



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**MISC. APPLICATION NO. 4 OF 2013**  
**EX-KENYA NATIONAL ASSURANCE CO.LTD**  
**EMPLOYEES**

JAMES JOSEPH MUNGURA MBUGUA .....1<sup>ST</sup> APPLICANT  
REUBEN JONATHAN OKUSI.....2<sup>ND</sup> APPLICANT  
STEPHEN GATOVU IKANDI.....3<sup>RD</sup> APPLICANT  
AUDI LINCON.....4<sup>TH</sup> APPLICANT  
PATRICK NDINI KIMANI.....5<sup>TH</sup> APPLICANT  
IRENE MANYEKI .....6<sup>TH</sup> APPLICANT  
JEDIDAH KINUTHIA .....7<sup>TH</sup> APPLICANT

**VERSUS**

THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT  
JAMES OLUBAYI .....2<sup>ND</sup> RESPONDENT  
THE OFFICIAL RECEIVER..... 3<sup>RD</sup> RESPONDENT  
KENYA NATIONAL ASSURANCE  
CO. [2001]LTD.....4<sup>TH</sup> RESPONDENT

**RULING**

The Applicants herein filed an ex parte Notice of Motion dated 8<sup>th</sup> February 2013 seeking the following orders:-

1. That leave be granted to the Applicants to file suit against the Respondents after the limitation period.
2. That costs of this application be provided for.

The Notice of Motion was amended on 28<sup>th</sup> February 2013 to change the names of the Applicants from Ex – Kenya National Assurance Co. Ltd Employees as listed in the Schedule No. 1 Annexed to the Application and replace with the current Applicants.

The Notice of Motion was argued on 25<sup>th</sup> September 2013 by Ms. Githaiga instructed by J. Waithaka Wachira & Company Advocates appearing for the Applicants. The applicants thereafter filed written submissions.

The background to the application as given in the supporting affidavit of James Joseph Mbugua sworn on 14<sup>th</sup> August 2013 and in the submissions is that the applicants are ex-employees of Kenya National Assurance Company Ltd which was put under interim liquidation in 1996. The applicants were promised by the Financial Secretary that they would be paid their terminal benefits and pension. The proposed 4<sup>th</sup> Respondent Kenya National Assurance Co. [2001] Ltd paid part of the terminal benefits in small installments until 2003 when only about 40 % of the pensions had been paid. That the balance remains unpaid to date. In 2004 the Claimants filed Misc. Application No. 833 of 2004 which was dismissed in 2009 by Justice Wendoh on the grounds that their remedy lay in a Civil Suit. They applied for proceedings with the intention to file appeal but abandoned the same on the grounds that the appeal had no chance of success. They now wish to get leave to file their claim in this court out of time. Their reason for seeking leave is that their counsel made a mistake by filing their claim as a Constitutional application and further that their number being large and having been scattered all over the country it was not possible for them to file this claim earlier. They state that they are desperate and have had to endure suffering, pain, loss and a lot of damages. That they lost their houses, household goods and other properties. They seek extension of time under Section 26 of the Limitation of Actions Act.

Section 26 of the Limitation of Actions Act provides for the Limitation period to start running on the date when the plaintiff discovers the mistake.

This being a claim on contract of employment and assuming that this court finds that the mistake referred to herein by the Claimants qualify as a mistake under Section 26 of the Act, the limitation period would start running on 28<sup>th</sup> May 2009. In 2009 the Employment Act 2007 had already been enacted and brought into operation. Under the Employment Act 2007 the Limitation period is 3 years from the date of the wrong complained of.

So assuming Limitation period started running on 28<sup>th</sup> May 2009, the claim should have been filed by 27<sup>th</sup> May 2012. It has however not been sufficiently explained by the applicants why if they are as desperate as they allege, they did not come to court sooner after their case was dismissed by the court on 28<sup>th</sup> May 2009.

The issue for determination though is whether what the Claimants have described as a mistake is a mistake as contemplated by Section 26 of the Limitation of Actions Act. The Section provides that where an action is for relief from the consequences of a mistake the limitation period does not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it. In the present case the Claimants have stated that they actually filed a Constitutional application which was heard and dismissed on the grounds that their claim was not Constitutional but a Civil Claim. Does this qualify as a mistake under Section 26 of the Limitation of Actions Act?

My answer to this is no. The mistake referred to in the Act is mistake as to the course of action, not mistake as to what form the claim should take. The Claimants were aware about their claim right from the moment their former employer or the liquidator failed to pay the full claim. They were not mistaken as to the nature of their claim. They went to court seeking orders in furtherance of the claim but the court case failed. They chose which court to go to and what claims to make. The case in that court was heard and a determination made. They even contemplated an appeal and gave it up on the basis that the appeal had no chance of success.

These were all conscious decisions made by the Claimants. After abandoning the appeal they waited for

almost 4 years before coming to this court to seek leave to file the claim out of time.

Having been heard on the merits and their claim failed, the Claimants

could only come to this court if their claim was still within the Limitation

period as they were not mistaken as to the nature of their claim.

I find that the Claimant's have not proved that they were suffering from the kind of mistake envisaged under Section 26 of the Limitation of Actions Act.

I find that this is an abuse of court process where one goes to one court and after dismissal of the claim, goes to another court to seek extension of time on the basis that they went to the original court by mistake. The object of the Limitation period is so that parties are not encumbered by the threat of court action beyond the Limitation period. In this case the Claimants cannot expect that the Respondents who believed their case had come to an end on 28<sup>th</sup> May 2009 or within the period available for appeal after that date should be brought back to court under a new claim. The law does not aid the indolent. Claimant's lost their jobs in 1996 when their employer was put under interim liquidation. The last payment they received from the liquidator was in February 2003.

Their claim was therefore only valid for six years from February 2003 and was extinguished in February 2009. If they made a mistake by making their claim in the many court, they must live with that mistake, as they did not come to this court within a reasonable period to seek redress.

I find no merit in the application and dismiss the same.

Delivered and signed in open court on **24<sup>th</sup> March** 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

Ms Githaiga holding brief for Wachira for applicants