



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

AT KISUMU

MISC. APPL NO. 3 OF 2015

(Before Hon. Justice Maureen Onyango on 20th February, 2015)

B M O.....APPLICANT

-VERSUS-

ECOBANK KENYA.....RESPONDENT

R U L I N G

By an application dated 30th January 2015 and filed on 5th February, 2015 under certificate of urgency through Charles Gomba & Co. Advocates, the applicant seeks the following orders:-

- 1. That this honourable court be pleased to grant the applicant leave to file his Statement of Claim out of time.**
- 2. That this honourable court be pleased to direct the time within which to file the annexed draft Statement of Claim.**
- 3. That the costs of this application be in the cause.**

The application is made under Section 22 of the Limitation of Actions Act, Section 12 of the Industrial Court Act and Rule 16 of the Industrial Court Procedure Rules.

The application is supported by the affidavit of the applicant B M O and on the following grounds:-

- 1. That on 14th October, 2011, the respondent unfairly terminated the applicant from employment.**
- 2. That the applicant ought to have instituted the requisite proceedings in the Industrial Court within 3 years of the said termination.**
- 3. That on or about 7th November 2013 to 15th November 2014, the applicant suffered a serious bout of meningitis which rendered him hospitalized and immobile.**
- 4. That the said illness led to complications which led to the applicant being temporarily paralyzed and was only able to move after month of physiotherapy.**

5. That as a result of the said illness the applicant underwent serious physical, psychological, emotional and financial challenges that rendered him disabled to institute the said proceedings.

The application which was made *ex parte* was argued before me on 5th February 2015 by M. M. Omondi, counsel for the applicant who submitted that the claimant fell sick soon after a criminal case against him was terminated. He was hospitalized for over one year during which the limitation period lapsed. That the delay to file was not intentional, that the respondent will not be prejudiced by allowing the application and that the claimant undertakes to comply with any direction the court may give.

I have considered the application and the affidavit in support thereof together with the annexures thereto.

The facts as may be summarized from the pleadings are that the applicant was dismissed from employment on 14th October 2011. The applicant together with another person were charged in the Chief Magistrate's Court at Kisumu in Criminal Case No. 543 of 2011 which was terminated when the prosecution entered a *nolle prosequi* on 20th January 2012. The claimant fell sick and on 7th November 2013 was diagnosed with meningitis. According to the medical documents filed in court the applicant was upon examination found to be feverish, have some confusion, unstable gait, dizziness and generalized body weakness. He was treated and thereafter on 30th November 2013 was referred to physiotherapy for 2 sessions per week for 6 months with home rest for the entire period of 6 months. When he was reviewed on 15th November 2014 he was declared to have recovered sufficiently to resume his duties and was discharged.

Section 90 of the Employment Act provides for claims arising from employment to be filed within 3 years from the date the course of action occurred. In the applicant's case the course of action arose on 14th October 2011. He should therefore have filed his claim on or before 14th October 2014. He was however declared sufficiently recovered on 15th November 2014, a month after the limitation period lapsed.

Section 22 of the Limitation of Actions Act provides for extension of limitation period in case of disability in the following terms:-

"If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired: Provided that—

(i) this section does not affect any case where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;

(ii) when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under disability, no further extension of time is allowed by reason of the disability of the second person;

(iii) an action to recover land or to recover money secured on a mortgage of land may not be brought by a person by virtue of this section after the end of thirty years from the date on which the right of action accrued to that person or to some person through whom he claims;

(iv) this section does not apply to an action to recover a penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law;

(v) in actions for damages for tort—

(a) this section does not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of his parent; and

(b) this section has effect as if the words “six years” were replaced by the words “three years”

The applicant's situation does not quite fit within the circumstances envisaged in Section 22 of the Limitation of Actions Act. He was not under disability at the time of accrual of the cause of action. He was only under disability at the expiry of the limitation period.

The issues I have to decide are whether supervening disability entitles the applicant to extension of time and whether sickness constitutes disability for purposes of extension of time under Section 22 of the Limitation of Actions Act.

In the Law of Contract, Cheshire & Fifoot 8th Edition at page 616, it is stated as follows in respect of supervening disability:-

"It must be observed that there is no extension of time unless the disability exists when the cause of action accrues. When time has once begun to run it is not stopped by the subsequent occurrence of some disability, as for example where the plaintiff becomes insane soon after the accrual of the cause of action. Again, if a person under a disability is succeeded by another person in like case there is no further extension of time by reason of the disability of the second person."

Chitty on Contracts; General Principles, Twenty - Sixth Edition at paragraph 1957 states as follows:-

"If on the date when any right of action accrued for which a period of limitation is prescribed by the Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date on which he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired. This does not apply to actions for which a period of limitation is prescribed by or under any other enactment. It will be observed that the period allowed after the cesser of disability or death is (subject to the exception discussed below) six years, and this is so even though the action is on a specialty. There is no extension of time under this section if the right of action first accrues to some person not under a disability, even if that person is one through whom the person under a disability claims. In other words, the disability must exist when the cause of action accrued: subsequent disability is of no effect." (emphasis added)

Under paragraph 553, the only forms of disability recognized in contract under common law are minors, married women (although little or vestige of their contractual incapacity remains), mentally disordered persons and drunkards. **"Abnormal weakness of mind short of such mental disorder as prevents a person understanding the nature of the transaction, or immaturity of reason in one who has attained full age, or the mere absence of skill upon the subject of the particular contract, affords a person no ground for relief at law or in equity---**".

From the foregoing, the claimant cannot avail himself of extension of time on grounds of incapacity under Section 22 of the Limitation of Actions Act on two grounds. The first is that he was not under incapacity on the date when the right of action accrued and secondly, sickness is not recognized as a disability under the Law as to avail him extension under the Limitation of Actions Act.

The result is that the application has no merit and is hereby dismissed.

MAUREEN ONYANGO

JUDGE

20/2/2015

Appearances:-

Odeny h/b Gomba for applicant present

N/A for respondents

CC. Wamache