



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAIROBI**

**MISC. APPLICATION NO. 50 OF 2015**

EVANS IGAIDE.....CLAIMANT/APPLICANT

**VERSUS**

BARCA EXPRESS LIMITED.....1<sup>ST</sup> RESPONDENT

JEREMIAH & BROTHERS CONTRACTORS LIMITED.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The Applicant seeks leave of court to file a claim against the 1<sup>st</sup> Respondent out of time. The ex parte Notice of Motion Application was expressed to be under Article 159(2)(b), section 90 Employment Act 2007 and Section 4(1)(e) of the Limitation of Actions Act. The application was supported by the affidavit of Evans Igaide and the grounds on the face of it. The application was filed on 22<sup>nd</sup> May 2015 while time ran out on 4<sup>th</sup> March 2015.
2. Mr. Wambugu for the applicant urged the motion and submitted that the application dated 22<sup>nd</sup> May 2015 seeks to have the claim against the 1<sup>st</sup> Respondent allowed for filing. He stated that the statutory limit is 3 years and that expired 1½ months and that the delay was occasioned by the fact that the lawyer for applicant had written to counsel for the Respondent in October 2014 and the advocate had stated that they would revert on the issue of leave. He thus sought the grant of prayers in the motion and submitted that the Respondent will not suffer prejudice and that the address for service is the same.
3. I reserved the Ruling after hearing counsel for the Applicant. The Applicant was an employee of the Respondent(s) until 4<sup>th</sup> April 2012. The provisions on limitation cited is the Limitation of Actions Act cap 22 of the Laws of Kenya and Section 90 of the Employment Act 2007. 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 Employment Act Section 90 provides as follows:-

90. Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action

or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

5. The issue of extension of time has been deliberated by the Court of Appeal in **Divecon v Samani (1995-1998) EA 48**. The Court of Appeal gave the definitive and binding position and though the cause of action in the **Divecon** case was based on tort, the Court of Appeal graciously went ahead to consider the issue of 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. The Applicant’s contract of service terminated on 4<sup>th</sup> April 2012 and limitation would have set in 3 years later that is to say on 4<sup>th</sup> April 2015. Limitation has therefore already set in and as held in the case of **Divecon v Samani**, 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 Employment Act 2007. He should have moved Court in April 2015. As he has a cause of action that is still live, he may proceed to file suit accordingly. The application is dismissed but I make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 5<sup>th</sup> day of **June** 2015

**Nzioki wa Makau**

**JUDGE**