



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**MISCELLANEOUS APPLICATION NO. 8 OF 2016**

**LUCY MUTHONI KUNYIHA..... APPLICANT**

**-VERSUS-**

**THE BOARD OF MANAGEMENT KARIMA BOYS HIGH SCHOOL .....  
RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17th March, 2017)

**RULING**

The applicant filed a notice of motion on 25.10.2016 through Magua & Mbatha Company Advocates. The application invoked sections 12(2) and 13 (8) of the Industrial Court Act and all enabling provisions of law. The applicant prayed that the honourable court be pleased to grant the applicant leave to file a suit out of time. The application was based on the applicant's supporting affidavit attached to the application and the following grounds:

- a) The claimant was the respondent's employee from 1999 until the claimant wrote the resignation letter dated 22.09.2015 and accepted by the respondent's letter dated 08.10.2015.
- b) The applicant wrote her letter dated 22.09.2015 seeking to withdraw her earlier letter of resignation dated the same date.
- c) The respondent accepted the resignation letter without accepting the letter withdrawing the resignation letter. The claimant's final dues were to be computed based on documents that the claimant was to provide.
- d) The applicant says that some of the terminal dues were not paid. The unpaid dues included unpaid leave days not taken, overtime, and public holidays worked and not paid. The claimant's case is that all the claims are of a continuing injury and the suit out to have been filed in 12 months from the date the resignation took effect on 08.10.2015 and as per section 90 of the Employment Act, 2007.
- e) The delay in filing the suit was due to the respondent's promise that all terminal benefits would have been paid.
- f) The applicant urged that the prayer sought for leave be granted as the respondent would not suffer prejudice. The applicant had been 16 days late in moving the court so that leave should be granted as prayed for.

The respondent opposed the application by filing on 06.12.2016 the replying affidavit of Herman Wanjau through Waweru Macharia & Company Advocates. The respondent also filed a preliminary objection that the suit was clearly time barred under section 90 of the Employment Act, 2007. The respondent further submitted that as per the holding in **Divecon –Versus- Samani [1995-1998]E.A 48**, there was no provision of law in the Limitation of Actions Act that empowered the court to extent the time of limitation in claims founded in contract. The respondent further relied upon **Attorney General & Another –Versus- Andrew Maina Githinji [2016]eKLR** where the Court of Appeal held that the issue of limitation of period for filing a suit went to the court's jurisdiction and once the time had lapsed, the court lacked judicial discretion in the matter.

The court has considered the respondent's submissions favourably and returns that the 12 months of limitation as prescribed in section 90 of the Employment Act, 2007 having lapsed, the applicant has not established legal provisions and justification for the court to grant leave as was prayed for.

In conclusion, the application is dismissed and in view of the complexity of the law in issue, the court considers that each party shall bear own costs of the application.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 17<sup>th</sup> March, 2017**.

**BYRAM ONGAYA**

**JUDGE**