



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**MISC. 80 OF 2013**

**MAULIDI MOHAMMED MWANGI ..... APPLICANT**

**VERSUS**

**EVERY SECURITY GUARDS CO. LTD. .... RESPONDENT**

Applicant in person

**RULING**

The suit was filed on 13<sup>th</sup> November 2013 by way of a memorandum of claim dated 13<sup>th</sup> November 2013.

Simultaneously was filed an *ex parte* Notice of Motion pursuant to *order 50 Rule 6 of the Civil procedure Rules 2010* seeking the Court to grant the applicant leave to file a suit at the Industrial Court out of time.

The Claimant's employment was terminated by a letter dated 7<sup>th</sup> July 2010, giving him a month's notice of termination. Termination therefore was to take effect on 6<sup>th</sup> August 2010.

However, by a letter dated 23<sup>rd</sup> July 2010, the Respondent purported to terminate the employment effective 31<sup>st</sup> July 2010.

In the letter, terminal benefits of the Claimant were calculated including 30 days salary for July 2010, eight (8) days prorata leave and twenty two years of service gratuity in the sum of Kshs. 67,084/=.

The Claimant received the payment on 9<sup>th</sup> August 2010 and signed for it, however he disputes the calculation for the severance pay which he claims should have been Kshs. 108,900/= instead of the Kshs. 67,084.00/=.

He therefore claims the balance of Kshs. 41,816.00/=.

The Claimant also seeks payment of Kshs. 15,538.20/= deducted from his terminal dues alleged to be 82 non-productive days. Effectively, this was a reduction of salary earned and worked for.

On 29<sup>th</sup> November 2010, Kituo cha Sheria wrote a letter of demand for the payment of aforesaid balance of gratuity and deducted salary.

A reminder was done on 6<sup>th</sup> October 2010. No response was forthcoming from the Respondent. However, the Applicant did not file the suit until 13<sup>th</sup> November 2009 and blames Kituo cha Sheria for the delay.

*Section 90 of the Employment Act No. 11 of 2007* reads thus:

**“Notwithstanding the provisions of *Section 4(1) of the Limitation of Actions Act*, 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 cessation thereof.”**

The effect of this provision is to reduce the limitation period applicable to claims based on contract, under the Limitations of Actions Act, Cap 22 of the Laws of Kenya, in case of employment contracts from six (6) years to three (3) years.

Cap 22 is a statute of general application. The provisions of *Section 90 of the Employment Act* is to be construed liberally in favour of upholding of the right to access justice depending on the circumstances of the case.

This action which is based on an employment contract and a statutory right, was commenced about five (5) months after expiry of the three years limitation period.

Where there is a justifiable reason for the delay, and if the delay is not inordinate, the Court will exercise its discretion to extend the limitation period because *Section 90 of the Employment Act*, does not bar extension of time to file a suit based on an employment contract.

Furthermore, the injury or damage complained of is continuous in nature within the meaning of *Section 90* aforesaid.

For the two reasons herein before advanced the Application is allowed with the result that the memorandum of claim dated 13<sup>th</sup> November 2013 is deemed duly filed.

The matter will take its normal cause from the date of this ruling.

Costs will be in the cause.

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

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**