



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 30 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 21st October, 2015)

FRANCIS NGIGI NGUGI APPLICANT

VERSUS

NAKUMATT HOLDINGS LIMITEDRESPONDENT

RULING

1. The application in Court was made by the Applicant herein through an ex parte Notice of Motion brought under Order 51 Rules 1 and 50 Rule 6 of the Civil Procedure Rules 2010 and Section 27 and 31 of the Limitations of Actions Act, Section 51 of the Institutions Act, Section 90 of the Employment Act, Rule 16 of the Industrial Court (Procedure) Rules 2010 and Section 3A of the Civil Procedure Act and all enabling provisions of the law.

2. The Applicant seeks for an order for leave to be granted to file this suit out of time and that the Memorandum of Claim filed herein be deemed as duly filed.

3. The Application is grounded on the grounds that:

a. That he is desirous to have this matter pursued to get justice.

b. That the Respondent has for a long time kept the Claimant hoping to be paid as it had promised.

c. That the failure to file the matter in time was not deliberate but due to circumstances beyond his control.

d. That he has a good case with overwhelming chances of success.

e. That the Defendants are not likely to suffer any prejudice if leave to file out of time is granted.

4. The Application is also supported by the annexed affidavit of Francis Ngigi Ngugi filed on 14/3/2015 where he depones that on 6/10/2003 he was employed by Respondent and served with diligence until 1/9/2009 when he was wrongfully and unlawfully terminated by the Respondents.

5. He avers that he had fallen sick while working for Respondent and in or about 4th September 2008, he was referred to hospital and diagnosed with severe conscious unresponsive disease- (Appendix 2 is the referral letter).
6. After his dismissal he sought help from the Kenya Union of Commercial Food and Allied Workers who didn't reply to his letter (Appendix 3).
7. He thereafter fell into depression and attended several hospitals for counseling and treatment (appendix 4). It is only now that he was advised that his claim was time barred. He believes he has a good case with chances of success. He seeks to be allowed to file this case out of time.
8. Though this application was filed exparte, when the matter came up for mention on 11/5/2015, the Court directed that the Respondents should be served and reply to the said application.
9. The Respondent thereafter filed their submissions and they submitted that under Section 90 of Employment Act 2007, the law does not leave any room for Court's discretion when it comes to limitation. They have also averred that they stand to suffer prejudice as the manager who handled claimant's case has since retired and the employment records discarded.
10. I have considered the averments of both parties. I notice that under Section 90 of Employment Act, any claim under the Employment Act should be brought within 3 years.
11. However, I do not believe that the Courts power to extend this period can even be fettered because the Court has inherent powers to do justice at all times and in interpreting the law the Court must always interpret it to do justice irrespective of the circumstances. Section 3A of the Civil Procedure Act envisages this special power that the Court has.
12. I do not find this Court's powers fettered under Section 90 of Employment Act and I believe the Court can still fall back of Cap 22 and grant this extension of time where circumstances permit.
13. Having found as such, the issue then is whether there are valid reasons to extend the time for filing this claim. The Applicant has stated that he couldn't file the claim in time because he was unwell, suffering from depression and has adduced evidence to that effect.
14. In their reply, the Respondents didn't seem to reply to this area of the application leaving it unchallenged.
15. It is my view and exercising my discretion, that the Applicant should be allowed to file his claim out of time and that no man should be locked out of the gates of justice. I therefore give the Claimant **90 days** to file his claim in a fresh file failure which he will forever be locked out.

Read in open Court this 21st day of October, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Applicant

No appearance for Respondent