



**REPUBLIC OF KEYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CIVIL SUIT NO. 22 OF 2014 (O.S.)**

**(Before Hon. Lady Justice Maureen Onayngo)**

**RISPER MUWANG'O OCHIENG .....APPLICANT**

**VERSUS**

**CHAIRMAN BOARD OF GOVERNORS ST. PAUL'S**

**SIGOMIRE SECONDARY SCHOOL .....1ST RESPONDENT**

**RICHARD OUMA ONYANGO THE SECRETARY**

**BOG/PRINCIPAL ST. PAUL'S SIGOMIRE SEC. SCHOOL.....2ND RESPONDENT**

**RULING**

The Originating Summons before me for determination is filed by Risper Muwang'o Ochieng who seeks the following orders:-

1. The Honourable Court be pleased to grant unto the Applicant herein, leave to file suit out of time against the Respondents herein for compensation for unlawful dismissal from employment.
2. Consequent to prayer (1) hereinabove granted, the Applicant be at liberty to file and/or lodge the intended proceedings within 30 days from the date of the order
3. Costs of this application be in the cause.
4. Such further and/or other orders be made as the court may deem fit and expedient.

The application is supported by the affidavit of the applicant and on grounds on the face of the application.

In the Originating Summons and the supporting affidavit the Claimant alleges that :-

1. That Applicant was employed by the Respondent as a school Matron, Cateress and Storekeeper from June, 20021 upto 21/10/2011 when she unlawfully dismissed by the Respondents.
2. The Applicant subsequently instructed and retained the firm of Messers Kemboy & Ogola Advocates to pursue her claim for compensation for unlawful dismissal against the Respondents.

3. Upon instructions of the Applicant, the said firm of Advocates drew, issued and served a Demand Notice upon the Respondents but failed to file and/or lodge a suit.
4. The Applicant withdrew her instructions from the firm of Messers Kemboy & Ogola Advocates due to the failure to file and/or lodge the suit and she subsequently instructed the firm of Maloba & Co. Advocates to take over.
5. Pursuant to Applicants instructions the firm of Maloba & Co. Advocates also served a Demand Notice upon the Respondents.
6. The Firm of Maloba & Co. Advocates were desirous of filing the suit but were persuaded by the firm of Otieno Yogo & Company Advocates, acting for the Respondents to settle the matter out of court.
7. The Applicant and the Firm of Maloba & Co. Advocates acceded to the Respondent's request for an out of court settlement and negotiations began forthwith.
8. The Negotiations lasted beyond the time limited for filing a suit without any success.
9. The applicant and her previous Counsel trusted and believed that negotiations will succeed thus failed to file and/or lodge the intended proceedings on time.
10. The applicant on her part was unaware of essential, material and decisive facts pertaining to the non filing of the suit.
11. The lapse and/or failure to file and/or mount the suit within the statutory period was occasioned by the negotiations and failure and/or mistake of her previous Counsel to file the suit within the statutory period on mistaken believe that the matter will be amicably settled.
12. The granting of the leave and/or extension of time is essential and/or paramount.
13. Unless the leave and/or extension sought are granted, the Applicant will suffer irreparable and/or substantial loss.
14. The delay attendant to the filing of the instant Application are excusable
15. The Applicant ought not to be punished and/or penalized for the delay occasioned by the negotiations and mistakes of her previous Counsels.
16. Applicant is desirous to be afforded an opportunity to be heard.
17. Denial and/or deprivation of a right to hearing, amounts to and/or constitutes infringement of her constitutional right.
18. The intended Respondents would not suffer any prejudice and/or loss as all as Respondents' participated in the negotiations that occasioned the delay.
19. It is the interest of justice that the application herein be heard and allowed.

The Respondent filed a Notice or Preliminary Objection to the application on grounds that:-

1. The claim herein is statute barred under the Provisions of Section 90 of the Employment Act and the court lacks jurisdiction to entertain the present application.
2. The Originating Summons offends the mandatory provisions of Limitation of Actions Act.

When the application came up for hearing on 22nd July, 2015 I directed that the Preliminary Objection would be deemed to be grounds of opposition and further directed parties to argue the application by way of written submissions. The Applicant argues in the written submissions dated 10th August, and filed on 14th August, 2015 through the firm of M.A. Ochanji - Opondo & Co. Advocates that the Respondents are estopped from raising the plea of limitation. The Applicant also argues that the Respondent acknowledged the debt through the letter dated 15th May, 2014 from the Respondents' Advocates served upon the Applicant's Advocates Messrs Maloba & Company Advocates on 3rd June, 2014. In the letter the Respondent offered to pay to the Claimant one months' salary for every year worked.

The Applicant relied on Section 39(1)(b) and 23(3) of the Limitation of Actions Act Cap 22. The Applicant further relied on the case of *Eliud Gatundu Wanjohi & 3 Others v Kenya Railways Corporation [2014] eKLR* and *Fred Mudave v G4S Security Services (k) Ltd [2014] eKLR*.

In the former case D.K. Njagi Marete J stated as follows:-

*"The Claimants have factually demonstrated a case against limitation. The case of the Respondents acknowledgement of the claim in both 2012 and 2013 (ousts) any further claim to limitation."*

In the latter case Mbaru J. stated that limitation period can be extended upon the court being moved by a party who on good grounds finds themselves under these circumstances.

For the Respondent, it is argued in the submissions filed on 29th July, 2015 that Section 90 of the Employment Act limits the period for filing suit to three (3) years while Section 27(2) of the Limitation of Actions Act requires an Applicant to prove material facts relating to cause of action which were outside the actual or constructive nature of the Applicant. The Respondent relied on the case of *Laban Chema Libabu v Bata Shoe Co. (K) Ltd [2013] eKLR*. The Respondent argues that the Applicant chose to sit on her rights and that Equity aids the vigilant, not the indolent. The Respondent argues that if the Applicant had any intention to prosecute her claim she would have done so within the limitation period and she should not use her advocates as scapegoats.

The Respondent further relied on the case of *Owners of the Motor Vessel "LillianS" v Caltex Oil (Kenya) Ltd [1989] KLR 1* where Nyarangi JA stated:-

*"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

The Respondent further relied on the writings of John Beecroft Saunders in Words and Phrases Legally defined - Volume 3:1 - N which at page 113 which states the following about jurisdiction:-

*"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction*

*which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."*

I have considered the arguments by both parties as contained in the pleadings, the submissions and the authorities cited.

The law relating to limitation in employment contracts is contained in Section 90 of the Employment Act as follows:-

*"Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.*

The Applicant's argument is that she is entitled to extension of time on two grounds. The first is that the Respondent acknowledged the debt by its letter dated 15th May, 2014. In the letter the Respondent denied owing the Applicant as demanded in the demand letter and proposed to pay one months' salary for every year worked. The Applicant's Advocates rejected the offer by letter dated 7th July, 2014. The last letter from Respondent's Advocates is dated 30th July, 2014 and sought a counter-offer from the Applicant. There appears not to have been any further correspondence after that.

The Applicant further alleges that the Respondent is estopped from pleading limitation. The Applicant relies on Section 23(3) and 39(1)(b) of the Limitation of Actions Act. The two provisions are reproduced below:-

*Section 23*

*(1) Where—*

*(a) a right of action (including a foreclosure action) to recover land; or*

*(b) a right of a mortgagee of movable property to bring a foreclosure action in respect of the property, has accrued, and—*

*(i) the person in possession of the land or movable property acknowledges the title of the person to whom the right of action has accrued; or*

*(ii) in the case of a foreclosure or other action by a mortgagee, the person in possession of the land or movable property or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right accrues on and not before the date of the acknowledgement or payment.*

*(2) Where a mortgagee is, by virtue of the mortgage, in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the titles of the mortgagor, or his equity of Limitation of Actions redemption, an action to redeem the land in his possession may be brought at any time before the end of twelve years from the date of the payment or acknowledgement.*

*(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:*

*Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in*

*respect of the principal debt".*

*"Contract not to plead limitation, and estoppel*

*(1) A period of limitation does not run if—*

*(a) there is a contract not to plead limitation; or*

*(b) that the person attempting to plead limitation is estopped from so  
doing.*

*(2) For the purposes of subsection (1) of this section, "estopped" includes estopped by equitable or promissory estoppel.". Section 24 provides as follows:-*

*" Every acknowledgement of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it.*

*(2) The acknowledgement or payment mentioned in section 23 of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made."*

From the facts of this case, the Respondent made an offer to the Applicant but the offer was rejected. Can this be considered as acknowledgement that is capable of creating a fresh cause of action as envisaged under Section 23 of the Limitation of Actions Act? I do not think so. In the first place, the offer was made on a without prejudice basis meaning that it cannot be used against the Respondent. Secondly while these negotiations were ongoing the issue of limitation did not arise, and was not foreseeable as the limitation period had not lapsed. Thirdly the Applicant rejected the offer, and did not respond to the Respondents' letter seeking a counter offer. Lastly, I do not think Section 23(3) of the Limitation of Actions Act covers the claim as made by the Applicant. The section seems to refer only to recovery of a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person which in my opinion differ from what the Applicant herein demanded which was as follows:-

(i) Immediate reinstatement of the Applicants as school matron

(ii) Salary arrears from the time of her suspension up to and including the date of reinstatement and

(ii) Compensation for pain and suffering as a result of the unfair termination and wrongful dismissal.

I therefore find that there was no acknowledgement. Instead there was a counter offer which was rejected by the Applicant.

The Applicant further relies on Section 39(1) of the Limitation of Actions Act.

This in my considered opinion must also fail because there was no promise not to plead limitation that could be interpreted to constitute either promissory or equitable estoppel. The issue of limitation did not feature at all in the communication between the Applicant's Advocates and those of the Respondents.

For the same reasons I find the cases relied upon by the Applicant distinguishable as the circumstances in those cases are not the same as in this case.

The foregoing being the case, I fall back on the Court of Appeal decision in *Divecon v Samani Ltd [1995-1998] 1 EA 48* in which the court stated that:-

*"No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. the corollary 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 bringing of the action,"*

For these reasons I dismiss the application with no orders for costs.

**Dated, Signed and delivered in court this 13th day of November, 2015**

**MAUREEN ONYANGO**

**JUDGE**