



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

AT NAIROBI

MISC. APPLICATION NO. 80 OF 2014

MAGETHE JOSEPH KIARIE APPLICANT

VERSUS

ECO BANK KENYA LIMITED RESPONDENT

RULING

1. Proceedings herein commenced by the Applicant filing Notice of Motion on 8th August 2014 seeking extension of time to file suit. The issues raised by the Respondent thus affect the Applicant filed by the Applicant and the same shall all be addressed in the ruling herein. Both parties have since filed their written submissions.
2. The Respondent filed a Replying Affidavit to the application together with grounds of opposition where they raise preliminary issues of law that the suit is time barred. By notice of Motion filed on 8th August 2014, made under the provisions of section 12 of the Industrial Court Act [Employment and Labour Relations Act] the Applicant is seeking for leave to file suit out of time; such suit be filed within 14 days; and any other orders the Court may deem fit. This application is supported by the annexe3d affidavit of Magethe Joseph Kiarie the applicant.
3. The application is based on the grounds that the Applicant was employed by the Respondent as a Cashier on 10th June 1991 until 10th March 2010 when he was suspended while at Nyeri Branch and was later terminated on 24th March 2010. That the termination was unfair and despite several appeals the Respondent has failed to reinstate or compensate the applicant. The Applicant has been indisposed for a long time and before and by the time he became stable, time to file suit had lapsed.
4. In hi affidavit, the Applicant avers that since his employment by the Respondent he diligently served until his termination on 24th March 2010. Before termination he was sick and was under medication, this worsened after termination. That he was later diagnosed with chronic appendicitis and pulmonary tuberculosis on 21st April 2011 which required hospital admission and was only released in September 2011. That he was later diagnosed with bronchospasm. That by the time he was able to file suit, time to do so had lapsed and hence seek extension.
5. The Respondent filed the Replying Affidavit on 25th September 2014 sworn by Christine Kiche the human resource manager and avers that the Applicant ceased working with the Respondent on 24th march 2010 and the intended suit is time barred as under section 90 of the Employment Act. The Court has no jurisdiction or discretion to extend time or grant leave to file suit out of time in respect of claims arising

of employment contracts. Section 90 is mandatory and any claims filed outside the requisite time period cannot stand. The Application by the Applicant must be dismissed.

6. The matters raised in the Replying Affidavit also form part of the objections noted by the respondent.

Submissions

7. The applicant filed their submissions on 12th November 2014. The applicant submitted that prior to his termination by the Respondent he was under medication. His condition was aggravated by the termination when he developed chronic appendicitis and pulmonary tuberculosis. This warranted hospital admission and he has since been attending reviews and medication. Section 90 had not anticipated such an occurrence hence the application herein seeking Court discretion to extend time for the Applicant to file suit. The law grants the Court inherent powers to make orders as appropriate under the provisions of section 12(3) Industrial Court Act [Employment and Labour Relations Act]. The Court should look at the nature of claim; length of delay; the reason for the delay; and degree of prejudice to the Respondent if the application is granted.

8. In response the Respondent filed their submissions on 8th December 2014. The Respondent submitted that the Applicant ceased employment on 24th March 2010 and the application herein is filed on 8th August 2014. Section 90 of the Employment Act states the time limitations to be 3 years.

9. The Respondent also submitted that the Court has no jurisdiction or discretion to extend time of grant of leave to file a claim out of time. Section 90 of the Employment Act does not give the Court a leeway to extend time and the Limitations of Actions Act does not change the application of section 90 with regard to time. The Court can therefore not move without jurisdiction as held in **Owners of Motor Vessel "Lilian S" versus Caltex Oil (Kenya) Limited [1989] KLR 1**. This position is also confirmed in the case of **Peter Nyamai & 7 Others versus M J Clarke limited [2013] eKLR** where the Court held that this Court has no jurisdiction or discretion to extend time or grant leave of Court to file a case grounded on breach of employment contract where limitation time is set at section 90 of the Employment Act. The law does not create room for extension of time.

10. The application as filed by the Applicant lacks merit, the Court has no jurisdiction or discretion to allow application by the Applicant and should be dismissed with costs.

Determination

11. The Applicant has relied on the provisions of section 12(3) of the Employment and Labour Relations Act in that the Court has the jurisdiction and discretion to make appropriate orders as it deems fit. To arrive at such a point the Court should be guided by the nature of claim, length of delay, degree of prejudice to be caused upon the Respondent and the reason for the delay. Indeed section 12(3) (viii) of the Employment and Labour Relations Act give this Court immense powers thus;

12 (3) in exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

...

(viii) Any other appropriate relief as the Court may deem fit to grant.

12. These are inherent powers granted to the Court by law. The whole to section 12(3) give a long list on the orders that the Court can make. The list is not exhaustive and section 12(3)(viii) give the all-important rider that where appropriate, the Court must assess every case on its own merits and make any other appropriate relief *as the Court may deem fit to grant*. This is a right that is both constitutional and legal as under article 162(2) read together with article 162(3);

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause

(2).

13. In that regard the Employment and Labour Relations Act, was passed giving the Court jurisdiction. Had Parliament meant to regulate, control and restrict such mandate and jurisdiction, there was nothing to stop it. but in its wisdom, which I agree is correct, section 12(3)(viii) had a purpose of giving the Court the mandate, power and discretion to address any given case on its merits and arrive at a just decision.

14. In this regard therefore, section 90 of the Employment Act, though couched in mandatory terms, to serve a particular purpose in limiting the time period within which a claim can be filed before this court, the powers of the Court under section 12 of the Employment and Labour Relations Act have not changed. The Court in any given scenario has the power to order and direct as appropriate. I note with the decision in **Peter Nyamai & 7 Others versus M J Clarke Limited** and respectfully differ in so far as the court's discretion is unfettered with regard to the powers granted to the Court under the provisions above cited – section 12(3)(viii). Where there is good reason that find justification, the Court has the power to invoke this discretion and sufficiently apply the same.

15. In this case, the Applicant seek for the extension of time to file suit. Essentially the application such as the one filed by the Applicant should come to Court *ex parte*. Upon unsuccessful application, then the Applicant is stopped at that point without need to involve the respondent. However in this case the Respondent is aware and is opposed to the application and raised the issue of time. Hence the Court must look at the reasons as to why extension of time is sought as well as the question of time.

16. The applicant was unable to file suit on the grounds that he was indisposed. Such indisposition arose while he was employed and was aggravated by his termination. In that regard, the Applicant does not state as to whether the issue of his indisposition was a factor in his termination. Whatever the reasons for termination, it is trite that such a claim should be filed within 3 years from the time the termination arose. The Applicant was terminated on 24th March 2010 and should have filed his claim on or before the 25th March 2013. This was not done and on 8th August 2014 application for extension of time was filed. The grounds are that the Applicant was admitted in hospital and was discharged in September 2011 and has since been on medication.

17. What is clear is that where the Applicant was Indisposed and admitted in hospital under medication, the period of admission was until September 2011. Though there is no evidence of such admission attached to the applicant's affidavit, he has since been on medication and out of hospital since September 2011. He does not give an account of his time from then onwards to March 2013 when he was supposed to file his claim. Annexure "JK3a" and "JK3b" are medical reports done with regard to an assessment done in 2011. These reports are done some time just before the application herein was filed. This is not an account for the time lost from 2013 when the applicant lapsed. The facts outlined by the application are not matters that can sway the Court to look beyond the mandatory application of the law and invoke the inherent power under section 12(3) (viii) noting such parts should sparingly be applied and used only in exceptional cases that speak for themselves.

18. Extension of time shall therefore not be granted herein. in that regard therefore, on a matter that should have first been addressed *ex parte* the proceedings herein should have ended at that point hence not requiring, the intervention of the respondent. Noting the submissions herein and the expense the Respondent has had to go through and in the interests of justice and noting the prayers sought by the Applicant have not been allowed, it is appropriate that each party bears their own costs.

In conclusion therefore, application by the Applicant is dismissed. Each party shall bear their own costs.

Delivered, dated and signed in open Court at Nairobi this 12th August 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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