REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISC CAUSE NO. 75 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 7th April, 2015)

DAVID TELLA……..…..…..1ST CLAIMANT

JENNIFER SSESANGA ……...…..……..……..2ND CLAIMANT

VERSUS

GILOIL COMPANY LIMITED …….....….....……..…RESPONDENT

RULING

1. The Application before court is the one dated 1/8/2014. The application is of such nature that is ordinarily an exparte application being an application to file suit out of time. The application was however served on the Respondent who also filed their replying affidavit on 6/10/2014 opposing the application.

Applicant's case

2. The application was filed through Originating Summons brought under Section 27 and 28 of the Limitation of Actions Act Cap 22, Order 37 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules 2010 Section 3A of the Civil Procedure Act and all enabling provisions of law.

The Applicants seek orders:

(1) That leave be granted to the Applicants to file suit against Giloil Company Limited out of time.

(2) That the Memorandum of claim annexed hereto be deemed to be duty filed.

(3) That costs of this application be in the cause.

The application is based on the grounds that:

(1) The delay in filing this claim was due to reasons beyond the Applicant's control.

(2) The delay is not inordinate.

(3) The delay was caused by the Claimants former Advocates and their mistake ought not to be visited on the Claimants/Applicants.

(4) In the interest of justice and fairness, the application ought to be allowed.

3. The Application is supported by the supporting affidavit of the 1st Applicant herein David Tella who has also the authority of the 2nd Applicanbt to swear the affidavit on her behalf.

It is the Applicants position that on 15/9/2010, they instructed the firm of Walubengo Waningilo & Co Advocates to act on their behalf and file claim for wrongful and illegal termination. This was immediately the false criminal complaint against them had been dismissed and they had been acquitted. They also went to the offices of the said Advocates on several occasions, wrote emails, letters and made telephone calls to inquire on the progress of their case as per annextures DST 1. The Advocates seem not to have responded.

4. The Applicants then resorted to seeking intervention of the Justice & Peace Committee of the Catholic Diocese of Kitale which also wrote to the said firm of Advocates asking about the failure to progress their case as per Annexture DST 2.

It was only after the intervention of this Justice & Peace Committee that the said firm of Advocates filed case No. 611 of 2014. The said suit was filed out of time without the leave of the court thus prejudicing the entire claim.

The Applicants consulted their current lawyer who decided to withdraw the said court in order to give them an opportunity to move the court properly hence this application.

The Applicants content that doors of justice should not be shut on them due to mistakes of their case hence their prayer that his application be allowed in the interest of justice and that they be allowed to file suit out of time.

Respondent's Case

5. The Respondents opposed this application. They filed their replying affidavit sworn by one Adrian Kibera on 3/10/2014. The deponent is an Accountant with the Respondent Company and he depones that the application is fatally defective and bad in law and should be dismissed. He depones further that the intended claim is time bared, the cause of action having arisen on 4/12/2007. They also depone that the Applicants had filed case No. 611/2014 and withdrew it prematurely prior to the court making a finding on the issue of limitation of time. The Applicants were then ordered to pay costs of case No, 611/2014 in the sum of Kshs.890,055/= which remains unpaid todate.

The deponent therefore argue that he withdrawal of case No. 611 of 2014 soon after the Respondent raised the issue of time and denying the court an opportunity to address the issue of time once and for all and filing this application is an abuse of the court process and therefore this court should not deal with the matter again. They depone that this court lacks jurisdiction to extend the time. They have cited **Gladys Amukoya Were vs Mumias Sugar Company (2014) eKLR.**

6. Upon considering the submissions from both parties the issues for determination are:-

(1) Whether this court has jurisdiction to extend time.

(2) Whether this application has merit.

On the 1st issue this court has an inherent jurisdiction to entertain applications of this nature as provided for under Section 27 and 28 of the limitation of Actions Act Cap 22 Laws of Kenya.

Under Section 28, such an application shall be made exparte except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action. In this case, the Applicants having previously filed a relevant action, it is proper that the Respondents be part and parcel of this application as they currently are.

7. Having stated as above, the next issue is whether this application has merit. The Applicants have explained the delay in filing suit emanating from the mistakes of their previous counsel as seen from the correspondence on the file. In the case of **Mwai v Wainaina (No4) 1982 KLR 38** Madam J A stated as follows:

> ***"a mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel, the court might feel compassionate more readily. A blinder on point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate".***

In an attempt to do justice, this court is guided by the dictates of Article 159(d) which states that:

> ***"justice shall be administered without undue regard to procedural technicalities……".***

The technicality here is the adherence to the strict timelines as provided for under Section 90 of the Employment Act 2007 that an employment related matter should be filed within 3 years-

> ***" …….after the act, neglect on default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof".***

8. The law however cannot be ignored as the rules are not merely ornamental. As submitted by the Respondents the Applicants had filed suit previously which they withdrew ostensibly in order to correct errors of previous counsel by now seeking leave to file suit out of time. They were ordered to pay costs in cause No. 611/2014. Todate the said costs have not been paid.

I have previously in the case of **Gladys Were Mukoya vs Mumias Sugar Company (2014) eKLR** interpreted the issue of extension of time and my interpretation then as it is today is that there is a 12 months window in case of a continuing nuisance, in this case, the running of the criminal trial which ended in 2009. This period ended in 2010. In November 2013, we see the 1st demand letters from Applicants Counsel way after the limitation period – even if this is 2009 as contended by the Applicants.

9. The Applicants contention that their counsel let them down can be remedied by suing the said counsel for indemnity as envisaged under the Advocate rules. To reopen this case after a period of 8 years is an abuse of the court process and I find that the application lacks merit. It is therefore dismissed.

Dated and delivered in open Court this 7th day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent