



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT KISUMU

MISC. APPLICATION NO. 4 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ELIZABETH AWINO OTIENO & 40 OTHERS.....CLAIMANT

- Versus -

KISUMU COUNTY GOVERNMENT.....1ST RESPONDENT

KISUMU COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

This application is filed by 41 applicants who state that they were lawful employees of various Councils which are now under the auspices of Kisumu County Government being Kisumu County Council, Nyando county Council, Ahero County Council and Muhoroni Town Council.

By way of Ex parte originating Summons filed under section 27 of the Limitation of Actions Act Cap 22 of the Laws of Kenya, Section 12 (3)(viii) of Industrial Court Act (sic) and Order 37 Rule 6 of the Civil Procedure Rules, 2012 and all the relevant provisions of the Law the applicants seek the following orders

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1. **THAT** this honourable court be pleased to extend time within which to file claim and grant leave to the applicants herein to file their respective claims out of time.
2. **THAT** costs be provided for.

The grounds upon which the application is premised as given on the face of the application are the following -

- a) That the applicants were lawful employees of various Councils which are now under the auspices of Kisumu County Government viz; Kisumu County council, Nyando County Council, Ahero County Council and Muhoroni Town Council.
- b) That the applicants' services were terminated by the respondent sometimes on 6.01.2014.
- c) That the applicants together with the others, instructed the firm of Mwamu & Co. Advocates to file a claim challenging the wrongful termination.
- d) That the said firm Mwamu & Co. Advocates indeed filed a claim being KSM INDUSTRIAL

COURT CASE NO.21 OF 2014 SAMUEL OGONJI & 32 OTHERS -VS- KSM COUNTY GOVERNMENT & KSM COUNTY PUBLIC SERVICE BOARD.

- e) That we were informed by Mr. Mwamu that our said 32 fellow employees were representing us and called upon us to contribute in paying the legal charges which we did.
- f) That as the matter was proceeding we were under the impression that we were properly represented in the said claim as advised by Mr. Mwamu.
- g) That the said claim was successfully completed and on 11.10.2016 a judgment was made reinstating us back to our respective positions of work.
- h) That we presented the judgment issued by this Honourable to the respondents but we were surprised when the respondent indicated to us that we were not part of the said claim and therefore we were not entitled to the said judgment granted.
- i) That when we requested Mr. Mwamu Advocate to advise us, he indicated to us that we were part of the said claim and therefore entitled to the judgement issued therein.
- j) That we have been advised by Mr. Ken Omollo advocate which advice we verily believe to be correct that we were not part of the said claim and therefore we are not entitled to enjoy the judgment issued therein.
- k) That the said Mr. Ken Omollo advocate has again advice us that time within which to file our claim has expired and that we require leave to file the same.
- l) That we failed to file our claim within time was not deliberate but was because we were under the belief that we were part of the claim in Kisumu Industrial Court Claim No.21 of 2014.
- m) That we have a good claim against the respondents herein, therefore we should be granted leave to pursue the same.
- n) That the respondents will not be prejudiced if the order sought is granted as they can be compensated by way of costs.
- o) That the applicants are likely to suffer if this application is not allowed and the order sought granted.
- p) That it is therefore in the interest of justice that this application be allowed and the applicants granted leave to file their claim out to time.

The application is supported by the affidavit of **ELIZABETH AWINO OTIENO** in which she deposes on her behalf and on behalf of her co-applicants that they were employees of the councils whose mandates were subsumed by the Kisumu County Government. Elizabeth deposes that their services were terminated on 6th January, 2014. She deposes that they instructed Mwamu & Company Advocates to file claim challenging their wrongful termination, that the said firm filed KISUMU INDUSTRIAL COURT CASE NO. 21 OF 2014 between SAMUEL OGONJI & 32 OTHERS v KISUMU COUNTY GOVERNMENT and KISUMU COUNTY PUBLIC SERVICE BOARD. They were called upon to contribute for the suit and did so, that they were under the impression that they were part of the Claimants in the said suit but were surprised that they were not part of the Claimants in the said suit but were surprised when on 11th October 2016 a Judgement reinstating the claimants back to work did not include their names.

ELIZABETH deposes that their counsel Mr. Ken Omolo informed them of lapse of limitation period and of the need to seek extension thereof.

ELIZABETH deponed that the delay in filing the claim is not deliberate and arose out of the mistaken belief that they were party to claim No.21 of 2014. She depones that they have a good claim and ought to be granted leave to pursue the same, that the Respondents will not be prejudiced by the grant of the orders as they can be compensated by costs while the loss by the applicants would be irreparable if the application is not granted.

The application was heard on 23rd February, 2017 when Mr. Odhiambo holding brief for Mr. Ken Omollo Esq. Counsel for the Applicants argued the application.

Mr. Odhiambo reiterated the contents of both the grounds and affidavit in support of the application and submitted that section 12(8) of the Employment and Labour Relations Court Act empowers this court to grant the orders sought. He submitted that section 27 of Limitation of Actions Act also empowers the court to enlarge time. He urged the court to find merit in the application and grant the orders sought.

Determination

Section 27 of the Limitation of Actions Act upon which the instant application is premised provides for extension of limitation period in case of ignorance of materials, facts in actions for negligence nuisance or breach of duty (whether the duty exists by virtue of a contract or of written law or independently). The section 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.

(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.

The application is further premised on section 12(3)(viii) of the Employment and Labour Relations Court Act which gives this court power to grant "any other appropriate relief as the court may deem fit to grant." Order 37 Rule 6 of the Civil Procedure Rules 2012 which the applicants also relied upon provides that an application under section 27 of the Limitation of Actions shall be made ex parte by originating summons supported by affidavit if made before the filing of suit or by an ex parte application in the suit if made after the suit is filed.

From the foregoing, only section 27 of the Limitation of Actions Act provides substantively for extension of time.

The subject of extension of limitation period in claims arising out of contract has been the subject of a good number of decisions of the courts and can be considered as settled. In the case of *Divecon v Samani* the Court of Appeal stated as follows with respect to section 27 of Limitation of Actions Act -

"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 bringing action."

In the case of *MARY OSUNDWA v NZOIA SUGAR COMPANY LIMITED* [2002]eKLR, the court of Appeal again expressed its views regarding the provisions of section 27 of the Limitation of Actions Act as follows.

"This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort.

This section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other cause of action other than those in tort."

In *KISUMU CIVIL APPEAL NO.6* of 2015, the Court of Appeal stated as follows with regard to section 27 of Limitation of Actions Act-

15. The application for extension of time was filed under the provisions of **sections 27 and 28** of the **Limitation of Actions Act**. **Section 27** relates to extension of limitation period in case of ignorance of material facts in actions founded on tort where negligence is alleged. **Section 28** basically sets out the procedure of filing the applications provided for by the preceding **section 27**. The respondent's suit had nothing to do with the tort of negligence and therefore the trial court had no jurisdiction to entertain the application for extension of the statutory period for filing of the suit.

19. 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."

This court is bound by decisions of the Court of Appeal unless it can distinguish the same. I agree with the decisions of the court of Appeal referred to herein and find no reason to depart from them.

For the foregoing reasons, this court has no jurisdiction to entertain the application herein or grant the

orders sought. The application is therefore for dismissal. The result is that I dismiss the same on grounds that I have no jurisdiction to grant the orders sought by the applicants.

Dated, Signed and Delivered this 10th day of April, 2017

MAUREEN ONYANGO

JUDGE