



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**MISC. APPLICATION NO. 4 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**PETER DAN ORUKO & 9 OTHERS .....CLAIMANTS**

**-Versus-**

**CHEMELIL SUGAR CO. LIMITED .....RESPONDENT**

**RULING**

The application before me is a notice of motion made under Order 51 Rule 3 of the Civil Procedure Rules Read together with sections 1A, 1B, 3A and section 80 of the Civil Procedure Act, section 90 of the Employment Act and all other enabling provisions of the law. The Application is filed by Chemelil Sugar Company Limited hereinafter referred to as the Respondent on 8th June, 2015 and seeks the following orders;

1. **THAT** this Honourable court be pleased to issue an order for stay of proceedings of KISUMU INDUSTRIAL CAUSE NO. 206, 207, 208, 209, 210, 211, 212, 213, 214 and 215 all of 2014 pending hearing and determination of this application.
2. **THAT** the Honourable Court be pleased to review its ruling delivered on 30th July, 2014 and set aside, discharge, vacate and or otherwise vary the same.
3. **THAT** this Honourable Court be pleased to issue an order the KISUMU INDUSTRIAL CAUSE NO.206, 207, 208, 209, 210, 211, 212, 213, 214 AND 215 all of 2014, filed pursuant to the ruling delivered on 30th July 2014, is time barred by statute.
4. **THAT** the costs of this application be provided for.

The application is supported by the affidavit of E. K. NGALA and on the following grounds;

- a) The court had no jurisdiction to extend/enlarge time under section 27, 28 and 29 of the limitation of Action Act or under any other Law.
- b) The time to filing suit under Section 4(1) and 4(4) of the limitation of Action Act, having elapsed, there was no provision under the said Act for extension of such time, whether under tort or contract or anywhere else.
- c) The Respondents did not bring any material that put their claim within the provisions of Section 27, 28 and 29 of the Limitation of Action Act.

d) There were no grounds set out or established for extension of such time.

e) **THAT** it would be proper that the Honourable court review and set aside its ruling of 30th July, 2014 and also stay the proceedings of the said suits pending the hearing and determination of the application herein.

The Claimant Peter Dan Oruko & 9 others hereinafter called the applicants filed grounds of opposition as follows;

1. **THAT** the said application is misconceived, bad in law and an abuse of the process of this honourable court.
2. **THAT** the orders sought are draconian in nature and cannot be granted by this Honourable court.
3. **THAT** there is delay in bringing the application.
4. **THAT** the firm of M/S AMOS OYUKO & CO. Advocates are not properly on record.

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

The Respondent's arguments are that the court had no jurisdiction to extend time under section 27 of the Limitation of Act, Section 90 of the Employment Act or any other law. The Respondent relied on the case of **Josephat Ndirangu v Henkel Chemicals (EA) Ltd [2013]eKLR**, the case of **Boniface Inondi Otieno v Mehta Electrical Limited [2013]eKLR** and the case of **Peter Nyamai & 7 others v M J Clarke Limited [2013]eKLR**.

For the Applicants Peter Dan Oruko & others, it is argued that section 80 of the Civil Procedure Act under which the review is sought by the Respondent refers to review of either a decree or an order, that in the application before the court for determination no decree or order has been extracted and there is therefore no decree or order before the court to be reviewed, that what has been annexed is a ruling. Counsel for the Claimants relied on the cases of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others; G. M. Jivanji v M. Jivanji & Another, Benard Githinji v Kirale Farmers Co-operative Limited and Murugam Gichembe v Gunda Gichembe**.

Secondly it was submitted for the Claimants that the issue of jurisdiction is a matter of law that should have been a ground for appeal and not review and on this point the Applicant's relied on the case of **National Bank of Kenya Limited v Ndungu Njau**.

The third ground raised for the Claimants is that hearing of the application by this court would be tantamount to sitting on appeal on a matter handled by another judge of the same jurisdiction and finally, that the application is not properly before this court as the counsel on record that is M/s Amos Oyuko & Co. Advocates were not on record at the time of filing the application on 8th June, 2016 and only filed the notice of appointment on 1st March, 2016 and only filed the notice of appointment on 1st March, 2016 in violation of order 9 Rule 7 of the Civil Procedure Rules. It was argued that the application is therefore not properly before court. On this point the Applicants relied on **Republic v Busia Senior Resident Magistrate's Court & another Ex-parte David Henry Muchelule & Another [2004]eKLR**.

I have considered the application herein and the grounds of opposition as well as the arguments for and in opposition of the application as set out in the respective written submissions filed by the parties.

The background of this case is well captured in the grounds in support of the application. The applicant's came to this court through Miscellaneous Application Nos.4 of 2014 to No.13 of 2014 seeking leave to file suit out of time. The applications were consolidated and heard *ex parte* pursuant to which a ruling was delivered granting leave to the applicants to file suit out of time. The suits were subsequently filed as Industrial Cause No.206, 207, 208, 209, 210, 211, 212, 213 and 214 of 2015. Those suits are currently

pending in court. Copies of the pleadings in those suits have been annexed to the application herein and in the defences filed by the Applicant/Respondent herein in the said suits, they have raised the issue of limitation.

It is my opinion that this court's jurisdiction has been invoked under the wrong provisions of the law. Section 16 of the Employment and Labour Relations Court Act gives this court the power to review its Judgements. The section provides as follows:-

*16. The court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.*

The Industrial Court (Procedure) Rules 2010 further provide at Rule 32 (*now rule 33 of The Employment and Labour Relations Court (Procedure) Rules*) for the circumstances when this court may review its decision as follows;

### **32. Review.**

*(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—*

*(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or*

*(b) on account of some mistake or error apparent on the face of the record; or*

*(c) on account of the award, judgment or ruling being in breach of any written law; or*

*(d) if the award, the judgment or ruling requires clarification; or*

*(e) for any other sufficient reasons.*

*(2) An application for review of a decree or order of the Court under subparagraphs (b), (c), (d), or (e), shall be made to the judge who passed the decree, or made the order sought to be reviewed.*

*(3) A party seeking review of a Court decree or order of the Court shall apply to the Court in Form 6 set out in the First Schedule.*

*(4) An application under paragraph (3) shall be accompanied by a memorandum supporting the application and the Court shall proceed to hear the parties in accordance with section 26 of the Act.*

*(5) The Court shall, upon hearing an application for review, deliver a ruling allowing the application or dismissing the application.*

*(6) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.*

*(7) An order made for a review of a decree or order shall not be subject to further review.*

This fact alone is however not sufficient to warrant the court to reject the application for review as it is a matter of procedure which can be corrected. In any event section 80 of the Civil Procedure Act and Order make similar provisions as section of the Employment and Labour Relations Court Act.

What is of concern to the court is that the orders that are sought to be reviewed were acted upon and the suits which are cited in prayer 1 of the application were filed pursuant to the leave now impugned in this

application. The Respondent filed responses to those suits and raised the same issues that are now raised in this application being that the suits were time barred. It is the view of this court that the court became *functus officio* upon the filing of the suits which were permitted by the orders that are sought to be reviewed by this application. It is the view of the court that the horse has bolted, the train has left the station and the matter can no longer be re-opened. The remedy of the Respondent now lies in following up its plea of limitation in the various suits that are now pending in court and not in this application which has already been acted upon and whose purpose has already been fulfilled by the filing of the suits which it gave leave to be filed out of time.

Having already participated in the suits filed pursuant to the orders sought to be reviewed, it is too late to resurrect this matter. The option now open to the Respondent is to raise the issue in the suit filed pursuant to the leave now contested.

Leave granted *ex parte* to file suit out of time can be challenged in the suit filed pursuant thereto as was held by Ndolo J, in **Justus Ochido OP v Kenyatta University Nairobi Cause No.430 of 2015**. Ndolo J. cited with approval the Court of Appeal decision in **Mary Wambui Kabugu v Kenya Bus Service Limited (Civil Appeal No.195 of 1995)**.

Having stated the foregoing, I must also look at the other issues raised by the applicants.

The ground that the counsel for the Respondent was not on record is not valid as the Respondent was never made a party and had not previously acted on its own or through other counsel to warrant its advocates to file a notice of appointment before filing the application. There is no requirement in law that having previously not been involved in a suit, a party who wishes to file an application therein must first file a notice of appointment. I therefore find no merit in this argument.

I also do not think that the fact that the Respondent has not challenged the ruling on appeal is a bar to applying for review. The argument is self defeating as the law specifically provides that a review may only be filed where an appeal has not been preferred.

As I have already stated above, it is the view of this court that it has been approached in the wrong file at the wrong time. The remedy for the Respondent lies in raising the plea of limitation either at the time of hearing or by way of preliminary objection in the various suits that were filed pursuant to the orders sought to be reviewed.

For the foregoing reasons, I dismiss the application. Each party shall bear its costs.

**Dated, Signed and Delivered this 15th day of September, 2016**

**MAUREEN ONYANGO**

**JUDGE**