



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. 40 OF 2013**

JOSEPH ODERO OCHOLA.....**APPLICANT**

**VERSUS**

KENYA RAILWAYS CORPORATION.....**RESPONDENT**

**RULING**

1. The Applicant seeks the grant of leave to file a suit out of time. The Originating Summons Application dated 27<sup>th</sup> May 2013 was urged on 25<sup>th</sup> March 2014 by Mr. Munoko for the Applicant. The Application is expressed to be brought under Order 37 Rule 6 of the Civil Procedure Rules 2010, Sections 27 and 28 of the Limitation of Actions Act cap 22 and Section 3A of the Civil Procedure Act. He submitted that the Applicant sought leave to commence suit out of time for the reason that the Applicant Joseph Odero Ocholla filed suit in the lower Court and the suit had to be withdrawn because of jurisdictional issues. The draft Memorandum of Claim attached to the Application was stated to raise triable issues and the amount involved is a huge sum and is the retrenchment entitlement of the Claimant. Mr. Munoko also relied on the facts in the affidavit of the Applicant sworn on 27<sup>th</sup> May 2013.
2. The Applicant was an employee of the Respondent until 31<sup>st</sup> October 2006. His employment thus terminated under the old order namely the repealed Employment Act cap 226. Under that statute, there was no provision on limitation. The Applicant had a contract of employment with the Respondent and any disputes arising would be bound by limitation under the Act in force at the time. The Employment Act Cap 226 (now repealed) had no express provision on limitation and the fall back was to the limitations under the Limitation of Actions Act Section 4(1). The section provides: ?  
  
*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;*
3. The Applicant's contract of service was terminated on 31<sup>st</sup> October 2006 when he was retrenched. Limitation would have set in on 31<sup>st</sup> October 2012. The Applicant filed a suit in the Magistrates Court on 26<sup>th</sup> October 2012. At the time, the Employment Act cap 226 had been repealed and replaced by the Employment Act 2007 which set the limitation period to 3 years under Section 90 thereof. While the Applicant had a cause of action which could be presented to this Court, he filed the suit in the 'wrong' Court namely the Resident Magistrates Court. He withdrew the suit on 6<sup>th</sup> February 2013 and filed the present Application dated 27<sup>th</sup> May 2013 on 18<sup>th</sup> July 2013.
4. In this case Sections 27 and 28 of the Limitation of Actions Act are not applicable as the cause of action is not one based on the torts of negligence, nuisance or the contractual breach of duty. This holding is reinforced by the ruling by Visram J (as he then was) in the case of **Timothy M Mukalo v Reuben Alubale Shiramba & 3 others [2005] eKLR**. In the case the learned Judge held that sections 27 and 28 of the Limitation of Actions Act are only applicable in actions based on negligence. I further am persuaded by the reasoning of my brother Radido J. in **Maria Machochi v Total Kenya Limited [2013] eKLR** where he expounded on the limitations of

actions and the issue of extension of time.

5. The Court of Appeal in **Divecon v Samani (1995-1998) EA 48** has deliberated on the issue of extension of time and given the definitive and binding position on the same. Though the cause of action in the *Divecon* case was based on tort, the Court of Appeal graciously went ahead to consider the 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 above, simply put, is that I cannot extend time I cannot entertain that which cannot be done. The Applicant did not seek a transfer of the suit he had filed in the Magistrates Court and instead withdrew the case. He has sought leave to file suit out of time. Unfortunately for him, there is no judicial craft or innovation to assist him in this quest. No Court can extend time in this case. Application thus fails and is dismissed. I make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 27<sup>th</sup> day of **March** 2014

**Nzioki wa Makau**

**JUDGE**