



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 164 OF 2016

(Before D. K. N. Marete)

ASAH NUWABIINE.....CLAIMANT

VERSUS

AGGREKO INTERNATIONAL

PROJECTS LIMITED.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

This is an *ex-parte* application by way of originating summons dated 3rd November, 2016. It seeks the following orders of court;

- 1. THAT** *this honourable court be pleased to the grant Claimant/Applicant leave to file the instant suit out of time for the recovery of damages for unlawful termination, unlawful confinement and malicious prosecution arising out of criminal case number 2616 of 2011*
- 2. THAT** *the already filed Statement of Claim be deemed as having been properly filed after the payment of the requisite fees.*
- 3. THAT** *the costs of this application be in the cause.*

It is grounded as follows;

- a. That this suit became time barred whilst the applicant herein was awaiting the finalization of Criminal Case No. 2616 of 2011.*
- b. The respondents will not suffer any prejudice if the orders sought herein are granted.*
- c. That this suit should only be determined on its merits.*

The applicant in his supporting Affidavit sworn on 30th November, 2016 avers that he was arrested and detained and also faced charges in Criminal Case No.2616/2011 and was acquitted on full hearing.

The claimant further avers that he was not able to pursue his claim as his termination letter was issued

while he was in prison (custody) and further that the criminal trial took well over three years thus disabling his pursuit for relief under employment law.

As was observed in the authority of Kipkemoi **Stanley Cheruiyot vs The Chairman, B.O.G Sigor High School and 2 others, ELRC Kericho Misc. Application No. 6 of 2016**, this court's hands are tied by the authority of **Rift Valley Railways (Kenya) Ltd. Vs. Hawkins Wagunza Musonye and Desidery Tyson Otieno** where the Court of Appeal sitting at Malindi in the reliance on the authority of **Divecon v Samani (1995 – 1998) I EA 48 at page 54** observed as follows;

By craft and innovation the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time. That is what the court stated in *Divecon v Samani (1995 – 1998) I EA at P.54*

“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.”

Despite section 4 (1) (a) of the Limitation of Actions Act, which sets the limitation of actions in respect of contracts to six years, section 90 of the Employment Act, which is a latter statute limits actions on employment contracts or contracts of service in general to three years

This jurisprudence disentitles this court to authority for a consideration of any overtures for extension to time. This application must therefore fail on grounds of time limitation.

I am therefore inclined to dismiss the application for the foregoing reasons with no orders to costs.

Delivered, dated and signed this 26th day of April 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Motanya instructed by Motanya & Company Advocates for the Claimant/Applicant