



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

ELRC MISC. APPL. NO 2 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

HUDSON WAMBIYA.....CLAIMANT

VERSUS

NZOIA SUGAR COMPANY LTD.....RESPONDENT

RULING

By an ex parte notice of motion dated 26th January 2016 the Applicant Hudson Wambiya seeks the following orders-

- (1) **THAT** the Honourable Court be pleased to grant the Applicant leave **to file his CLAIM out of time;**
- (2) **THAT the annexed MEMORANDUM OF CLAIM** be deemed as properly filed and served upon the payment of the requisite Court fees; and
- (3) **THAT** the cost of the Application be in the course filing fees.

The application is made under section 27 and 28 of the Limitation of Actions Act, section 3 and 3A of the Civil Procedure Act and All enabling Provisions of the Law and is grounded on the annexed affidavit of HUDSON WAMBIYA the Applicant and on the following grounds-

- (1) **THAT** the Applicant's desire to file a CLAIM out of time is neither inexcusable, inordinate or unjustifiable;
- (2) **THAT the Applicant's failure to file the CLAIM in time** was not deliberate nor was it his making, but as a result of having been duped by the Respondent;
- (3) **THAT the Applicant** has written several letters to the Respondent who has ignored to respond;
- (4) **THAT** it is in the interest of justice that the **ORDERS** are granted.

In the affidavit the Applicant deposes that he was employed by the Respondent in 1976. He deposes that the Respondent falsely accused him of a serious allegation, but having failed to prove the allegation, resorted to retiring the applicant with full benefits. The applicant deposes that upon retirement the respondent shortchanged him. He states that he entered into dialogue with the Respondent to no avail. He states that because of that he delayed in filing his claim to seek legal redress in order to give dialogue a

chance.

The applicant states that he has now discovered that the respondent has no intention to resolve his claim hence this application to file suit out of time.

Together with the application the Applicant filed a Statement of Claim in which he states he was retired against his will on 19th November 2004.

The Respondent filed grounds of opposition as follows-

1. That the Application is misconceived bad in law and is otherwise an abuse of the due process of the court.
2. That no sufficient grounds have been adduced to enable the court exercise its discretion in favour of the Applicant.
3. That the Application is an after thought and calculated to vex the Respondent.
4. That at no time or at all did the Respondent engage into negotiations with the Applicant.
5. That there is no provision in the Employment Act that allows this court to extend time.
6. That the Applicant is guilty of laches and has come to this court with unclean hands and does not deserve the sought order.

The application was heard on 20th February 2017 in the absence of the Respondent who failed to attend court although it was properly served with a hearing notice.

At the hearing the applicant reiterated the contents of his affidavit in support of the application.

Determination

Having considered the application, the grounds and affidavit in support thereof and the documents attached thereto, and having considered the grounds of opposition filed by the Respondent, the issue for determination is whether the Applicant is entitled to leave to file his statement of claim out of time.

The applicant having been retired on 19th November 2004, the applicable law is the Limitation of Actions Act. Under section 4 thereof claims arising out of contracts should be filed within 6 years from the date of accrual of cause of action. The cause of action herein having arisen on 19th November 2004, the limitation period lapsed on 19th November 2010.

Section 27 and 28 of the Limitation of Actions Act under which the application is filed provide for extension of time

In the case of **Divecon v Samani [1995-1998] E.A. 48**, the Court of Appeal stated that once the limitation period had lapsed, a court is devoid of jurisdiction, and without jurisdiction, a court must down its tools (**Owners of Vessel Lillian 'S' v Caltex Oil (K) Ltd**). Limitation is a matter of law and not procedure. The effect of limitation is to extinguish a right such that the right can no longer be the subject of a claim.

In the recent decision of the Court of Appeal in Kisumu in **Civil Appeal No.6 of 2015 Kenya Airports Authority v Shadrack Abraham Kisongochi**, the Court of Appeal overturned the decision of this court in ELRC Kisumu Cause No.20 of 2014 wherein the court had granted leave to the applicant to file suit out of time. In the judgment the court stated as follows-

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 or

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 the suit.

16. This Court, in **MARY OSUNDWA V NZOIA SUGAR COMPANY LIMITED [2002]eKLR**, expressed its views regarding the provisions of **section 27** of the **Limitation of Action 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."

With respect to section 27 and 28 of Limitation of Actions Act the Court stated as follows in **Divecon v Samani**

"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."

The application herein being one arising out of an employment contract, section 27 and 28 of Limitation of Actions Act are not applicable. As stated in **Divecon v Samani** no court can extend limitation period in a claim arising out of contract. For these reasons the claim must fail.

Even if this court had jurisdiction to grant the orders sought by the applicant, it would still not have jurisdiction to entertain this application as it arises out of tabulation of retirement benefits which under the Retirement Act should be made in a claim to the Retirement Benefits Authority. Such claim would only come to this court as an appeal against a decision of the Retirement Benefits Tribunal.

For these reasons the application is dismissed with no orders for costs.

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

MAUREEN ONYANGO

JUDGE