



**REPUBLIC OF KENYA**

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

**CAUSE NO. 7 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**PHILIP OMENDA OTIENO .....CLAIMANT**

**-Versus-**

**WEST FIELD MOTORS LIMITED .....RESPONDENT**

**RULING**

By a Notice of Motion dated 22nd July, 2016 and filed under Certificate of Urgency, the Applicant who is the Claimant in the substantive suit seeks the following orders:-

1. This application be certified as extremely urgent and be heard ex-parte in the first instance.
2. This Honourable Court be pleased to extend time within which the above suit would have been filed by 60 days from the 30/12/2015.
3. This suit as filed be admitted for hearing.
4. In the interim there be a stay of proceedings in the above matter pending the hearing and determination of this application inter parties.
5. The costs be provided for.

The application is filed under section 90 of the Employment Act, unspecified sections of the Limitation of Actions Act, Articles 162 and 165 of the Constitution of Kenya 2010 and all enabling provisions of the law.

The application is supported by the affidavit of PHILIP OMENDA OTIENO, the Applicant and on the grounds that -

- (a) This suit was filed without unreasonable delay.
- (b) This suit is based on contract of employment and contract service, the Applicant should not be condemned unheard.
- (c) The Applicant has come to court without undue delay.
- (d) Substantial justice should be administered without undue technicalities.

(e) The Applicant has come to court with clean hands.

(f) It is in the interest of substantial justice that the orders sought herein are granted.

In the supporting affidavit the Applicant states that he is aware that his suit should have been filed within 6 years, that at the time of termination of his services he engaged the Respondent for payment of his dues but the Respondent kept dilly dallying, that the delay in filing suit is not unreasonable, and that the court has a duty to protect litigants from unscrupulous employers who try to circumvent the law. He further stated that the suit is merited by law.

This case first came up for hearing of the Applicant's claim on 11th July, 2016 when Mr. Shifwoka appearing for the Respondent raised a Preliminary Objection. Mr. Kyamazima counsel for the Claimant was not ready for the hearing of the Preliminary Objection as the claimant was unwell. The Court directed that parties argue the preliminary objection by way of written submissions.

In the Claimant's written submissions opposing the Preliminary Objection it is submitted that there is a dispute as to whether or not the suit was filed out of time, that there is a difference between a contract of service and a contract for employment, that the Claimant was employed under both Employment Act Contract and contract of service and that the limitation period for the Claimant's suit is 6 years which has not lapsed. It is submitted that the Claimant was employed to sell units of vehicles on commission based on terms and at the same time engaged as an employee, with both contracts running concurrently.

It is further submitted for the Claimant that the Preliminary Objection raised by the Respondent relates to form and not substance of the claim contrary to Article 159(2) and (d) of the Constitution and is therefore a technicality and should be dismissed. The Claimant relied on the case of **P.M.N. v Kenyatta National Hospital [2015]eKLR**.

For the Respondent, it is submitted that the Claimant by his own pleadings stated that his employment was terminated on 31st December, 2012 but the suit was filed on 19th January, 2016, some 19 days after expiry of limitation period. The Respondent relied on the following authorities:-

**1. Fred Mudave Gogo v G4s SAsecurity Services (K) Ltd [2014]eKLR.**

**2. E. Torgbor v Ladislaus Odongo Ojuok [2015]eKLR and**

**3. Stephen Kamau Karanja & Another v Family bank Ltd[2014]eKLR.**

### **Findings and Determination**

Section 90 of the Employment Act provides for limitation period of 3 years for civil action or proceedings based or arising out of the Act or contract of service in general. The Claimant's arguments about the distinction between contracts for service or contracts of employment are therefore irrelevant as section 90 of the Act would apply either way. This notwithstanding, the claimant has not persuaded me that there is a difference between what is referred to as contract of service and contract of employment which in my opinion is one and the same. Perhaps he intended to distinguish "contract of service" which is an employment contract and "contract for service" which refer to outsourced services. In the case of the claimant, the facts point to a contract of employment which is a contract of service. It is thus subject to the provisions of section 90 of the Employment Act which provides in mandatory terms that a suit in respect thereof must be instituted within 3 years.

The Claimant's argument that a Preliminary Objection cannot be raised in the circumstances of his case as the facts thereof are disputed must also fail. The Claimant has in his motion application dated 22nd July, 2016 prayed for extension of time within which the suit should be filed. This is an admission that the suit is out of time and the Preliminary Objection filed by the Respondent is based on a pure point of law as was stated in **Mukisa Biscuits Manufacturers Co. Limited v West End Distributors (1969) E.A. 696** at page 700 that -

*"... a Preliminary Objection consists of a point of law which has been pleaded, or which arises by a clear implication out pleading and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

The preliminary objection filed by the Respondent raises both the plea of limitation and by extension jurisdiction as was stated in the case of **Divecon v Samani** where the court of Appeal stated that *"...no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action."*

The six years referred to in the above case is by virtue of section 90 of the Employment Act replaced by 3 years. The section thus amends section 4(1) of the Limitation of Actions Act with respect to contracts of service in general or claims arising out of the Act.

The Claimant further argued that his contract is preserved by virtue of Article 159(2) of the Kenya Constitution 2010. This court has pronounced itself severally on the issue whether limitation is a mere technicality or substantive law. The court has consistently held that the effect of limitation is to extinguish a right and as was stated by Mbaru - J in **Fred Mudave Gogo v G4s Security Services (K) Ltd**, limitation is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims. Neither the Employment Act nor the Limitation of Actions Act provide for extension of Limitation period in respect of contracts generally or claims arising out of employment contracts in particular.

The result is that the Respondent's preliminary objection succeeds and is upheld while the Claimant's notice of motion must fail.

I therefore dismiss the Claimant's notice of motion and uphold the Respondent's Preliminary Objection. The Claimant's suit herein is thus dismissed with no orders as to costs.

**Ruling dated, signed and delivered this 27th day of October, 2016.**

**MAUREEN ONYANGO**

**JUDGE**