



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

MISC. CIVIL APPLICATION NO. 21 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KENNETH OUMA WASIKECLAIMANT

-Versus-

MUMIAS OUTGROWERS SACCO SOCIETY LTD

CURRENTLY T/A NITUNZE SACCO SOCIETY LTD.....RESPONDENT

R U L I N G

By an Exparte notice of Motion dated 6th December, 2016 the applicant seeks the following orders -

- a) THAT this Application be certified urgent and the same be heard on priority basis.
- b) THAT the Applicant be granted leave to lodge a claim out of time contesting termination of employment which occurred on 8th February, 2010.
- c) THAT costs of this application be in the cause.

The grounds upon which the application is premised are the following

- i. THAT the Applicant was an employee of the Respondent and his services were unlawfully terminated on 8th February, 2010.
- ii. THAT the applicant instructed the firm of B.O. Otsula to pursue the claim but no action was taken by the said advocate.
- iii. THAT the Respondent will not suffer any prejudice if the orders sought herein are granted.
- iv. THAT it will serve the interest of justice if the orders sought are granted.

The application is supported by the affidavit of the Applicant KENNETH OUMA WASIKE sworn on 6th December, 2016 in which he depones that he was an employee of the Respondent until 8th February, 2010 when his services were terminated. He states that he instructed the firm of B. O. Otsula & Company Advocates to file a claim for unfair termination and paid fee on 7th January 2011. He subsequently visited the office several times and was informed that a case had been filed. However in the month of October, 2016 when he visited the court registry in Kisumu and perusing the Register, he was advised that no such suit had been filed.

He states that failure to file suit in time was occasioned by the said advocates and the mistake of advocate should not be visited upon him. He states that the period within which he was to file claim lapsed hence he is seeking leave to file the claim out of time. He states that his advocate has advised him that the court has unfettered discretion to grant leave to file claim out of time. He states his terminal dues were withheld and he has high chances of success. He further states that technicalities of law should not defeat the substance of the suit.

The Claimant annexed a copy of statement of claim filed on 8th December 2016. He prays that the orders sought in the application be granted.

The application came before me for hearing under certificate of urgency on 8th December, 2016 when I directed the applicant to serve the Respondent. The Respondent however did not file any response or appear in court on 30th January, 2017 for the hearing of the application. I allowed the applicant's counsel Mr. Mukolwe holding brief for Mr. Mukosi to argue the application.

Counsel reiterated the contents of the application and the affidavit in support thereof and urged the court to grant the application as prayed on grounds that it is unopposed.

Determination

Section 90 of the Employment Act provides that suits relating to claims under the Act should be filed within 3 years. The section provides as follows -

90. Limitations

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

The Act does not provide for extension of time for filing suit where the limitation period has lapsed. Jurisdiction of courts is donated by law and where no jurisdiction is granted by law the court cannot exercise jurisdiction.

Limitation is not a legal technicality as deponed in the applicant's affidavit. It is substantive law whose effect is to extinguish the rights of a party to make a claim in law. The wording of section 90 of the Employment Act are clear and unequivocal that no civil action or proceedings based or arising out of the act or a contract of service in general shall lie or be instituted unless commenced within 3 years. There are no exceptions to the rule. Mistake of counsel to file suit in time is not an exception. The recourse of a client in such circumstances is to file a negligence claim or complaint against such lawyer.

In any event, even if the court had jurisdiction to extend time, which as I have already stated this court does not have, a receipt from an advocate's firm which is the only evidence herein would not be sufficient proof that the applicant paid counsel to file suit.

In the case of **Divecon v Sumani [1995-1998] E. A. 48**, the Court of Appeal was categorical that no claim in contract can be made after the expiry of limitation period and further, that no court has jurisdiction to extend time for filing of claims in contract.

In a recent decision of the court of Appeal setting in **Kisumu in Civil Appeal No.600 of 2015 Kenya Airports authority v Shadrack Abraham Kisongochi**, the court stated as follows -

The fundamental issue is whether the trial court had jurisdiction to extend time to enable the respondent to file the suit in the first place. The answer must be in the negative. The trial court simply acted without jurisdiction. In SAMUEL KAMAU MACHARIA & ANOTHER V KENYA

COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR, the Supreme Court held that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

The court further stated -

"Having reached the firm conclusion that the trial court acted without jurisdiction in allowing the Respondent to file his suit outside the statutory period, we must allow the appeal."

The applicant's application is subject to a similar fate.

For the foregoing reasons, I find that I have no jurisdiction to extend time for filing suit out of time with the result that the application is dismissed.

DATED SIGNED AND DELIVERED THIS 9TH DAY OF FEBRUARY, 2017

MAUREEN ONYANGO

JUDGE