



**REPUBLIC OF KENYA**

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

**CAUSE NO. 234/2013**

**(Before Hon. Justice Hellen Wasilwa on 31<sup>st</sup> March, 2014)**

**BEATRICE KAHAI ADAGALA ..... CLAIMANT**

**-VERSUS-**

**POSTAL CORPORATION OF KENYA .....RESPONDENTS**

**R U L I N G**

The application before court is the one dated 10.3.2014 and filed by the claimant applicant herein. The application is brought through a Notice of Motion filed on the 10.3.2014 and brought under Section 20(1) of the Industrial Court Act 2011, the Industrial Court Rules and Article 50 of the Constitution of Kenya, 2010 and other enabling provisions of law.

The applicants seeks orders that:-

- 1. The application hereof having been placed before the Honourable Judge for perusal, be certified urgent and be allocated an early hearing date on priority owing to its nature.**
- 2. Pending *inter parties* hearing of the application, there be stay of further or other proceedings, other than for this application.**
- 3. The stay order granted under paragraph 2 above remain in force after the *inter parties* hearing until the determination of this application.**
- 4. This Honorable court deem it just and fit to extent, for the applicant, the period within which this suit was to be filed up to the date of filing of the suit.**
- 5. This suit be deemed, the period for its filing having been so extended, to have been duly filed within time.**
- 6. The suit proceeds for hearing and determination on merit.**
- 7. Costs of the application be provided for.**

The application is also brought in the grounds that:-

- (a) The suit was filed outside time without first seeking extension of time from the court,**
- (b) Leave of the court to file the suit out of time was statutorily required as a procedural requisite.**
- (c) The error in filing the suit out of time without prior leave was made by the lawyer then on record for the applicant,**
- (d) It would be against the tenets of justice to punish the applicant for the error of the advocate then on record who no longer has instructions in the matter,**

**(e) It will be in the best interest of justice to accord the plaintiff opportunity to be on her case on merit,**

**(f) The hearing of the claim has not commenced yet,**

**(g) The orders sought will not occasion any prejudice as the court has the powers to redress the loss if any, so far suffered by the respondent through an award of costs,**

**(h) The applicant gives an undertaking to abide by the terms of the court.**

The application is also supported by the affidavit in support of the Notice of Motion sworn on 10.3.2014 by **Beatrice Kahai Adagala** the claimant herein. It is the applicant's contention that the suit was filed without seeking leave of court to extent time. The suit had been filed by a previous lawyer on record for the claimant and the claimant was not aware that the suit was filed out of time. The applicant argue that it would be unfair to punish applicant for errors of her advocate and the applicant is willing to pay respondents as court awards.

The respondents submitted that the claimants having admitted to filing the suit out of time, the preliminary objection should be allowed and the case should be struck out as the court has no power to extent time.

Having heard the submissions of both parties, the issues for determination by this court are as follows:-

- 1. Whether this court has powers to extent time to bring an action after time.**
- 2. If so whether such powers can be exercised after filing of suit.**

On the 1st issue, Section 90 of Employment Act 2007 is clear and states that:-

**“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.”**

It is therefore imperative that an action based on an employment contract must be filed within 3 years or within 1 year in case of a continuing nuisance. Going by Section 28 of the Limitation of Actions Act, the court – the High Court and the Industrial Court is a court with the status of High Court can entertain applications for extension of time. Other courts have held that the Industrial Court has no powers to extent time as in cases cited herein. I however disagree with that holding as I believe it cannot be the intention of Parliament to fetter the discretion of a judge. Otherwise, the judge would be considered a stooge or bystander to hold that I can't make any decision over a matter even when circumstances call for action. This will also go against the Principle of Article 159 of Constitution which calls for avoidance to adherence to undue technicalities. Each case must therefore be considered on it's own merits by the court in deciding whether to entertain or not entertain an application for extension of time.

On second issue, this is coupled with the timing within which the court can exercise it's discretion. Section 28(2) of Limitation of Actions states that:-

**“Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—**

**(a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and**

**(b) to fulfill the requirements of section 27(2) of this Act in relation to that cause of action.**

”

It is therefore clear that such an application should be filed before a suit is filed. To file a suit and to seek within the suit to have time extended to bring the “**illegal**” suit in conformity with the law is an abuse of the court which this court cannot entertain.

This suit having been filed already out of time, the application to extend time and correct the situation is untenable and is therefore dismissed. The end result is that the preliminary objection is sustained. The suit having been filed out of time is dismissed accordingly with no order as to costs.

**HELLEN WASILWA**

**JUDGE**

**31/3/2014**

**Appearances:-**

Simba h/b Mr. Otinga for claimant present

Omboto for respondents present

CC. Wamache