



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 60 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

MOSES OUMA ODEROCLAIMANT

Versus

G4S SECURITY SERVICES KENYA LIMITED.....RESPONDENT

R U L I N G

The application before me for determination is a motion filed under Order 51 Rule 1 and Order 50 Rule 6 of the Civil Procedure Rules, 2010, section 4(1), 27 and 31 of the Limitation of Actions Act, Section 90 of the Employment Act, Rule 16 of the Industrial Court (Procedure) Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

The application is dated and filed on 1st March, 2016 and seeks the following orders:-

- a) The Honourable Court be pleased to grant the Applicant herein leave to file his Claim out of time.
- b) Upon grant of leave in prayer (a) above, the Statement of Claim annexed hereto be deemed as duly filed and served upon payment of the requisite court fee.
- c) The costs of this application be provided for.

The application is supported by the affidavit of MOSES OUMA ODERA, the applicant and on the following grounds:-

1. The Applicant was wrongfully, unfair and/or summarily dismissed by the Respondent on **5th January, 2012**.
2. The Applicant had until **4th January, 2015** to institute his claim against the Respondent which date has since long-passed.
3. The applicant could not bring his claim within the statutorily- prescribed time as he was waiting for the outcome of **Criminal Case No.670 of 2011** in the Chief Magistrate's Court at Kisumu which had a bearing on this case.
4. The Applicant is still desirous of pursuing his claim against the Respondent.
5. It is now a well-settled principle as was pronounced in the case of **Francis Ngigi Ngugi v Nakumatt Holdings Limited [2015] eKLR** that

"...I note that under Section 90 of Employment Act, any claim under the Employment Act should be brought within 3 years. However, I do not believe that the Courts power to extend this period can even be fettered because the Court has inherent powers to do justice at all times and in interpreting the law the Court must always interpret it to do justice irrespective of the circumstances. Section 3A of the Civil Procedure Act envisages this special power that the Court has. I do not find this Court's powers fettered under Section 90 of Employment Act and I believe the Court can still fall back of Cap 22 and grant this extension of time where circumstances permit ..."

In the supporting affidavit sworn on 1st March, 2016 the applicant reiterates the grounds in support of the application.

The Respondent was served with both the application and the hearing notice but did not file any response or attend court for the hearing of the application. The application was canvassed by way of written submissions.

In the written submissions filed on behalf of the applicant, it is acknowledged that section 90 of the Employment Act is couched in mandatory terms that do not allow a judicial officer any room for manoeuvre, and ties the hands of a Judge once the three year period has lapsed.

The applicant never-the-less relies on the statement by Marete J in **George Musyoki v Sarova Hotels [2014]eKLR** as follows;

"Employment and Labour relations matters and disputes must always be awarded human face. Stringent application of the law may not necessarily bring out justice in the circumstances. It would always necessary to bridge these situations to come out with a case for justice. This is the case here. I would in the circumstance allow the application with no order as to costs."

The applicant also relied on the case of **Francis Ngigi Ngugi v Nakumatt Holdings Limited [2015]eKLR** in which the court stated:-

*"I have considered the averments of both parties. I notice that under section 90 of Employment Act, any claim under the Employment Act should be brought within 3 years. However, I do not believe that the Courts power to extend this period can even be fettered because the court has inherent powers to do justice at all times and in interpreting the law the Court must always interpret it to do justice irrespective of the circumstances. Section 3A of the Civil Procedure Act envisages this special power that the court has. I do not find this Court's powers fettered under Section 90 of Employment Act and I believe the Court can still fall back on Cap 22 and grant this extension of time where circumstances permit. Having found as such, the issue then is whether there are valid reasons to extend the time for filing this claim. The Applicant has stated that he couldn't file the claim in time because he was unwell, suffering from depression and has adduced evidence to that effect. In their reply, the Respondents didn't seem to reply to this area of the application leaving it unchallenged. It is my view and exercising my discretion, that the Applicant should be allowed to file his claim out of time and that no man should be allowed to file his claim out of time and that no man should be locked out of the gates of justice. I therefore give the Claimant **90 days** to file his claim in a fresh file failure which he will forever be locked out."*

Determination

Section 90 of the Employment Act as correctly observed by the applicant, is couched in mandatory terms and gives no room for extension of limitation period provided therein of 3 years. Neither the Employment Act nor the Limitation of Actions Act make provision for extension of limitation period in respect of contracts. Sections 27 and 28 of the Limitation of Actions Act which provide for extension do not apply to contracts, but refer to claims in tort.

In the case of **Divecon v Samani [1995-1998] E.A. 48**, the Court of Appeal stated that once the limitation period had lapsed, a court is devoid of jurisdiction, and without jurisdiction, a court must down its tools (**Owners of Vessel Lillian 'S' v Caltex Oil (K) Ltd**). Limitation is a matter of law and not procedure.

The effect of limitation is to extinguish a right such that the right can no longer be the subject of a claim.

In the recent decision of the Court of Appeal in Kisumu in **Civil Appeal No.6 of 2015 Kenya Airports Authority v Shadrack Abraham Kisongochi**, the Court of Appeal overturned the decision of Wasilwa J in Cause No.20 of 2014 wherein she had granted leave to file suit out of time.

It is my opinion and I find that this court has no jurisdiction to grant leave to file suit out of time in a case arising out of employment. I therefore find no merit in the application and dismiss it.

Dated, Signed and Delivered this 8th day of September, 2016

MAUREEN ONYANGO

JUDGE