



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT KISUMU**

**MISCELLANEOUS APPLICATION NO. 12 OF 2015**

*(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)*

**DENIS KSANG RIPKO .....APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED ..... RESPONDENT**

**R U L I N G**

The Applicant herein filed this application by notice of motion made under Article 48, 159(2) and 160(1) of the Constitution of Kenya 2010, Order 50 Rule 6 of the Civil Procedure Rules 2010, Section 12(2), 20(1) and 36 of Industrial Court Act and Section 90 of the Employment Act Cap 226 of the Laws of Kenya and all other enabling provisions of the law. The application was filed under certificate of urgency and seeks the following orders;

1. **THAT** this Application be heard Ex-parte and service be dispensed with in the first instance.
2. **THAT** the Applicant herein be granted leave to enlarge time in order to file a suit out of time.
3. **THAT** the attached Draft Memorandum of Claim to be deemed as duly filed.
4. **THAT** costs of this Application be in the cause.

The application is supported by the affidavit of DENIS KSANG RIPKO, the applicant and on the following grounds on the face of the application. The applicant states in the affidavit that he was dismissed by the Respondent Kenya Commercial Bank on 18th July, 2012 from his work station at Kapenguria. On the same day he was arrested and taken to Kapenguria Police Station from where he was taken to Eldoret Police Station and arraigned in court where he was charged with the offences of forgery and stealing by servant. The case was heard and a ruling acquitting him under section 210 of the Criminal Procedure Code was delivered on 30th July, 2015.

The applicant states that the reason for delay in filing his claim against the Respondent is because he was waiting for conclusion of the Criminal Case and thereafter, he was waiting for certified copies of proceedings and ruling. He states that when he was unable to obtain typed proceedings he applied for handwritten proceedings which he has attached to his affidavit as Appendix DK 4.

The Respondent opposed the application and filed grounds of opposition as follows;

1. The Application lacks merit.
2. The application is an abuse of the process of the court.
3. The Honourable Court has no jurisdiction or discretion to extend time or grant leave to file suit out of time in respect of claims arising out of employment contracts.
4. The Application has not demonstrated a plausible reason for the delay in filing suit within time as a pending criminal case doesn't act as a bar to Civil litigation.

The Respondent also filed a list of the following authorities:

1. EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI MISC. APP. 80 OF 2014  
MAGETHE JOSEPH KIARIE VS ECO BANK (K) LIMITED
2. EMPLOYMENT & LABOUR RELATIONS COURT AT MOMBASA MISC. APP. 2 OF 2012  
MARIA MACHOCHO VS TOTAL KENYA LIMITED
3. EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU MISC. APP. 27 OF 2014  
DISMAS KISIKA VS. MIN. OF EDUCATION, SCIENCE & TECHNOLOGY
4. EMPLOYMENT & LABOUR RELATIONS COURT AT NAKURU MISC. APP. 3 OF 2015  
KENYA ELECTRICAL TRADES & ALLIED WORKERS UNION VS KPLC CO. LIMITED
5. EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI MISC APP. 46 OF 2014  
LABAN CHEMA LIBABU VS BATA SHOW CO. (K) LIMITED

The application was by consent of the parties argued by way of written submissions.

In Submissions filed on behalf of the applicants by his advocates Messrs. Naikuni, Ngaah & Miencha Company Advocates it is submitted that this court has jurisdiction to extend time under section 90 of the Employment Act. He relied on the decision of the court in the case of Beatrice Kahai Adagala v Postal Corporation of Kenya [2014] eKLR where the court stated the following:

*"..... the High Court and the Industrial Court is a court with the status of a High court can entertain applications for extension of time. Other courts have held that the Industrial Court has no powers to extend time..... I however disagree with that holding as I believe it cannot be the intention of Parliament to fetter the discretion of a judge. Otherwise, the judge would be considered a stooge bystander to hold that I can't make any decision over a matter even when circumstances call for action. This will also go against the principle of "Article 159 of Constitution which calls for avoidance to adherence to undue technicalities. Each case must therefore be considered on its own merits by the court in deciding whether to entertain or not entertain an application for extension of time..."*

The applicant further relied on the case of Fred Mudave Gogo v G4S Security Services (K) Limited [2014] eKLR where the court stated as follows

*".....This time can be extended upon the court being moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist parties who for good reasons are unable to come to court in good time...."*

The Applicant further submitted that the court has unfettered discretion to allow application to extend time under section 12(3) (viii) of Employment and Labour Relations Act. The applicant further submitted that he has good reasons for extension of time to be granted as demonstrated in the draft memorandum of Claim. He states the delay in filing this case was caused by the Criminal Case which dragged for more than 3 years. The applicant submitted that there was no inordinate delay in filing the application as his criminal case was concluded on 30th July, 2015. He thereafter applied for certified

copy of proceedings and filed this application on 6th October, 2015 using hand written copies of proceedings and judgement as waiting for typed proceedings would have caused further delay in filing.

For the Respondent Messrs. Odhiambo Owiti & Company Advocates submitted that section 90 of the Employment Act provides for claims under the Act to be filed within 3 years and this court has no jurisdiction to grant leave or extend in respect of the causes of action based on contract. The Respondent relied on the case of **Owners of Motor vessel "Lilian s" v Caltex Oil (Kenya) Limited [1989]eKLR** as confirmed in the case of **Peter Nyamai and 7 others v M. J. Clarke Limited [2013]eKLR**. It was submitted for the Respondent that the Law does not create room for extension of time.

The Respondent further relied on the court of Appeal decision in **Divecon Limited v Samani [1995-1998] 1 EA 48 at 54** where the court stated that section 4(1) of the Limitation of Actions Act was clear about there being no room from extension of time in contract when it stated:-

*"...no one shall have the right or power to bring an action 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 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 Action Act (Chapter 22) suggests a discretion that can be invoked'.*

The Respondent submitted that part III of the limitations of Actions Act provides for circumstances when the period of limitation may be extended in actions on negligence, nuisance or breach of duty but not in contracts of service.

The Respondent submitted that although this court has wide discretion under section 12(3)(viii) of the Industrial Court Act that discretion does not extend to the granting of extension of limitation period under section 90 of the Employment Act. The Respondent submitted that the court can only exercise jurisdiction under section 12(3) (viii) on matters in which it has jurisdiction and that the court does not have jurisdiction where a matter is filed outside the limitation period. The Respondent relied on the words of the court in **Motor Vessel "Lillian S" Case** where the court stated :

*".....By Jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. It the jurisdiction of an interior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...."*

The Respondent submitted that the court neither has statutory jurisdiction not discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out of the Employment act 2007. The Respondent submitted that the application must be declined.

The Respondent also submitted that the applicant has not demonstrated a plausible reason for filing out of time as tendency of a criminal case alone is not an excuse for not filing a civil case. The Respondent submitted that there was no gag or order stopping the applicant from moving to this court while the criminal case was pending.

The Respondent submitted that Article 48 of the constitution 2010 relied upon by the applicant provides for access to justice, and no one entailed the applicant's right to access to justice. The Respondent submitted that neither illness (*Magethe Joseph Kiarie v Eco Bank (K) Limited*) (*Supra*) nor financial constraints (*Maria Machocho v Total (K) Limited*) are reasons for extension of time in claims under the Employment Act. The Respondent submitted that unfair treatment and subsequent psychological torture is also not a ground for extension of time (*Dismas Kisika v Ministry of Education Science and Culture*). With respect to the cases that the applicant relied upon, the respondent submitted that in both the case of *Fred Mudave Gogo* (*Supra*) and *Beatrice Kahai Adagala* (*Supra*) the court declined to grant leave to file suit out of time or extend the limitation period.

The Respondent prayed that the application be dismissed with costs.

### **Determination**

Section 90 of the Employment Act provides that claims under the Act must be made within 3 years. The section is an exception to section 4(1) of the Limitation of Actions Act which provides that claims in contract must be made within 6 years. The Limitation of Actions Act provides for extension of limitation period at Part III thereof only in cases of disability, acknowledgement and part payment, fraud, mistake and ignorance of material facts.

In the case of ***Divecon Limited v Samani*** (*Supra*) the Court of Appeal stated that no court has jurisdiction to extend limitation period in cases founded on contract under Part III of the Limitation of Actions Act.

For this reason I do not have to consider whether or not there was inordinate delay or whether the grounds for delay were justifiable. This court cannot extend the limitation period in a claim based on contract as the court is not seized of jurisdiction to do so.

For these reasons this application must fail. The same is dismissed with no orders for costs.

**Dated signed and delivered this 3rd day of March, 2016**

**MAUREEN ONYANGO**

**JUDGE**