



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION NUMBER 27 OF 2016

BETWEEN

1. HARRISON SAFARI KITSAO
2. PATRICK AWUOR OMWAGA
3. MUTTAH MWONGOJOHI SHETI
4. JULIUS WAMBUA MUSIMI
5. COLLINS GITHAE KARIUKI
6. JACOB AKALA OGWANG
7. HAMISI ALI MWAKATONYA
8. JULIUS OWINO OWUOR
9. SIMON OTIENO MUDIR
10. SULEIMAN MOHAMMED SAID
11. MUGALLA JOHN RUWA
12. JOSEPH OUMA
13. CHARLES OTIENO OKOTH
14. GEORGE MWAKIMA..... CLAIMANTS

VERSUS

MAERSK KENYA LIMITEDINTENDED RESPONDENT *EX PARTE*

RULING

1. The *ex-parte* Applicants were employed by the intended Respondent as Port Clerks. Their contracts of

employment were terminated by the Respondent in June 2011. They state they were paid tokens as their terminal benefits. They allege they were shortchanged by a total amount of Kshs. 1,420, 800 which they intend to pursue from their Employer.

2. The 14 Employees state they were a total of 90 Employees affected. 61 of their Colleagues initiated Claim against the Intended Respondent, and obtained a favourable Award on the 13th May 2015. The Applicants state they were not able to join their successful Colleagues, because they did not have the financial wherewithal to engage a Lawyer. They have now managed to engage a Lawyer, and wish to pursue their balance of terminal dues.

3. They have been advised by their Lawyer that their cause of action arose on 24th June 2011, and expired under Section 90 of the Employment Act 2007, in June 2014. The Applicants seek the following orders:-

a. Leave be granted to file the Claim out of time.

b. The Plaint [Statement of Claim] filed with this Application be validated/allowed and deemed duly filed on time upon payment of requisite Court fees and/or further orders from this Honourable Court.

c. Costs be in the Cause.

4. The Application is based on the Affidavit of the 1st Applicant, sworn on 30th June 2015, and some 10 grounds on the face of the Motion. It is anchored on Section 27 and 28 of the Limitation of Actions Act Cap 22 the Laws of Kenya. It was heard on 15th July 2016.

The Court Finds:-

5. The Court does not have the jurisdiction to extend the time limit created under Section 90 of the Employment Act. This law has been accepted to be a substantive law, not a procedural law as submitted by the Applicants.

6. The Applicants state their cause of action has lapsed. They were not engaged in any dispute resolution processes such as consultation, negotiation or conciliation which occasioned delay in filing of their Claim. They state they were hampered by finances. While the Court has held in the past that engagement in alternative dispute resolution mechanisms could serve to freeze time, and allow the filing of otherwise late Claims, lack of finances to engage a Lawyer has never been accepted by this Court as one of the ways time could be deemed to have been frozen. It has been pointed out that the filing of Claims before this Court is inexpensive. Until recently there were no filing fees required. Currently there is a minimal fee required in filing of Claims.

7. It has also been the position of this Court that there are ways through which indigent Persons can access justice. Financial limitation is a non-issue, and has been a non-issue in access to industrial justice. Lawyers representing the indigent similarly do not demand for fees upfront, and there are many Lawyers offering legal services on reasonable terms.

8. The Applicants should have joined their Colleagues at the outset, pooled resources, rather than wait to see what their Colleagues would come out of the Court carrying, before the Applicants woke up from their slumber.

9. The Court is unable to assist them by extending time. It does not have the power to do so. The Applicants should explore ways of achieving their goal by engaging their ex-Employer; by examining if they could have some form of inclusion in the concluded Claim; or by invoking the dispute resolution mechanism contained in Section 62 of the Labour Relations Act 2007, which gives the Minister some leeway in extending late reports. ***The Application is rejected with no order on the costs.***

Dated and delivered at Mombasa this 25th day of July, 2016

James Rika

Judge