



**REPUBLIC OF KENYA**

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

**Misc. No. 1 Of 2017**

***(Before Hon. Lady Justice Maureen Onyango)***

**VINCENT MUKOYA AMBANI..... APPLICANT**

**-Versus-**

**1. INSPECTOR GENERAL OF POLICE**

**2. THE HON. ATTORNEY GENERAL.....RESPONDENT**

**R U L I N G**

The application before me for determination is an ex parte notice of motion dated 12th January, 2017 and filed under certificate of urgency on 18th January, 2017. The application is made under Rule 13 of Industrial Court (Procedure) Rules, 2010, the Limitation of Actions Act and all other enabling acts and laws and seeks the following orders -

1. **THAT** the time allowed for the Applicant to file suit for wrongful dismissal be enlarged/extended to allow the Applicant to file suit against the Respondent.
2. **THAT** the Applicant be granted leave to unconditionally file and pursue his claim for wrongful dismissal against the two Respondents.
3. **THAT** the costs of this application be provided for.

The Application is supported by the affidavit of **VINCENT MUKOYA AMBANI**, the Applicant and on the following grounds -

i. **THAT** the Applicant was charged before the Chief Magistrate's Court in **Criminal Case No.2418 of 2011** with the offence of Robbery with violence Contrary to Section 296(2) of the Penal Code, Cap 63 Laws of Kenya and at the close of the prosecution case the learned Hon. Ochoi, P.M. found after considering evidence of prosecution witnesses that the Applicant had no case to answer and acquitted and discharged him under section 210 of the Criminal Procedure Code. The judgement was delivered on **12th October, 2015.**

ii. **THAT** the Applicant having been dismissed due to absence from duty during the pendency of the Robbery trial, the Applicant expected to be reinstated as per the code of regulations which was not done.

iii. **THAT** the Applicant appealed through all lawful channels and even served Notice on the Honourable Attorney General of his intentions to sue the Government which has not produced any

results.

iv. **THAT** the Applicant knew he was to file suit within 12 months of being acquitted but unfortunately the Applicant fell seriously sick and was admitted at the Kenyatta National Hospital from 6th October, 2016 and discharged on treatment on 13th October, 2016 by which time the limitations of actions Act has set it.

v. **THAT** the delay is highly regretted but was inevitable and was occasioned by factors beyond control of the Applicant.

vi. **THAT** the Applicant has highly plausible grounds for suing the two (2) employers with high probability of success, and prays this honourable court to grant him a chance to sue.

vii. **THAT** this honourable court has unfettered discretion to grant the orders sought Ex-parte.

viii. **THAT** the intended Respondents will not suffer irreparable losses if the orders sought are granted.

ix. **THAT** it is in the interest of justice that the orders sought be granted.

In the affidavit supporting the application the applicant reiterated the grounds in support of the application. He has annexed copies of the Ruling in CMC Criminal Case No.2418 of 2011 delivered on 12th October 2015, a Notice of Intention to sue the Inspector General of Police (Under section 13 of The GOVERNMENT PROCEEDING ACT) and a medical treatment report dated 13th October, 2016 from Kenyatta National Hospital.

The application was heard on 25th January 2017 when Mr. Shilenje appearing for the applicant submitted that the applicant has given reasons for late application being that he would have filed suit in time had he not been sick. Mr. Shilenje submitted that the applicant was hospitalised at Kenyatta National Hospital, and that he seeks to file his claim within 14 days of leave being granted by the Court.

### **Determination**

The applicant has not stated the specific provisions under which the application has been made. Section 13 of the Industrial Court (Procedure) Rules 2010 that the applicant relied upon was repealed and replaced by the Employment and Labour Relations Court (Procedure) Rules, 2016.

The Applicant cited the Limitation of Actions Act without reference to the specific sections he relied on. The relevant section is 4(1) which provides for limitation period as follows -

#### **4. Actions of contract and tort and certain other actions**

*(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—*

*(a) actions founded on contract;*

*(b) actions to enforce a recognizance;*

*(c) actions to enforce an award;*

*(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;*

*(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.*

The only provision in the said Act providing for extension of limitation period is section 27 which provides 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.

Section 28 provides for the procedure of applying for extension as follows -

**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 fulfil 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 fulfil 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.

Under the Employment Act which is the relevant Act as far as limitation period for suits relating to employment and labour relations are concerned, the limitation period is 3 years from the date of accrual to cause of action. There is no provision for extension of limitation period under the Act. Section 90 of the Employment Act 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.*

In the instant application the applicant has given two grounds for his failure to file suit within the prescribed limitation period of 3 years. The first is that there was a pending suit CMC Criminal Case No.2418 of 2011 in which the ruling acquitting the applicant was delivered on 12th October, 2015.

The second is that he was admitted at Kenyatta National Hospital between 6th and 13th October, 2016.

I find the application so poorly drafted and prosecuted that it is impossible for the court to make any determination thereon except to dismiss it for being bad in law.

My first reason for so stating is that the application does not state precisely under what provisions of the law it is made. I must however add that this is not fatal as it is a mere technicality that can be corrected by amendment.

The second reason is that there is no evidence in the application that the applicant was employed by the Respondents, or that he was ever dismissed. The applicant should have stated or in the least, attached a copy of the letter of alleged dismissal to prove that he was once an employee in the service of the Respondent and that he was dismissed on grounds of his having been charged in the criminal case for which he was discharged as alleged.

Thirdly, the applicant has not annexed a draft copy of the claim he intends to file to enable the court determine if indeed there is a valid claim that he should be given an opportunity to prosecute. The court has no clue about the nature of claims he is seeking leave to file. Even if he did not attach a draft Memorandum or statement of claim, he should at least have mentioned in the affidavit the nature of claim he is seeking leave to file.

The foregoing notwithstanding, the grounds upon which the application is anchored, that is, the pending of a criminal case and admission in hospital are not valid grounds for extension of limitation period.

In the case of MOSES JUMBA OTIENDE v G4S SECURITY SERVICES KENYA LIMITED [2016]eKLR and also in the case of KEVIN OMONDI ODERA v FLAMCO LIMITED [2014]eKLR, Ndolo J and Radido J. respectively considered the issue whether pendency of a criminal case is a ground for extension of limitation period. In KEVIN OMONDI ODERA's case Radido J stated as follows with reference to section 90 of the Employment ACT.

*"The section does not make any reference to criminal proceedings as an exception to the 3 year cap on commencement of legal proceedings. The only exception is in the case of a continuing injury or damage, where the time limit has been fixed at 12 months of the cessation of the injury or damage.*

*The question therefore is whether the charging of an employee in a criminal case would constitute a continuing injury or damage for purposes of the section.*

*In the same vein, it cannot be that time for purposes of limitation would stop running because an employee has been charged with a criminal offence. If this were the intention, it would have been expressly provided for either in the Limitation of Actions Act or the Employment Act, 2007."*

Judge Ndolo making reference to the same issue stated as follows in the case of MOSES JUMBA OTIENDE -

*"The only question therefore is whether the pendency of criminal proceedings against the Applicant could operate as a halt to running of time with regard to his claim against the Respondent. Faced with a similar situation in **George Hiram Ndirangu v Equity Bank [2015]eKLR** this court stated as follows:*

***"an employee who sits on their right to come before this Court cannot escape the limitation dragnet by waving criminal proceedings."***

*I have no reason to change my mind on this particular point. The result is that the Applicant's right to bring action against the Respondent lapsed on 4th January, 2015 being three years after accrual of the cause of action.*

*Evidently, the Applicant failed to exercise his right and this court lacks the power to extend time.*

I agree with the position held by the Judges in the two cases. The Court of Appeal in DIVECON v SAMANI categorically stated the import of section 4(1) as far as limitation period for contracts is concerned when it stated that -

*...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 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 ... 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 recent case of KENYA AIRPORTS AUTHORITY v SHADRACK ABRAHAM KISONGOCHI the Court of Appeal affirmed the said position when it stated -

*There was no doubt in the respondent's mind that his intended suit was statute barred. He stated as much in his affidavit in support of the application for extension of time and reiterated the same in his oral arguments before the trial court. The respondent stated that his services were terminated on 31st January, 2006 before finalization of the criminal case that had been filed against him. He contended that termination was a violation on **clause 30.8 of the Collective Bargaining Agreement** between his Trade Union and the appellant. The cause of action therefore arose on 31st January, 2006 and not on 6th April, 2011 when he was reinstated to his employment.*

*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."***

My position is therefore that this court has no jurisdiction to extend limitation period in the case of contracts, that is assuming that the suit that the applicant seeks leave to file is for unlawful or unfair termination of his contract of employment.

On the second ground, that is admission in hospital, I must point out that the "MEDICAL REPORT" annexed to the affidavit of the applicant as Exhibit VMA-3 does not qualify to be a medical report. It does not state the patient's admission or treatment number or the ward in which he was treated. Also in my experience both as Judge and in my previous engagements, I am aware that patients are discharged from wards with a case summary or discharge summary or discharge report not a medical report. A scrutiny of the "Medical Report" will also disclose that under the heading "Observations" what is stated is not observations but perhaps what should be contained in a prescription for medicines.

There is therefore no valid evidence of hospitalisation of the applicant.

In any event, the alleged hospitalisation was for 7 days only, between 6th and 13th October 2016. The applicant did not explain why he did not file the application between 12th October 2015 when he was acquitted by the court and 6th October 2016 when he was allegedly admitted in hospital, a period of about one year. He further does not explain whether the sickness was such as it qualifies for disability as defined in the Limitation of Actions Act. That is assuming that the claim he wishes to file is on the tort of malicious prosecution as I have already stated that in employment claims pendency of criminal proceedings is not a ground for extension of limitation period.

As I stated earlier, this application is bad in law and in so many other ways that it must fail. I consequently dismiss the same.

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

**MAUREEN ONYANGO**

**JUDGE**