



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CLAIM NO. 313 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ANTHONY ASHITAKAYA AKUNGWI.....CLAIMANT

-Versus-

1. THE INSPECTOR GENERAL OF POLICE

2. THE NATIONAL POLICE SERVICE COMMISSION

3. ATTORNEY GENERAL..... RESPONDENTS

R U L I N G

What is before me for determination is an application by notice of motion dated 21st April 2017 filed on 28 April 2017. The application is anchored on section 27 of the Limitation of Actions Act cap 22, Order 37 Rule 6 of the Civil Procedure Rules 2010, Article 159 of the Constitution, section 95 of the Civil Procedure Act and all enabling provisions of the law. The applicant seeks the following orders-

1. The Plaintiff/Applicant be granted leave to file his suit out of time.
2. The costs be in the cause.

The application is supported by the affidavit of **ANTHONY ASHITAKAYA AKUNGWI**, the Claimant/Applicant, and on the following grounds-

- (a) **THAT** the Applicant was employed as a police constable on the 28th December, 2004.
- (b) **THAT** the Applicant's employment was permanent and pensionable.
- (c) **THAT** sometimes in 2006, the Applicant fell sick and remained critically ill up to the end of 2014.
- (d) **THAT** the illness affected the Applicant's mental capacity and he could not manage his affairs on his own.
- (e) **THAT** during such illness the Applicant's salary was stopped.
- (f) **THAT** upon recuperation and reporting to work the Applicant was not and has not been redeployed.

(g) **THAT** however, since the stoppage of salary in November, 2008 the Statutory time to bring an industrial cause have elapsed.

(h) **THAT** it is in the interest of justice that the Applicant be granted to file suit out of time

The Respondent did not file any response to the application.

In the affidavit in support of the application the applicant deposes that he was employed as a police constable on 8th December, 2004, that he was taken ill sometime in April, 2006 but did not get well. That on 9th May 2006 he was granted leave to seek further medical treatment and was admitted at St. Mary's Hospital intensive care unit. That again on 30th December 2006 he was hospitalised at Testimony Medical Clinic, Mumias from where he was discharged on 4th January 2007 with follow-up treatment for two weeks. The Applicant deposes that he was again admitted at Kakamega Provincial Hospital on 6th January 2007.

The Applicant deposes that he reported back to work at General Service Unit(GSU) L Company on 1st April 2007 and was directed to report to GSU Health Centre, Ruaraka for attachment. The Officer commanding Ruaraka Health Centre however refused to receive him as his condition was not stable. He deposes that he again collapsed on 4th April 2007 while waiting for a clearance letter from the officer Commanding GSU L Company. He deposes that he was in and out of hospital between 2008 and 2010 and was readmitted to St. Mary's Hospital Mumias in 2013. He deposes that seeing no improvement he decided to seek divine intervention at (the famous) Prophet Owuor's King's Outreach Church, Nakuru between December, 2014 and January 2015 where he stayed in camp for over 2 months receiving prayers.

The Applicant deposes that during his illness he was incapable of conducting his affairs due to a frail body and mind. He further deposes that during his illness his salary was stopped and he could not afford to instruct a lawyer. That his wife tried to intervene by writing to his employer over his salary but no response was received. His follow up by letter of 11th March 2014 also elicited no response. He deposes that he visited GSU Headquarters severally for redeployment after his recovery but was denied audience. He prays for this court's intervention.

The application was heard on 20th June 2017 in the absence of the Respondent. Mr. Namatsi who appeared for the Applicant relied on the affidavit of the Applicant and the medical reports filed in court. He submitted that the applicant did not file suit within time due to the fact that he was bedridden. He prayed that the application be granted.

Determination

I have considered the application and the affidavit and grounds in support thereof. The issue for consideration is whether the applicant has made a case justifying the grant of the orders sought.

Section 90 of the Employment Act provides that cases involving claims on employment contracts ought to be brought within 3 years. The section 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.

Section 27 of the Limitation of Actions Act under which the application has been brought 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.

In the case of **Divecon v Samani** the court of Appeal had occasion to consider the application of section 27 of the Limitation of Actions Act to contracts and observed as follows:

“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.”

Section 90 of the Employment Act is couched in mandatory terms and gives no room for extension of limitation period provided therein of 3 years. Neither the Employment Act nor the Limitation of Actions Act make provision for extension of limitation period in respect of contracts. Sections 27 of the Limitation of Actions Act which provides for extension does not apply to contracts, but rather to claims in tort.

In the decision of the Court of Appeal in Kisumu in **Civil Appeal No.6 of 2015 Kenya Airports Authority v Shadrack Abraham Kisongochi**, the Court overturned the decision of this court in **Cause No.20 of 2014** wherein the court had granted leave to the Applicant therein to file suit out of time.

For the foregoing reasons this court has no jurisdiction to grant the orders sought with the result that the application is dismissed with costs.

Dated, Signed and Delivered this 27th day of JULY 2017

MAUREEN ONYANGO

JUDGE