



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**

**MIS. APPLICATION NO. 22 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**SAMSON NYABWARI KEIRE ..... CLAIMANT**

**-Versus-**

**PUBLIC SERVICE COMMISSION OF KENYA..... 1ST RESPONDENT**

**ATTORNEY GENERAL .....2ND RESPONDENT**

**RULING**

By Ex parte originating summons dated 5th December, 2016 and filed on 9th December, 2016 the Applicant seeks leave to file suit out of time. The application is filed under section 22 of the Limitation of Actions Act and section 5 of Public Authorities Limitation Act. The application is supported by the affidavit of SAMSON NYABWARI KEIRE the applicant, in which he depones that he was employed by the 1st Respondent on 20th June, 1991 as Gaming Officer Job Group "H". In 1997 he was granted a scholarship of 4 years to study in the United States of America. On his return in 2001 he learnt that the 1st Respondent had dismissed him from employment on 15th September, 2001 on grounds of desertion of duty. He was not served with any show cause letter before dismissal. His appeal against dismissal was unsuccessful.

The applicant further depones that he has been sickly since he came back from further studies and has been in and out of hospitals. His latest admission having been from 4th to 9th July, 2016. He prays that his application be allowed.

In the draft statement of claim attached to his application, the applicant seeks a declaration that his dismissal was unlawful and irregular, general damages for wrongful dismissal, reinstatement or in the alternative payment of salaries adjusted from 2001 to date.

The application was heard on 25th January, 2017 when Counsel for the applicant Mr. Kasamani submitted that the application is merited as the applicant was partly unwell and partly out of jurisdiction.

**Determination**

I have considered the application. Having been dismissed in 2001 before the enactment of this Employment Act 2007, the limitation period for filing claim by the claimant was in accordance with the Limitation of Actions Act as read with the Public Authorities Limitation Act. The Limitation period within which his claim should have been filed in therefore 3 years as provided in section 3 of the Public Authorities Limitation Act which provides as follows -

### **3. Limitation of proceedings**

*(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.*

*(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.*

*(3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—*

*(a) twelve months, in the case of proceedings founded on tort; or*

*(b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.*

Section 5 & 6 thereof provides for extension period as follows -

### **5. Extension of limitation period in case of disability**

*Notwithstanding the provisions of section 4 of this Act, if, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of twelve months from the date when that person ceases to be under a disability:*

*Provided that—*

*(i) this section does not apply in respect of proceedings where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;*

*(ii) this section does not apply to an action to recover a penalty or forfeiture or a sum by way of penalty or forfeiture recoverable by virtue of a written law.*

### **6. Application of Cap. 22**

*Notwithstanding the provisions of section 31 of the Limitation of Actions Act, section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the Limitation of Actions Act the reference to section 4(2) of that Act shall be read and construed as a reference to section 3(1) of this Act, but subject thereto and notwithstanding section 42 of the Limitation of Actions Act, Part III of that Act shall apply to this Act.*

In the present application the applicant seeks extension of limitation period on two grounds. The first is that he was out of jurisdiction. Being out of jurisdiction is not a ground for extension of limitation period. The applicant has not stated on what basis he would be granted extension of limitation on that ground. There is neither statutory nor factual basis upon which the applicant would seek extension period on that ground. This is because there is no law affording extension for limitation period on grounds of the applicant being out of jurisdiction, nor is that factual as the applicant was within jurisdiction during the pendency of limitation period according to his affidavit in support of the application. At paragraphs 4 and 5 of the affidavit the applicant depones that -

*4. sometimes in 1997 I got a scholarship from the 1st Respondent to further my studies in the United States of America and when I came back to Kenya in 2001, I found out that the 1st Respondent had dismissed me.*

5. *sometimes on the 15th day of September 2001, I received a letter from the Respondent dismissing me on account of desertion from duty. Attached herewith is a copy of the letter marked as SNK - 1.*

The Public Authorities Limitation Act provides for actions founded on contract to be brought within 3 years from the date on which the cause of action accrued. In the case of the applicant, the cause of action accrued on 15th September, 2001 the very year he alleges to have come back to Kenya. The limitation period therefore lapsed on 15th September, 2004 when he had been in Kenya for the entire duration from the date on which the cause of action accrued.

The second ground is the health of the applicant. He has deponed that he has been suffering from failing health and was unable to file suit on grounds thereof.

According to the treatment records annexed to the applicant's affidavit as Exhibit SN K-3, the first date of treatment is 1st February 2005. This was after the lapse of the 3 year limitation period which as I have already pointed out above commenced on 15th September, 2001 and lapsed on 15th September, 2004. The Claimant has not explained what he was doing between 15th September, 2001 when he received the letter of dismissal and 1st February 2005 when he was first treated as per his medical records attached to his affidavit in support of the application.

As provided at section 5 of the Public Authorities Limitation Act, extension of limitation period on grounds of disability does not apply in respect of proceedings where the right of action first accrues to a person who is not under a disability. The applicant was not under a disability at the time when the cause of action accrued and neither is he claiming through a person who was under disability at the time the cause of action accrued.

It is also important here to define what disability referred to in section 5 entails , Under Black's Law Dictionary, disability is defined as -

*The want of legal ability or capacity to exercise **legal rights** either special or ordinary, or to do certain acts with proper legal effect or to enjoy certain privileges or powers of free action(emphasis added)*

Disability is further defined as follows -

*At the present day disability is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights, thus married women, persons under age, insane persons, and fellows convict are said to be under disability. Sometimes the term is used in a more limited sense, as when it signifies an impediment to marriage.*

Sickness therefore is not disability under the law unless it prevents a person from the exercise or enjoyment of his legal rights. The applicant has not stated that during the period he was under treatment he was incapable of filing suit or instructing counsel to file suit on his behalf.

For the foregoing reasons, I find no merit in the application and dismiss the same.

**DATED, SIGNED AND DELIVERED THIS 2ND DAY OF FEBRUARY, 2017**

**MAUREEN ONYANGO**

**JUDGE**