



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT AT MOMBASA**

**MISCELLANEOUS APPLICATION NUMBER 4 OF 2015**

**BETWEEN**

**HASSAN SHALI MBWANA.....APPLICANT**

**VERSUS**

**BUSY BEE SCHOOL.....RESPONDENT**

**RULING**

1. Mr. Hassan Shali Mbwana filed an *ex parte* Application, asking the Court to extend time beyond the ceiling 3-year given under Section 90 of the Employment Act 2007, to enable him file a Claim for terminal dues, and compensation for unfair termination, against his former Employer, the Intended Respondent.

2. The Application is based on his Affidavit, sworn on the 20<sup>th</sup> March 2015. He states he was employed by the Respondent School as a Driver in the year 2003. He left employment in August 2011. He states it was not until ‘sometime in 2014’ that he became aware of his right to institute a Claim against the Respondent.

3. Relying on *the Industrial Court Miscellaneous Civil Application between Desidery Tyson Otieno Onyango v Rift Valley Railways Limited*, he submits the Parties were engaged in out-of- Court negotiation, which prevented the Applicant from filing his intended Claim within the limitation under Section 90. He urges the Court to hold that time was frozen for the period of negotiation.

4. The Court is not able to uphold the Applicant’s position. His contract was terminated in August 2011. He did nothing in 2011, 2012, 2013 and the better of part of 2014, which would be considered as an attempt to resolve the dispute out of Court. It was not until July 2014, that he issued the first demand letter through his Advocates to the Respondent, starting a dialogue between the Parties on settlement. The time taken to start any form of negotiation was inordinate. Negotiation which followed cannot have the effect of undoing the Applicant’s initial 3 years of indolence. Indeed the Applicant seems to acknowledge that it was his own ignorance, rather than his engagement in negotiation, which prevented him from coming to Court in good time. He states in his Affidavit that “ *I was not aware of my right to institute Claim against the Respondent until sometime in 2014...*”

5. His situation is distinguishable from *Disidery’s*. Negotiation commenced when time to file the Claim has expired, or is on the verge of expiry, cannot have any effect on the prescribed time, more so when no explanation is given for the delay in commencement of the negotiation. Being unaware of one’s right to institute a Claim, does not explain the delay.

6. The Claimant should instead pursue negotiation on terminal benefits with his former Employer. There were reasonable proposals placed on the table which recognized his years of service. The Claim in Court for terminal dues, and compensation for unfair termination, is in the circumstances time-barred. ***The application is dismissed with no order on the costs.***

Dated and delivered at Mombasa this 26<sup>th</sup> day of February, 2016.

James Rika

Judge