



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT KISUMU

MISC. APPL. NO. 27 OF 2014

(Before Hon. Lady Justice Maureen Onyango on 11th June, 2015)

DISMAS O. KISIKA CLAIMANT

-VERSUS-

MIN. OF EDUCATION SCIENCE & TECHNOLOGY 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

RULING

By a Notice of Motion dated 30th December and filed on 31st December 2014 the applicant Dismas Okumu Kisika who is acting in person seeks the following orders:-

1. That the Honourable Court may be pleased to grant leave for the claimant to file suit out of time.
2. That the cost of the application be on cause.

His application is based on the following grounds:-

1. That the claimant's desire to file suit out of time is neither inordinate, unjustifiable and inexcusable.
2. That the claimant's failure to file the suit on time was not deliberate.
3. That the claimant has proper cause of action against the 1st and 2nd respondents jointly.
4. That it is at the interest of justice that the orders be granted.

The application is supported by the applicant's affidavit sworn on 30th December 2014.

He depones that he was an employee of the 1st respondent as an adult education teacher from 17th June 1980 and worked peacefully for 15 years. On 20th August 1995 the District Education Officer framed him with an offence of absence from duty for 175 days from 20th August 1995 to 12th February 1996, which he denies. He was dismissed for desertion of duty on 1st March 1996 and his appeal was rejected. He states that the delay in filing his case was caused by his unfair treatment and the subsequent psychological torture that he suffered. He also stated that he had hope of being reinstated as the respondent did not respond to his letter of complaint until 9th August 2012. He further states his disciplinary case took too long to be decided further delaying the intended suit, and that he was unemployed and without income and therefore lacked funds to file the suit. He states that his case has

overwhelming chances of success.

The applicant filed written submissions on 7th May 2015 in which he largely repeats the facts deponed in his affidavit.

The respondent filed grounds of opposition on 31st March 2015 through Grace Essendi, Litigation Counsel in the Attorney General's Office. The respondent's grounds of opposition are that the application is misconceived and an abuse of the court process and that the claimant has failed to demonstrate his reason for delay in filing the claim.

The law applicable to the claimant's case is the repealed Employment Act (1976). Under the Act claims for breach of contract of employment were to be filed within 6 years as provided in Section 4(1) of the Limitation of Actions Act. Section 4(1) provides that actions founded on contract may not be brought after the end of six years.

The claim herein arose on 12th February 2002 being the date of applicant's letter of dismissal. His application was filed on 31st December 2014 almost 13 years after the dismissal. No valid grounds have been given for delay. Lack of funds is not a ground for delay as the Law provides for pauper suits where litigants cannot afford to pay court fees.

The precedent in this regard was set out by the Court of Appeal in **Divecon Ltd V Samani [1995 - 1988] 1EA 48** at page 54 that Section 4(1) of the Limitation of Actions Act was clear beyond any doubt and that the section meant that no one shall have the right or power to bring an action founded on contract after the end of six years from the date on which a cause of action accrued 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 the light of these clear statutory provisions, it would be unacceptable to imply that 'the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked'.

In my humble opinion this court neither has the statutory jurisdiction nor discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out of the Employment Act, 2007.

In the circumstances I do decline to accept the invitation by the applicant to grant him leave to file suit out of time and dismiss the application with no order as to costs.

Dated, delivered and signed in open court in Kisumu on this **11th June, 2015.**

MAUREEN ONYANGO

JUDGE

Appearances:-

..... for the claimant(s)

..... for the respondent(s)

CC. Wamache