi for all of them but no such action was taken,
4. That the time for Filing of Suits seeking their Terminal dues in terms of the employment Act has since expired,
5. That the delay in instituting the desired suits was not deliberate and it is only fair that the time for such filing extended to enable the applicants secure their rights on account of the unlawful terminations in the year 2012.
6. That the delay in filing the suit is neither inordinate or intentional.

The same grounds are reiterated in the affidavit in support of the application.

When the application came up for hearing on 23rd May, 2016 I directed the applicants to file draft memorandum of claim to enable the court determine if there was a valid claim before determining the application for leave to file the claim out of time. I further directed that the application be served on the

Respondent although it is an *ex parte* originating summons. The application was argued by way of written submissions.

I will first address the issues raised in the Respondent's submissions because I consider them to be of preliminary nature.

As I have already observed herein above this application is brought by way of *ex-parte* originating summons. It is made pursuant to Order 37 Rule 6 of the Civil Procedure Rules and section 27 and 28 of the Limitation of Actions Act.

The Respondent did not file a replying affidavit but filed written submissions in which it states that it was not to respond to the application but for the orders of the court. The Respondent has referred this court to several authorities the gist of which is that where an application is brought by way of *ex-parte* originating summons an order made pursuant thereto can only be challenged in the trial and not by review or application for setting aside. The said authorities are MARY WAMBUI KABUGU v KENYA BUS SERVICE [1997] eKLR; YUNES K. ORUTA AND ANOTHER v SAMUEL MUGE NYAMOTO [1984] KLR and NGARI & ANOTHER V ODERO [1999] 2 EA 241. I do agree with the decisions in the authorities. However I think the Respondent misapprehended my orders or the authorities cited or both. The authorities provide that once an order has been made granting leave to the applicant to file suit out of time, such order cannot be challenged by way of an application to set aside, or review or a by preliminary objection in the suit filed pursuant to such leave, but can only be challenged at the trial.

That is not the case herein. No leave has been granted to the applicants in this case and the Respondent has not been called upon to contest such leave *ex-parte* originating summons .

The forgoing notwithstanding I agree with the Respondent that both order 37 Rule 6 of the Civil Procedure Rules and section 27 and 28 of the Limitation of Actions Act do not provide for participation of the Respondent in an application made *ex-parte* and therefore the court may not make an order for service of the Application upon the Respondent before it is heard.

Having dealt with that preliminary issue I now turn to the substantive application which is for leave to file suit out of time.

It is submitted that the relationship between the application and the Respondent is contractual and under section 4 (1) of the Limitation of Actions Act the limitation period for filing suit is 6 years. That being an employment relationship the contract falls under the Employment Act which provides his limitation period of 3 years. It is submitted that the applicants' contracts of employment were terminated by the Respondent on 1st May, 2012 and 3 years lapsed in 2015. That their claims are thus time barred unless the time is extended by this court, that being the purpose of the instant application.

It is submitted that section 90 of the Employment Act makes no express provision for extension of time and that section (3) of the Limitation of Actions Act provides that where the period of limitation is prescribed for action or arbitration by any other written law that written law shall be constructed as if part III of the Act were incorporated therein.

It is submitted that any application for extension of limitation period under section 90 would by virtue of section 31 of the Limitation of Actions Act import part III thereof into the Employment Act hence the application for extension.

It is further submitted that labour relations which forms the basis upon which the applications have filed the instant application is a constitutional right under Article 41 of the Constitution and Articles 47 and 48 afford the applicants the right to fair administrative action and access to justice generally, that the principal objective of the Act establishing this court is stated at section 3 thereof. It is submitted that the delay in filing suit is not inordinate and the reason for not filing suit in time is excusable. The applicants urge the court to grant the prayers sought.

Determination

Sections 27 and 28 of the Limitation of Actions Act under which the instant application has been filed provide as follows.

27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.

(1) Section 4(2) does not afford a defence to an action founded on tort

where—

(a) the action is for damages for negligence, nuisance or breach of duty

(whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect—

(a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

28. Application for leave of court under section 27

(1) An application for the leave of the court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient-

(a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and

(b) to fulfill the requirements of section 27(2) of this Act in relation to that cause of action.

(3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient—

(a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and

(b) to fulfill the requirements of section 27(2) of this Act in relation to that cause of action, and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27 of this Act) to afford a defence under section 4(2) of this Act.

(4) In this section, “relevant action” in relation to an application for the leave of the court, means any action in connexion with which the leave sought by the application is required.

(5) In this section and in section 27 of this Act “court”, in relation to an action, means the court in which the action has been or is intended to be brought.

Section 27 expressly refers to claims in tort where action is for damages from negligence, nuisance or breach of duty. This section does not provide for claims arising from contractual relationships. Section 28 provides for the procedures for extension of time under section 27. The two sections are therefore limited to extension of limitation period for claims under section 4(2) of the Limitation of Actions Act which provides for actions founded on torts. Section 27 and 28 are therefore not applicable to claims under section 4(1) of the Limitation of Actions Act under which limitation period for contracts is provided for.

The Application of section 27 and 28 of the Act have been the subject of several decisions by superior courts including the Court of Appeal which in *DEVECON V SAMANI* categorically stated that there is no provision for extension of limitation period with respect to contracts. The court expressed itself in the following terms-

...to us, the meaning of the wording of section 4(1) is clear beyond any doubt. It means that 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 to 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 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 (my emphasis).

In the case of *SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK LIMITED & 2 OTHERS* [2012] eKLR the Supreme Court stated that Jurisdiction of courts is derived from either the constitution or the law. The sections relied upon by the applicants do not confer jurisdiction on this court to make the orders sought. As was stated in the case of *OWNERS OF THE MOTOR VESSEL "LILLIAN S" V CALTEX OIL (KENYA) LIMITED*[1989] eKLR, where a court has no jurisdiction, it cannot move any step forward and must down its tools.

This court has no jurisdiction to grant the orders sought by the Applicants with the result that this application must fail. The application is accordingly hereby dismissed. There shall be no orders for costs.

DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE