



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

MISCELLANEOUS NO. 27 OF 2016

RONALD MUKOYA NAMAI..... CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa on 8th June, 2016)

RULING

1. The application before Court is one dated 9.3.2016. The same was filed through a Notice of Motion and filed in Court under Certificate of Urgency and brought under Articles 50, 159(2) (d) and 162 of the Constitution of Kenya 2010, Sections 3, 4 and 12 of the Employment and Labour Relations Court Act 2010, Sections 41, 43, 45 and 90 of the Employment Act 2007, Sections 2, 4, 22, 23, 27 and 28 of the Limitation of Actions Act and all enabling provisions of the Law.

2. The Applicant seeks the following prayers:

1. *That the Application be certified as urgent and heard ex-parte in the first instance.*
2. *That leave be granted to the Claimant/Applicant to file suit against the Respondent after the limitation period.*
3. *That the Memorandum of Claim annexed herein be considered as duly filed.*
4. *That costs of this application abides the result of the intended suit.*
5. *That any other and/or further Orders of the Honourable Court do issue as it may deem necessary and expedient in the interest of justice.*

3. The Application is premised on the grounds that:

1. *That at all material times relevant to this suit, the Claimant/Applicant was an employee of the Respondent when he was unlawfully and wrongfully terminated from employment by the Respondent herein on the 29th December, 2009.*
2. *That at the instigation, intrigue and call of the Respondent a criminal trial was initiated at the Nairobi Chief Magistrate Court under CC No. 2321 of 2009 which lasted more than 3 years and at some stage the Claimant was incarcerated.*
3. *That the delay in filing suit was caused by the claimant/applicant being incarcerated at the Industrial Area Prisons as a result of the judgment in CC No. 2321 of 2009.*

4. ***That the delay in filing suit was also caused by the Claimant/Applicant undergoing criminal trials in the said case CC 2321 of 2009.***
5. ***That there was no valid reason for dismissing the Applicant as enunciated vide judgment dated 31.7.2015, delivered in Court by Lady Justice Dorah Chepkwony.***
6. ***That the Criminal proceedings forms part and parcel of the trial process therefore he Claimant/Applicant cannot be locked out on grounds of not having sought redress within the time limit set in statute whereas he was legally disabled.***
7. ***That the Criminal Proceedings had facts substantially similar to the reasons leading to the Claimant/Applicant's dismissal.***
8. ***That the Employment and Labour Relations Court as constituted by the Constitution of Kenya 2010 is the proper Court to move for leave to commence trade disputes.***
9. ***That the numerous demands and Notice of intention to sue having been given, the Respondent has failed refused and/or neglected to compensate the Claimant/Applicant and persists in so doing.***
10. ***That the quantum, damages and compensation claimed by the Claimant/Applicant are in respect to statutory provisions envisaged mainly in the Employment Act 2007.***
11. ***That the application has been brought without inordinate delay.***

4. The Application is supported by the Affidavit of the Claimant sworn on 9.3.2016 where he states that until 8.1.2010 he was an employee of the Respondent as the Relationship Manager – Asset based Financing in Corporate Banking Head Office Manager Level C with staff No. 9604 having been employed on 20.2.2006.

5. He states that the Respondent dismissed him based on allegations of commission of a criminal offence of fraud. He was convicted of the offence and appealed to the High Court where the conviction was quashed.

6. He submits that the time stopped running when the criminal trial commenced and only started to run again after his appeal was upheld. He further submits that the Respondent was wrong in exercising disciplinary control over the Claimant/Applicant in making findings on criminal liability. He is of the view that there are triable issues for determination by the Court and the application should be allowed as prayed.

7. The Respondent opposed the application and filed a replying affidavit sworn by one Bonnie Okumu who is the Respondent's head of legal services. He states that the Court does not have jurisdiction to extend the limitation period of instituting claims under section 90 of the Employment Act. He states that he the complaint of termination arose on 29.12.2009, and ought to have filed his claim by 29.12.2012.

8. In response to the allegation by the Applicant that he could not file his claim in time as a result of the criminal trial and subsequent incarceration, they state that the intended claim is based on the termination of contract and not the criminal proceedings. That nothing in law bars criminal and civil cases to run concurrently and the position that time stopped running when the criminal trial was ongoing is untrue.

9. The Respondent states that it is not true that the issue for wrongful termination was a subject matter of determination by the Magistrates Court as the said Court was dealing with a criminal matter and it has no jurisdiction to make any determination on issues of employment.

10. The Respondent states that the application is without merit and ought to be dismissed.

11. I have considered submissions of both parties under Section 90 of Employment Act, 2007:

“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”.

12. It is obvious that the claim by the Claimant Applicant ought to have been filed by 28.2.2012, the Claimant having been dismissed on 29/12/2009 as provided under Section 90 of Employment Act 2007.

13. The Respondents contend that this Court cannot extend time for filing a case not filed within time.

14. Section 90 of Employment Act seems to fetter the Courts jurisdiction to extend time for filing a suit out of time. This is because Section 90 seems to fetter the Court notwithstanding the provisions of Cap 22 where the Court is allowed for good cause to extent time albeit in certain situation. A law that fetters a Judge’s discretion is not a good and I am short of saying that Section 90 of Employment Act is bad law.

15. However given that the Claimant Applicant has not shown to this Court the reason/s why he is approaching this Court this 11th hour, I find the prayers sought unwarranted and I decline to extend time during which to file this claim.

Read in open Court this 8th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Munyiri holding brief for Onyony for Applicants - Present

Munga & Company for Respondents – Absent