



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT KISUMU**  
**MISC. APPL NO. 2 OF 2014**

(Before Hon. Justice Maureen Onyango on 27<sup>th</sup> February, 2015)

**MOSES OCHIENG MUSA ..... APPLICANT**

**-VERSUS-**

**KISUMU WATER & SEWERAGE CO. LTD ..... RESPONDENT**

**R U L I N G**

The applicant herein Moses Ochieng Musa filed a Notice of Motion on 16th February 2014 seeking the following orders:-

1. **That this honourable court be pleased to grant leave to the applicant for extension of time to file his claim.**
2. **That the plaint filed herein be deemed to have been filed and served on time.**
3. **Cost be provided for.**

The Notice of Motion which is dated 16th October 2013 is filed through Mwamu & Company Advocates. It is filed under Section 1A, 1B and 3A and 95 of the Civil Procedure Act, Section 12 of the Industrial Court Act, Order 56 Rule 6 of the Civil Procedure Rules and Article 159 of the Constitution. The application is supported by the affidavits of James Aggrey Mwamu advocate and Moses Ochieng Musa the applicant. It is grounded on the following other grounds:-

- a. **That the memorandum of claim/plaint and other documents relevant to this suit had been made.**
- b. **That the time granted by this honourable court to file and serve had elapsed.**
- c. **That what remains in this matter on our side is to file and serve.**
- d. **That it is just to grant orders sought herein.**

The application was not served on the respondent and was argued *ex parte* by Mr. M. M. Omondi holding brief for Mr. Mwamu on 5th February 2015.

Mr. Omondi submitted that the reason for delay is that the claimant was out of employment for the past five years and was not able to raise funds to file his claim in time. He further submitted that it was due to the benevolence of the applicant's advocates that this application has been filed. He urged the court to consider the application for extension of time in the spirit of Article 159 of the Constitution. He submitted that it will be discriminatory to shut the claimant of the doors of justice.

I have considered the application and the affidavits in support thereof. According to the documents on record, the applicant resigned from employment of the respondent on 5th October 2009 and his resignation was accepted on 13th October 2009. Section 90 of the Employment Act requires that all employment cases are brought to court within 3 years from the date of the act complained of.

The Limitation of Actions Act provides for extension of time only in the circumstances provided for under Part III thereof, which are disability, acknowledgement and part payment, fraud, mistake and ignorance of material facts. None of these factors are cited in the application by the claimant.

Article 159 of the Constitution cited by the claimant was not mentioned by Mr. M. M. Omondi who argued the application.

I presume the applicant was referring to Article 159(2)(d) which provides that justice shall be administered without undue regard to procedural technicalities. The other sections cited that is Sections 1A, 1B, 3A and 95 of the Civil Procedure Act, Section 12 of Industrial Court Act and Order 50 of the Civil Procedure Rules were also not referred to by Mr. M. M. Omondi in his submissions in court. It is not the duty of the court to make presumptions on the part of a litigant who makes an application to the court even if done *ex parte*. A party who comes to court must make the necessary arguments to persuade the court. Having failed to make any argument relating to the Law upon which the application is granted, I will not make any finding on those sections.

With reference to Section 90 of the Employment Act, the applicant has not persuaded the court that he falls under any of the provisions of Part III of the Limitation of Action Act that allow the courts to extend the limitation period.

As regards Article 159, limitation is not a procedural technicality but substantive law that has the effect of extinguishing the applicants right to make a claim in this court.

The foregoing being the case, I find that the application lacks merit and dismiss the same.

Orders accordingly.

**MAUREEN ONYANGO**

**JUDGE**

**27/2/2015**

**Appearances:-**

..... for applicant present

.....for respondents

CC. Wamache