



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO 43 OF 2016

MOSES JUMBA OTIENDE.....APPLICANT

VS

G4S SECURITY SERVICES KENYA LIMITED.....RESPONDENT

RULING

1. The Applicant's application dated 12th April 2016 seeks leave of the Court to file a claim against the Respondent out of time. The application which is supported by the affidavit of Brian Ogoro, Advocate is based on the following grounds:

- a. That failure to bring the action within time was not occasioned by the Applicant nor his Advocate;
- b. That the Applicant is at risk of suffering irreparable damage and loss unless the orders sought are granted;
- c. That grant of the orders sought will not occasion the Respondent any damage or loss that cannot be compensated by way of costs.

2 In the supporting affidavit sworn by Brian Ogoro, Advocate it is deponed that the Applicant was summarily dismissed by the Respondent on 5th January 2012 on the basis of a criminal charge in Criminal Case No 670 of 2011 at the Chief Magistrate's Court in Kisumu.

3 The Applicant was acquitted of the criminal charge on 26th October 2015 and on 3rd November 2015 he issued a demand notice seeking compensation from the Respondent.

4 It is further deponed that in light of the criminal charge facing the Applicant he was unable to file his claim against the Respondent within the statutory three years. The Applicant was acquitted after lapse of the limitation period.

5 The Respondent filed grounds of opposition on 16th May 2016 stating that:

- a. The application is defective and is an abuse of the court process;
- b. The Applicant's employment was terminated on 5th January 2012 and his cause of action is therefore time barred by dint of the provisions of Section 90 of the Employment Act;
- c. The existence of criminal proceedings did not suspend the limitation period. The Applicant ought

to have preserved his rights by filing suit;

d. The Court has neither jurisdiction nor discretion to extend time for the filing of any claims predicated on contracts under the Employment Act, the Limitation of Actions Act or any other applicable law.

6 When the parties appeared before me on 24th May 2016, they agreed to dispense with the application by way of written submissions. However, only the Respondent filed submissions.

7 In its submissions filed on 10th June 2016, the Respondent states that the Claimant's contract was terminated on 5th January 2012 and that his right to sue for wrongful dismissal lapsed on 5th January 2015. Any claim filed after this date would be time barred by dint of Section 90 of the Employment Act, 2007.

8 The issue for determination in this application is whether this Court has jurisdiction to extend time within which the Applicant may file a claim arising from his employment with the Respondent.

9 The Respondent submits that this Court has no jurisdiction to extend time for filing of claims arising out of a contract of employment under the Employment Act, 2007.

10 In explaining the delay in filing his claim, the Applicant submits that he was held back by a criminal case arising from a complaint made against him by the Respondent.

11 The Respondent relies on Section 90 of the Act which provides as follows:

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, 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 after the cessation thereof.”

12 From the time of *Divecon Ltd v Samani [1995-1998] 1 EA* to the enactment of Section 90 of the Employment Act, limitation of actions has remained part of jurisdictional law (see *Bob Odhiambo v Kenindia Assurance Company [2014] eKLR*).

13 With specific reference to Section 90, the emerging jurisprudence is that the Court has no discretion to extend time for filing of claims arising out of the Employment Act, 2007 (see *Maria Machocho v Total Kenya Limited [2013] eKLR* and *Kenya Union of Sugar Plantation & Allied Workers v Sony Sugar Company [2015] eKLR*).

14 The only question therefore is whether the pendency of criminal proceedings against the Applicant could operate as a halt to running of time with regard to his claim against the Respondent. Faced with a similar situation in *George Hiram Ndirangu v Equity Bank [2015] eKLR* this court stated as follows:

“an employee who sits on their right to come before this Court cannot escape the limitation dragnet by waving criminal proceedings.”

15 I have no reason to change my mind on this particular point. The result is that the Applicant's right to bring action against the Respondent lapsed on 4th January 2015 being three years after accrual of the cause of action.

16 Evidently, the Applicant failed to exercise his right and this Court lacks the power to extend time.

17 The Miscellaneous Application dated 12th April 2016 therefore fails and is dismissed with no order for costs.

18 Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF
JULY 2016**

LINNET NDOLO

JUDGE

Appearance:

Mr. Ogoro for the Applicant

Mr. Makori for the Respondent