



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

MISCELLANEOUS CAUSE NO. 4 OF 2014

DAVID ONDARI

MOGAKA.....CLAIMANT

- VERSUS -

AFRICAN BANKING CORPORATION

LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd May, 2014)

RULING

The claimant **David Ondari Mogaka** filed a notice of motion on 4.03.2014 through Odhiambo & Odhiambo Advocates. The application was brought under Rule 27(1) (g) of the Industrial Court Rules 2010, Order 50 rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, sections 1A, 3A, 3B, 95 of the Civil Procedure Act and, all other enabling provisions of law. The claimant prayed for orders:

- 1. That the honourable court be pleased to enlarge the time within which to file the intended memorandum of claim.**
- 2. That the draft memorandum of claim annexed on the application be deemed as having been duly filed and served.**
- 3. That costs be in the cause.**

The application was based on the supporting affidavit of David Ondari Mogaka filed together with the application and his further affidavit filed on 25.03.2014.

It was the claimant's case that the 3 years within which to file the relevant memorandum of claim as prescribed under section 90 of the Employment Act, 2007 had lapsed. The claimant stated that he worked for the respondent from 7.07.2008 until 29.01.2011 when his services were abruptly cut short without any explanation and without a fair hearing. Under the cited section, the time for filing the relevant suit lapsed about 29.01.2011 so that as at filing of the application on 4.03.2014, the filing of the suit would be about 2 months late. The reason for the delay in filing the suit was that the claimant had not received the termination letter dated 28.01.2011 and he had just received the relevant letter from the respondent to enable him now institute the suit. Thus, the claimant urged that the delay was not inordinate or inexcusable.

The respondent opposed the application by filing on 12.03.2014, the replying affidavit of Agatha Kiattu through Mukite Musangi Advocates. The respondent's case was that the documents the claimant says he was to obtain from the respondent had not been exhibited except for the letter of termination dated 28.01.2011. Further, the respondent stated that the claimant had not shown any effort that he had asked

the respondent to provide the alleged documents. It was urged for the respondent that the claimant had been charged in court for the offence of stealing by servant in Criminal Case 702 of 2011 at Nakuru and the case had not been determined. The respondent urged that the claimant's unemployment did not correlate his alleged claim of unfair dismissal. Thus, it was the respondent's case that the claimant's application lacked merits and should be dismissed with costs.

The parties filed their respective submissions. The court makes findings on the issues in dispute as follows:

1. The 1st issue in dispute is whether the claimant has established a good reason for the delay in filing the suit. The main ground advanced is that the claimant delayed to obtain necessary documents from the respondent. As submitted for the respondent, the only exhibited document said to have been belatedly obtained by the claimant from the respondent is the termination letter dated 28.01.2011. The respondent has submitted that the claimant has endorsed his signature on that letter and dated the endorsement "29.01.2011". It is the respondent's case that 29.01.2011 is therefore, the date the claimant received the letter. The court finds that the claimant has not stated the date he received the letter and in absence of any other material, the court finds that the reason as advanced by the claimant lacks merit. The finding is supported with lack of evidence by the claimant to show that there were efforts to obtain documents but the respondent failed to comply or cooperate. Accordingly, the court finds that the claimant has not established a good reason for the delay in filing the suit.
2. The second issue is whether the court is vested with the power to enlarge time as limited under section 90 of the Employment Act, 2007. The claimant has not established any constitutional or statutory power for the court to extend the time. The respondent has submitted that the jurisdiction to extend time by way of leave to file outside the 3 years as limited by the statute has not been established. The court considers that under section 31 of the Limitation of Actions Act Cap. 22, the court is empowered to extent time of 3 years prescribed in section 90 of the Employment Act, 2007. Under the said section 31, the principles of enlargement of time in the Limitation of Actions Act apply to limitation of time as may be prescribed in other written laws. However, in the present case, the court finds that the applicant has not established any ground for the enlargement of time as envisaged under the relevant permissive provisions of the Limitations of Actions Act.

In conclusion, the claimant's application filed on 4.03.2014 is dismissed with costs.

Signed, dated and delivered in court at **Nakuru** this **Friday 23rd May, 2014**.

BYRAM ONGAYA

JUDGE