



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISC. APPLICATION NO. 94 OF 2014

PAUL OYUGA ORIARO.....APPLICANT

VERSUS

BARCLAYS BANK OF KENYA.....RESPONDENT

RULING

1. The Applicant seeks the enlargement of time within which the claim ought to have been filed. 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 2010 and all enabling provisions of the law was filed on 23<sup>rd</sup> October 2014 and was supported by the Affidavit of the Applicant.
2. Mr. Olando urged the Originating Summons and submitted that the Applicant seeks leave to commence suit out of time. He submitted that the failure to file suit was not as a result of deliberate omission or intention to delay. He submitted that the Applicant was unlawfully dismissed on 3<sup>rd</sup> December 2004 and by virtue of the dismissal was charged and consequently convicted and that he appealed against the conviction which appeal was allowed on 21<sup>st</sup> February 2013. He submitted that the Applicant was dismissed without his dues.
3. I reserved the Ruling after hearing counsel for the Applicant. The Applicant was an employee of the Respondent until 3<sup>rd</sup> December 2004. The Applicant was charged in a criminal case and was convicted. He appealed against the conviction and was successful. The Appeal was allowed on 21<sup>st</sup> February 2013. The Applicant did not file any application for leave at the time and filed the Application in October 2014 one year eight months later. At the time of dismissal, the applicable law was the Employment Act cap 226 of the Laws of Kenya. The repealed Employment Act made no provision on limitation and the fallback on limitation was to the Limitation of Actions Act cap 22 of the Laws of Kenya.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 Court of Appeal in **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”.*

5. The Applicant’s contract of service terminated on 3<sup>rd</sup> December 2004 and limitation would have set in 6 years later that is to say on 3<sup>rd</sup> December 2010. Limitation therefore has already set in insofar as his cause of action goes and as the decision in **Divecon v Samani** holds, there is no discretion in the matter. That simply means that there is no room for extension of time in contracts of service under either the Limitation of Actions Act or the current Employment Act. He should have moved Court in December 2010. The application is therefore dismissed.

Orders accordingly.

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of February 2015**

**Nzioki wa Makau**

**JUDGE**