



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISC. APPLICATION NO. 100 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 6th September, 2016)

DANIEL LIGAYE OKACH.....CLAIMANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

1. The Application before Court is an Originating Summons dated 16.10.2015. The Application is brought under Article 162(2)(a) Sections 27 and 28 of the Statute of Limitation Act, Section 1A, 1B and 3A of the Civil Procedure Act, Order 37 Rule 6(1) of the Civil Procedure Code and other enabling Provisions of the law

2. The Applicant seeks orders that he be allowed to file suit against the Respondent out time.

3. The grounds he relies on are as follows:

- a. That the Applicant had been unable to sue the Respondent as he was charged and tried in Nyahururu Principal Magistrate's Court Criminal Case Number 2518 of 2008.*
- b. That the case did not proceed to trial after the Prosecutor withdrew the matter under Section 87(a) of the Criminal Procedure Code and he expressed the view that the state could not succeed on the second count. The Applicant was acquitted on 8/6/2009.*
- c. That in spite of the acquittal in the Court of law, the Ministry of Lands decided to proceed with disciplinary action nonetheless and wrote to the Applicant on 23/2/2010.*
- d. That by an undated letter, the Applicant wrote a show cause to the Ministry of Lands.*
- e. That by a letter dated 20/4/2010, the District Surveyor under whom the Applicant worked wrote to the Ministry of Lands pleading the Applicant's case. A similar letter dated 14/5/2010 was written by the Director of Surveys to the Ministry.*
- f. On 11/5/2010, the Ministry of Lands wrote to the Applicant to communicate their decision to dismiss him from service. The said letter communicated to him the right of appeal.*

g. On 25/5/2010, the Applicant drafted an appeal to the Ministry to appeal his dismissal.

h. On 15/9/2010, the Ministry responded to the Applicant rejecting his appeal but communicating to him the right to apply for a review within one year.

i. On 25/11/2011, the Applicant applied for a review of his dismissal but the same was rejected on 31/11/2011.

j. That following the rejecting of the appeal for review of his dismissal, the Applicant sought help from his trade union, the Kenya Union of Civil Servants. The said Union appointed an Advocate to act for the Applicant on 17/11/2014.

k. That the Applicant has lost his employment and means of livelihood and now risks losing his retirement and terminal benefits.

l. That the Applicant has a sustainable and meritorious case with great possibility of success against the Respondent and it is only fair and just that he be allowed to institute a suit against the Respondent.

m. That it is only fair and just to have the Honourable Court grant the Orders sought.

4. The Application is also supported by an affidavit sworn by Daniel Ligaye Okach the Applicant herein.
5. The main contention by the Applicant is that he didn't file his case in time because his employer communicated the dismissal of his appeal on 25.5.2010. He then sought for a review on the dismissal which was also dismissed on 31.11.2011. In the meantime, he ran out of time hence this application.
6. The Respondents opposed this application on 12.7.2016 stating that the reasons given by the Applicant for not filing the case in time are not meritorious.
7. I have considered submissions of both parties.
8. Under Section 90 of Employment Act:

“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”.

9. Any suit that ought to be filed must be filed within 3 years. Assuming that the Applicant was dismissed as he has stated and appeal on dismissal communicated to him on 25.5.2010, then he should have filed his case by 24.5.2013.

10. Does this Court have powers to extend time for filing Applicant's suit?. This issue has been extensively dealt with by the Court of Appeal in Court of Appeal No. 6/2015 **Kenya Airports Authority vs. Shadrack Abraham Kisongochi** where the Court of Appeal rendered itself as follows:

“This Court, in Mary Osundwa vs. Nzoia Sugar Company Limited (2002) expressed its views regarding the provisions of Section 27 of the Limitation of Actions Act as follows:

“This Section clearly lays down the circumstances under which the Court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance on breach of duty and the damage claimed are in respect of personal injuries to the Plaintiff as a result of the tort”.

11. This Section does not give jurisdiction to the Court to extend time for filing suit in cases involving contract or any other cause of action other than those in tort.

12. That being the position in law and as restated by the Hon. Judges of Court of Appeal, I am bound by that position. I find I do not have any jurisdiction whatsoever to grant orders sought by the Applicant. I therefore dismiss this application accordingly.

13. Costs to the Respondents.

Read in open Court this 6th day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent