



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 23 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ALOYS OSORO OBAGA.....APPLICANT

V

THE PRINCIPAL SEC.

MINISTRY OF ENVIRONMENT & NATURAL.....RESPONDENT

RULING

By a notice of motion dated 11th November, 2014 the applicant Aloys Osoro Obaga seeks leave to file suit out of time against the Respondent, the Principal Secretary, Ministry of Environment and Natural Resources. The application is made under Order 51 of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure and Section 27 and 28 of the Limitation of Actions Act.

The grounds in support of the application are that ;

1. That the Applicant was an employee of the Ministry of Environment and Natural Resources till 24th January, 2003 when he was dismissed from employment on allegations of gross misconduct.
2. That prior to the Applicant's dismissal, he had been arrested and arraigned in the Chief Magistrate's Court, Kisii vide Criminal Case No. 1010 of 2001 where he was charged with stealing c/s.279(a) of the Penal Code.
3. That although the Applicant was acquitted of the charges of stealing, he was dismissed from employment without benefits.
4. That the applicant by this application wish to seek leave of the honourable court to file a claim for payment of his terminal benefit.

According to the annexed affidavit of the applicant he was employed by the Respondent on 15th February, 1984 and worked until 19th June 2002. He was charged with the offence of stealing by servant in Kisii CMCR.Case No. 1010 of 2001 but was acquitted on 21st July 2003. The applicant thereafter filed an application for Judicial Review in the High Court Kisumu (No. 67 of 2005) seeking reinstatement. The same was dismissed in the judgement delivered on 14th November 2011. In the judgement the Court observed that his claim was a private right that may be pursued in an ordinary Civil Suit.

In the applicant's written submissions the applicant merely reiterates the facts deponed in the affidavit and

does not make any attempt to argue the legal basis of the application.

Section 4 of the Limitation of Actions Act requires that claims in contract be brought before the expiry of 6 years while section 90 of the Employment Act 2007 provides that claims arising from employment relationships be made before the expiry of three years.

The applicant's employment having ceased on 19th February 2002 the claim falls under section 4 of the section 4 of the Limitation of Actions Act as it arose before the enactment of the Employment Act 2007. The claim should therefore have been filed on or before 19th February, 2008.

In his affidavit the applicant states that the delay in filing suit was not intentional and was caused by his financial incapacity.

Sections 27 and 28 cited in the applicant's application provide for extension of Limitation period in case of ignorance of material facts in actions for negligence, nuisance and breach of duty and do not relate to contracts. Indeed the Limitation of Actions Act does not provide for extension of time in contracts.

In the case of Divecon vs Samani [1998] 1 EA 48 the Court stated that:

"No one shall have the right or power to bring an action after the end of six(6) 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(6) 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 the 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. "

In the Judgement of the Court in respect of the applicant's application for Judicial Review (Kisumu HC.Civil Appl No. 67 of 2005) the court observed that the claim was already time barred having arisen 9 years earlier. That was in November, 2011.

The court further observed that as follows;

"In my view also the 2nd respondent did not exceed its powers in dismissing the Ex parte applicant. If the ex parte applicant is aggrieved with the dismissal, he may pursue the private right in an ordinary Civil litigation."

This is a finding of fact that has not been contested and which this court cannot overlook or ignore.

I therefore find that apart from this Court not having jurisdiction to grant the orders sought, the Applicant's claim is also *res judicata*, the issue of the Respondent's liability having been determined by a court of competent jurisdiction.

For these reasons I find no merit in the application and dismiss the same.

Dated, signed and delivered this 26th Day of January, 2016

MAUREEN ONYANGO

JUDGE