



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**MISCELLANEOUS APPLICATION NO. 12 OF 2014**

**KEPHA NYAGECHANGA ONSONGO**

**CLAIMANT**

**v**

**MOI TEACHING & REFERRAL HOSPITAL**

**RESPONDENT**

**RULING**

1. Kepha Nyagechanga Onsongo (Applicant) filed an Originating Summons in Court on 18 July 2014 seeking the enlargement of time to file suit and leave to file suit out of time. The Summons was anchored on sections 3, 3A and 95 of the Civil Procedure Act, section 27 of the Limitation of Actions Act, order 37 rule 6 and order 50 rule 6 of the Civil Procedure Rules, the grounds on the face of the Summons and a supporting affidavit sworn by the Applicant on 17 July 2014.
2. On 18 July 2014, Ongaya J directed that the application be served for *inter partes* hearing and directions on 25 July 2014. On 25 July 2014, the Respondent sought and was granted time to file a replying affidavit and hearing was fixed for 2 October 2014. The Respondent filed Grounds of Opposition on 28 July 2014.
3. Mr. Bichana urged the application on behalf of the Applicant. He reiterated the grounds on the face of the Summons and what had been deposed to in the supporting affidavit.
4. Mr. Bichana submitted, relying on the supporting affidavit, that the cause of action related to unfair termination which had been occasioned by the Applicant's state of health which led to the delay to commence legal action within the prescribed time.
5. Mr. Bichana further submitted that no prejudice would be occasioned to the Respondent were the orders sought to be granted and that it was in the interest of justice to extend time.
6. Opposing the application, Mr. Masese for the Respondent submitted that it was not in dispute that the Applicant was dismissed on 21 June 2010. In this regard, he urged that a suit relating to the termination should have been filed within 3 years in accordance with section 90 of the Employment Act, 2007, which he urged is couched in mandatory terms.
7. He further submitted that the Limitation of Actions Act, cap. 22 and the sections cited by the Applicant were not applicable and that the Court had no power to enlarge time for commencement of legal action. For this submission, he sought umbrage in *Divecon v Samani* (1995-1998) 1 EA 48.
8. In the view of Mr. Masese, a right had accrued to the Respondent which should not be tampered with by allowing the Applicant to commence legal action out of time and in a parting shot, he submitted that the application was frivolous and vexatious because no draft Statement of Claim was annexed to the Summons.

## Evaluation

9. It is apparent that the proposed Claim relates to an employment relationship, a contract of service. However, the Applicant did not produce any contract to establish the relationship between him and the Respondent. But the Court would assume that he was an employee of the Respondent.
10. The supporting affidavit of the Applicant, in its brevity does not state or depose as to exactly when his relationship with the Respondent ended. No termination letter or date is given. The only date given is 30 December 2007, when the Applicant was assaulted on his way to work.
11. The Respondent's advocate on record Mr. Masese stated from the bar that the Claimant was terminated on 21 June 2010, without opposition from the Applicant. Again, the Court reluctantly assumes that is the date on which the termination took place.
12. With the assumption, and relying on section 90 of the Employment Act, 2007, the Applicant had 3 years within which to institute legal proceedings in respect of his complaint of unfair termination. And the three years would have expired on 19 June 2013. No suit had been instituted by that date.
13. And in this respect, the Applicant citing the statutory provisions already mentioned asks the Court to allow him to commence legal proceedings outside the prescribed time set out in section 90 of the Employment Act.
14. Order 37 rule 6 and Order 50 rule 6 of the Civil Procedure Rules are merely procedural and do not go into the substance or merits of an application to enlarge or extend time.
15. Sections 3, 3A and 95 of the Civil Procedure Act cannot be of much assistance to the Applicant herein. The sections save the special jurisdiction and inherent powers of the Court respectively, while section 95 of the Civil Procedure Act is a general provision.
16. I say so on the basis of the fact that there are specific statutes (statutory provisions) dealing with the issue of limitation and extension of time and these are the Limitation of Actions Act and section 90 of the Employment Act, 2007. The attention of the Court must therefore turn to these statutes to ascertain whether the Court has the power to do what the Applicant is asking of it.
17. The primary statutory provision relating to limitation in causes of action arising out of the employment relationship is section 90 of the Employment Act. The prescribed period is 3 years. But the Employment Act, 2007 is silent on what should happen when a legal proceeding is not commenced within the 3 years provided for. In this regard, parties and the Court must look elsewhere within the statutory framework for limitation. The Limitation of Actions Act is a good source to begin the inquiry.
18. Section 4(1)(a) of the Limitation of Actions Act provides for limitation of 6 years in cases of contract. But this provision is superseded by section 90 of the Employment Act in cases of employment contracts, which is a newer and specific piece of legislation. Section 4(1)(a) of the Limitation of Actions Act must yield and give way to section 90 of the Employment Act, 2007.
19. Next in the discourse then must be question whether a window has been created in the Limitation of Actions Act to enlarge or extend time in causes of action arising out of contract generally, and employment relationships specifically.
20. Section 28 of the Limitation of Actions Act has provided for applications for leave to institute suit out of time but subject to and for purposes of section 27 of the said Act. Now, section 27 of the Act is intractably linked to section 4(2) of the Limitation of Actions Act and cannot be interpreted or applied in isolation from it. And section 4(2) of the Act applies to rights of action founded on tort.
21. My reading of Sections 27 and 28 of the Limitation of Act as read with section 4(2) of the same Act leads to the inescapable conclusion that only causes of action found on tort, and not contract as herein, are contemplated.
22. From the foregoing, my conclusion is that the Industrial Court has no power and or jurisdiction to extend, enlarge time or grant leave to institute legal proceedings founded on a cause of action arising from an employment contract after the expiry of 3 years unless an applicant can satisfy the requirements set out in section 39 of the Limitation of Actions Act to show estoppel not to plead limitation.
23. In this respect, the Court endorses the decision in *Divecon v Samani* as setting out the correct legal position even in regard to section 90 of the Employment Act, 2007. This Court also observes that it reached the same conclusion in the case of *Maria Machochi v Total Kenya Ltd* (2013) eKLR.
24. Limitation is not merely an issue of procedural technicality. It is a substantive issue going to

jurisdiction.

25. But that cannot be the end of the inquiry. In paragraph 5 of the supporting affidavit, the Applicant deposed

*That the delay in bringing this intended suit was also occasioned by unfruitful promises by the Respondent.*

26. This particular deposition was not taken any further by the Applicant's counsel. The Court was not informed whether the promises related to limitation and were in writing or oral. The Applicant also did not disclose who in particular made the promise.

25. If the Applicant had placed sufficient material before Court to support this plea, then he could have had a window of opportunity under section 39 of the Limitation of Actions Act on the ground of promissory estoppel. The section provides that

**(1) A period of limitation does not run if –**

**(a) there is a contract not to plead limitation; or**

**(b) that the person attempting to plead limitation is stopped from doing so.**

**(2) For the purposes of subsection (1), 'estopped' includes stopped by equitable or promissory estoppels.**

27. This Court has had occasion to discuss the aforesaid section and its implications in *Joseph Tinga Janga v Kenya Marine & Fisheries Research Institute*, Mombasa Cause No. 4 of 2014 ( *Joseph Janga Tinga v Kenya Marine & Fisheries Research Institute* (2014) eKLR).

28. In the said case, the Court made reference to the legal principle discussed in the Court of Appeal decision in *Doge v Kenya Cannery Ltd* [1988] KLR that

It is a principle of justice and equity that when a man by his words or conduct has led another to believe that he may safely act on the faith of them and the other does not act on them, he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so.

29. But for the Applicant, he did not demonstrate that any promises relating to limitation were made to him to escape the peremptory and harsh effects of sections 4(1)(a) of the Limitation of Actions Act and 90 of the Employment Act, 2007.

## **Conclusion and Orders**

30. The upshot of the foregoing discussion is that the Court declines the invitation by the Applicant to enlarge or extend time or grant leave to commence legal proceedings out of time on the basis of lack of jurisdiction.

31. The Originating Summons dated 17 July 2014 is therefore dismissed with no order as to costs.

**Delivered, dated and signed in open Court in Nakuru on this 10<sup>th</sup> day of October 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Applicant Mr. Bichana instructed by Chepkwony & Co. Advocates

For Respondent Mr. Masese, Legal Officer, Federation of Kenya Employers