



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

MISC. APPLICATION NO. 12 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

BENJAMIN KEMOI SAMIKWA APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED..... RESPONDENT

RULING

By an application by way of motion dated 25th April 2017 filed under certificate of urgency through Mwakio Kirwa & Company Advocates on 28th April 2017, the Claimant seeks the following orders-

1. This matter be certified urgent and the same be dispensed within the first instance.
2. This honourable court be and hereby extends the limitation period for filing of a suit by the claimant/applicant claiming for terminal dues for unfair, unlawfully and uprocedurally termination from the respondent's employment on 19th August, 2008.
3. That pursuant to prayer (2) being granted, the claimant's suit as commenced by the memorandum of claim attached hereto be and is hereby deemed as properly filed and served.
4. That costs hereof be borne by the respondent.

The Application is supported by the grounds on the face thereof and affidavit of **BENJAMIN KEMOI SAMIKWA**, and is made pursuant to the provisions of section 12(2) and 13(8) of the Industrial Court Act (sic), Article 159 and 50 of the Constitution of Kenya, 2010, Order 37 Rule 6(1) and Order 51 of the Civil Procedure Rules, section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law.

In the grounds and affidavit in support of the Application the Applicant states that he was unlawfully, unfairly and unprocedurally terminated from the Respondent's employment on 19th August 2008 and instructed his then advocates MSSRS Chepkitway and Company Advocates who instituted a suit at the High Court Eldoret on 24th November 2011 being ELDORET CIVIL CASE NO. 203 203 OF 2011. He states that in the suit he was seeking a declaration that he was unlawfully terminated, reinstatement and terminal dues. He deposes that the suit was on 9th February 2016 withdrawn by G.K. Kimondo J. upon application of his advocate on grounds that the court lacked jurisdiction and an order made that the Applicant files suit in the Employment and Labour Relations Court being the forum with jurisdiction. The Claimant deposes that he was assured by his advocates then on record that they would file suit in the right court. He however came to discover a year later that his advocates had not filed suit.

The Applicant deposes that the period within which he should have filed the suit has lapsed, that he was prevented from doing so for just cause and that the delay is excusable having been occasioned by occurrences beyond his doing, that the circumstances of his suit do not constitute inordinate delay, that he has a good cause of action and the mistakes of his advocates should not be visited upon him being an innocent litigant. He pleads that it is in the interest of justice that the application be allowed and that this court has jurisdiction and unfettered discretion to grant the prayers sought in his application.

The Respondent filed Grounds of Opposition as follows-

1. The said application for Extension of time is misconceived and constitutes an abuse of the due process of the Law.
2. There is no jurisdiction for this court or any provision in law for extension of time for filing suit beyond the period prescribed by law for instituting such suits in relation to contracts of all kinds, including contracts of service of the nature that the Applicant seeks to have time for filing this suit extended.
3. Time limited within which to file such suits as the instant one, is Three (3) years from the date of the alleged wrongful act complained of, in accordance with the mandatory provisions of section 90 of the Employment Act, 2007.
4. In the instant case, time limited for filing suit, lapsed on 18th August 2011, long before the Applicant had filed his suit at the High Court vide ***Eldoret High Court Civil Case No. 203 of 2011, Benjamin Kemoi Samikwa versus Kenya Commercial Bank Limited***, which was also filed out of time on 24th November 2011, hence it cannot be a justifiable basis for explaining the fact of delay in presenting the correct suit in the right forum of the Employment and Labour Relations Court.
5. The said application ought to be dismissed with costs, as it discloses no proper factual or legal basis for seeking the orders sought.

When the application came up for hearing on 10th July 2017 parties agreed to canvass the same by way of written submissions.

In the submissions filed on behalf of the Applicant it is urged that the grounds given by the Applicant are worthy of granting the orders, that this court has jurisdiction to grant the orders donated by section 12 (3) and that the extension of time is part of orders envisaged under the section. It is urged that in the case of ***Fred Mudave Gogo v G4S Security Services (K) Limited*** the court stated that time can be extended upon the court being moved on good grounds. It is submitted that the case of ***Dennis Ksang Ripko v Kenya Commercial bank*** and ***Jeremiah Mutua Mutea v Standard Newspapers Limited*** is distinguishable as the facts and circumstances in the two cases are different. He urged the court to grant the orders under Article 159 of the Constitution and section 20 of the Employment and Labour Relations Court Act and disregard technicalities.

For the Respondent it is submitted that the argument by the Claimant that the delay in filing his suit arose from the filing of the suit in the wrong court is misconceived and defeated by logic. It is submitted that the suit in the High Court was already time barred when filed the Applicant having filed suit on 24th August 2011 which was more than 3 years from the date of his termination on 19th August 2008. It is submitted that the limitation period lapsed on 18th August 2011. The Respondent further submitted that this court has no jurisdiction to extend time and relied on a long list of judicial precedents including the following:

1. ***Denis Ksang Ripko vs Kenya Commercial Bank Ltd – Kisumu ELC. Misc. Appl. No.12 of 2015;***
2. ***Laban Chema Libabu vs Bata Shoe Co. (K) Ltd – Nairobi Industrial Court Misc. Appl. No. 46***

of 2013;

3. *Jeremiah Mutua Mutea vs Standard Newspapers Ltd – Nairobi Industrial Court Cause No.2194 of 2012;*

4. *Willis Onditi Odhiambo vs Gateway Insurance Co. Ltd – Kisumu Court of Appeal Civil Appeal No. 37 of 2013;*

Determination

I have considered the application and the grounds and affidavit in support thereof. I have further considered the grounds of opposition, the submissions of both parties and the authorities cited by the parties. The issues for determination are the following-

1. Whether the Applicant's suit was time barred when originally filed in **ELDORET CIVIL CASE NO. 203 of 2011;**
2. Whether this court or any other court has jurisdiction to enlarge time;
3. Whether Article 159 of the Constitution and section 20 of the Employment and Labour Relations Court Act empower this court to extend limitation period;
4. Whether the Applicant is entitled to the orders sought.

1. Whether the Applicant's suit was time barred when originally filed in ELDORET CIVIL CASE NO. 203 OF 2011

The Applicant deposed in his affidavit that he was summarily dismissed by the Respondent on 19th August 2008 and filed **ELDORET CIVIL CASE NO. 203 OF 2011** on 24th November 2011. According to section 90 of the Employment Act claims arising from employment relationships under the Act must be commenced within 3 years. As submitted by the Respondent the 3 years lapsed on 19th August 2011, some 3 months before the suit was filed in Eldoret. This therefore means that the suit filed in Eldoret which was withdrawn by the Applicant for want of jurisdiction was also bad for having been filed out of time. Even the demand letter dated 19th September 2011 referred to and copy annexed to the Claimant's affidavit was out of time by a month as the cause of action lapsed on 19th August 2011, being the 3rd anniversary of the Applicant's summary dismissal.

It is therefore not true as deposed by the Applicant and as urged in the submissions filed on his behalf that it is the filing of suit in the wrong court that caused the delay in filing the suit in the appropriate court.

2. Whether this court or any other court has jurisdiction to enlarge time

The principal legislation on limitation is the Limitation of Actions Act Cap 22 of the Laws of Kenya. Extension of time is provided for under Part III thereof which provides for such extension in the specific circumstances set out therein including disability, acknowledgment and part payment, fraud, mistake and ignorance of material facts, none of which is pleaded herein.

In the case of *Mary Osundwa v Nzoia Sugar Company Limited* in which the Court quoted with approval in *Willis Onditi Odhiambo v Gateway Insurance Company Ltd*. In the case the Judge in the High Court had extended time for filing suit by consent of parties. The Court of Appeal held 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. The Section does not give jurisdiction to the court to extend time for

filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly Osiemo, J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the Judge by their consent.”

In the case of **Divecon v Samani** the Court of Appeal stated as follows-

“to us, the meaning of the wording of section 4(1)is clear beyond any doubt. It means that 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. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that “the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked”.

This is the thread in all the cases referred to by the Respondent. It is therefore a firmly entrenched principal of law that has been affirmed by precedent over and over again that once limitation period has lapsed no court has jurisdiction even with the consent of parties, to extend time.

3. Whether Article 159 of the Constitution and section 20 of the Employment and Labour Relations Court Act empower this court to extend limitation period

The Applicant urged the court to exercise its discretion under Article 159 of the Constitution and section 20 of the Employment and Labour Relations Act. The issue that this raises is whether limitation is a procedural technicality which the courts can deal with under the said provisions. This issue too has been the subject of many precedents and the position is that limitation is substantive law and not a matter of procedure. The effect of limitation goes to the route of the case, to the cause of action and compromises the right of a claimant to pursue the claim. Limitation grants a Respondent or Defendant an accrued substantive benefit, right or defence against a claim. Article 159 of the Constitution and section 20 of the Employment and Labour Relations Act are therefore not applicable in cases of limitation. The provisions only allow the court to disregard procedural technicalities in favour of substantive justice. Limitation is not a matter of procedural technicality. It is substantive law.

4. Whether the Applicant is entitled to the orders sought

The Applicant seeks extension of limitation period for filing his Claim. The court having found that **ELDORET CIVIL CASE NO. 203 OF 2011** was filed out of time, all grounds relied upon by the Applicant for extension of limitation period in his application herein are invalid. In any event as already stated above, courts do not have jurisdiction to extend limitation period in matters of contract as there is no provision for the same in law. For these reasons the application has no merit and is dismissed with no orders for costs.

Dated Signed and Delivered this 19th day of October 2017

MAUREEN ONYANGO

JUDGE