



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISC. APPLICATION NO. 95 OF 2014

JUSTUS MUKHWANA SEBHI.....CLAIMANT/APPLICANT

VERSUS

BARCLAYS BANK OF KENYA.....RESPONDENT

RULING

1. The Applicant seeks the grant of leave to file a suit out of time. The Originating Summons Application under Sections 3A and 95 of the Civil Procedure Act and Section 27 of the Limitation of Actions Act and Order 37 Rule 6(1) of the Civil Procedure Rules was filed on 23<sup>rd</sup> October 2014.

2. Mr. Olando urged the *ex parte* Originating Summons and submitted that this application is a lifeline for the Applicant. He submitted that the Applicant seeks to enjoy his dues on account of the dismissal.

3. The Applicant was an employee of the Respondent until dismissal on allegations of theft by servant. He was convicted for the offence and served time but on appeal his conviction was quashed. He was dismissed on 3<sup>rd</sup> December 2004. His employment was terminated under the former regime of law, to wit, the Employment Act cap 229 of the Laws of Kenya. That statute had no limitation period and the fall back is to the Limitation of Actions Act cap 22 Laws of Kenya. Section 4(1) of the Act makes provision on limitation as follows:-

4. (1) *The following actions may not be brought after the end of six years from the date on which the cause of action accrued -*

(a) *actions founded on contract;*

(b).....

4. The Applicant's contract of service terminated on 3<sup>rd</sup> December 2004 and limitation would have set in 6 years later which is 3<sup>rd</sup> December 2010. In this case limitation has already set in insofar as his cause of action goes.

5. The Court of Appeal in the case of **Divecon v Samani (1995-1998) EA 48** has deliberated on the issue of extension of time and given the definitive and binding position on the same. Though the cause of action in the **Divecon** case was based on tort, the Court of Appeal graciously went ahead to consider the grant of leave or extension of time in respect of causes of action based on contract. The Court of Appeal stated as follows:-

*....to us, the meaning of the wording of section 4(1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is 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. A perusal of Part III*

*shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that “the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked”.*

6. That simply means that there is no room for extension of time. Whereas I commiserate with the Claimant who was convicted and served time only for the appellate Court to reverse the trial Magistrate, the law is clear. He ought to have moved Court for his dues even though he was not through with the criminal trial. The Miscellaneous application is therefore dismissed with no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 23<sup>rd</sup> day of **February** 2015

**Nzioki wa Makau**

**JUDGE**