



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
MISC. NO. 7 OF 2014

AGNES M. OSIEMO	1ST APPLICANT
AGNES W. KIMANI	2ND APPLICANT
ALEXANDER K. KARIUKI	3RD APPLICANT
ALFRED MAILU	4TH APPLICANT
ALLOYS MAKENYA	5TH APPLICANT
BEATRICE W. NGATIA	6TH APPLICANT
BRIDGET KAIMURI	7TH APPLICANT
CATHERINE N. KAMENWA	8TH APPLICANT
CHARLES T. CHIRA	9TH APPLICANT
CHRISTINE W. MUHIU	10TH APPLICANT
DANIEL M. KIBARU	11TH APPLICANT
DAVID N. SAMANI	12TH APPLICANT
DICK MANWA	13TH APPLICANT
DICK N. MOCHACHE	14TH APPLICANT
DUNCAN M. ONUNDU	15TH APPLICANT
EDITH WANJIRU	16TH APPLICANT
EDWARD K. MAINA	17TH APPLICANT
ESTHER A. OTIENO	18TH APPLICANT

EZRA O. SAMUEL	19 TH APPLICANT
GRACE K. MAINA	20 TH APPLICANT
GRACE N. MBATIA	21 ST APPLICANT
GRACE A. OGWANG	22 ND APPLICANT
HASSAN ODHIAMBO	23 RD APPLICANT
HENRY MWANGI	24 TH APPLICANT
HENRY N. MURANGA	25 TH APPLICANT
HENRY WETENDE	26 TH APPLICANT
JAMES N. GICHIA	27 TH APPLICANT
JAMES KAGUAI	28 TH APPLICANT
JAMES K. GUCHU	29 TH APPLICANT
JAMES O. MASIRA	30 TH APPLICANT
JANE N. MAINA	31 ST APPLICANT
JANE W. KANJA	32 ND APPLICANT
JANET K. IRUNGU	33 RD APPLICANT
JACINTA W. THUMBI	34 TH APPLICANT
JASON OBINO	35 TH APPLICANT
JOAB O. ONGOCHE	36 TH APPLICANT
JOSEPH M. NGOTHO	37 TH APPLICANT
JUDITH M. MURIITHI	38 TH APPLICANT
JULIUS B. NANDWA	39 TH APPLICANT
LEAH W. NGANGA	40 TH APPLICANT
LUCAS OTIENO	41 ST APPLICANT
LUCY W. NDUNG'U	42 ND APPLICANT
MARGARET W. KARURI	43 RD APPLICANT
MARY W. MURIUKI	44 TH APPLICANT

MARY N. GITAU	45 TH APPLICANT
MERCY M. MWANGI	46 TH APPLICANT
MINNIE N. KIMANI	47 TH APPLICANT
NELIUS G. NDUNGU	48 TH APPLICANT
ROSE N. KIMANI	49 TH APPLICANT
PETER M. KAMUNDIA	50 TH APPLICANT
PETER NYAKERI	51 ST APPLICANT
RICHARD K. WANYOIKE	52 ND APPLICANT
RICHARD M. NYANGAU	53 RD APPLICANT
REGINA W. GITHII	54 TH APPLICANT
ROSEMARY W. KANGANGA	55 TH APPLICANT
SAMUEL H. KARANJA	56 TH APPLICANT
SAMUEL GITAU	57 TH APPLICANT
SAMUEL NGATA	58 TH APPLICANT
SAMUEL O. ONCHIRI	59 TH APPLICANT
TABITHA W. NJIRAINI	60 TH APPLICANT
VERONICA W. MAINA	61 ST APPLICANT
VIOLET K. NDAMBO	62 ND APPLICANT
NANCY H. MACHARIA	63 RD APPLICANT
PAUL KARANJA	64 TH APPLICANT
NORAH ANAM	65 TH APPLICANT
WACEKE KIMANI	66 TH APPLICANT
STEPHEN N. GATHURU	67 TH APPLICANT
SAMSON M. MBINDO	68 TH APPLICANT
ROSE A. IMBAYA	69 TH APPLICANT
STEPHEN N. KANYI	70 TH APPLICANT

HENRY N. MANENGA 71ST APPLICANT
JACOB M. KILEI 72ND APPLICANT
SAMUEL G. MWANGI 73RD APPLICANT
DOMINIC N. ANDERE 74TH APPLICANT
ZIPPORAH CHEMUTAI 75TH APPLICANT
LYDIA W. WACHIRA 76TH APPLICANT

VERSUS

NATIONAL BANK OF KENYA 1ST RESPONDENT

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION 2ND RESPONDENT

F. N. Kimani for Applicant

RULING

1. This Application dated 15th January 2014, was filed on the same date supported by an affidavit of Daniel Mugo Kibaru, on behalf of 76 Applicants.

2. The applicants are ex-employees of Dawa Pharmaceutical Limited, which company was placed under liquidation and its assets and liabilities taken over by the 1st and 2nd Respondents herein.

This took place sometimes in 2008. The Applicants were not paid their dues subsequent to which they filed H.C. Misc. Application No. 1612 of 2005.

On 2nd March 2007, the High Court struck out the case on grounds it had no jurisdiction to entertain the same.

4. The Advocate for the Applicants, sought to file an appeal to the Court of Appeal out of time but the Application for extension of time was dismissed by the Court of Appeal on 13th December 2008 for failure by the Advocate to appear to ventilate the matter.

A subsequent Application was granted by the Court of Appeal on 22nd January 2010 allowing an appeal to be filed out of time.

The Advocate did not file an appeal on time and sought a further extension which was refused on 23rd March 2012.

The Advocate became elusive, and completely unavailable until the Applicants obtained the service of their current Advocate, F. N. Kimani & Associates.

5. That the Applicants seek extension of time to file a suit before the Industrial Court out of time.

They claim they are truly owed terminal benefits by the Respondents herein and therefore it is in the interest of justice that this application be allowed.

6. The Applicants have not annexed a draft statement of claim to this application for the Court to evaluate its viability in exercise of its discretion as prayed.

7. The 1st and 2nd Respondents were not the employers of the Applicants and there is no material placed before Court to help it determine whether this Court has jurisdiction over the intended suit.

Furthermore, the cause of action as alleged in the oral submissions, though not stated in the Supporting Affidavit is alleged to have arisen sometimes in 2006. The circumstances under which the cause of action arose, are neither canvassed in the grounds of the Application nor in the Supporting Affidavit itself. The court can in the circumstances only guess when, where and what happened to the Applicants who are alleged to have been declared redundant by an employer who is not a party to this suit.

8. It is now trite that labour claims founded on contract before the enactment of the *Employment Act, 2007*, fall within the purview of the limitation of Actions Act, Cap 22 of the Laws of Kenya, on matters of limitation.

The provision applicable is *Section 4(1)* thereof which limits the period of bringing suits founded on contract to six (6) years from the date the cause of action arose in mandatory terms.

9. The Court of Appeal of Kenya at Nairobi in the matter of **Divecon Ltd. Vs. Saman** held:

“the word of Section 4(1) were clear beyond any doubt and meant that no one had the right or power to bring an action founded on contract after the end of six years from the date on which the cause of action occurred.”

The Court held further that:

“under Section 28(2) of the Limitation of Actions Act, where an ex parte application for extension of time was made before the commencement of an action, leave would only be granted where a cause of action had been established and the requirements of Sections 27(2) and 29 had been fulfilled.”

10. In this case, reliance is made on the negligence of an Advocate, who misled the parties to proceed before a Court without jurisdiction and who failed, through negligent conduct to prosecute an appeal against an order of the High Court to the effect that it lacked jurisdiction to entertain the matter, even upon condonation by the Court of Appeal. No doubt, the parties have recourse against the Advocate personally.

The Court has no discretion to enlarge the time for filing this suit.

11. Accordingly, the ex parte Application is unmeritorious and the same is dismissed.

Dated and delivered at Nairobi this 4th day of April, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE