



REPUBLIC OF KENYA

Industrial Court of Kenya

Miscellaneous Civil Cause 2 of 2012

MARIA MACHOCHO.....APPLICANT

Versus

TOTAL KENYA LIMITED.....RESPONDENT

RULING

1. The applicant filed an ex parte Originating Motion on 14 December 2012 under sections 12(3)(viii) and 20 of the Industrial Court Act, 2011, sections 27 and 28 of the Limitation of Actions Act and Order 37 rule 6 of the Civil Procedure Rules seeking leave to file a Claim against the Respondent out of time.
2. I directed the applicant to serve the application for hearing *inter partes* because I doubted whether this Court had the jurisdiction to grant the orders sought and again because section 90 of the Employment Act, 2007 which is a recent statute on which jurisprudence is just starting to be build has now set the limitation period to three years in respect of employment contracts and the said section does not appear to envisage extension of time to file claims out of time.
3. The parties argued the application before me on 25 February 2013. The cause of action arose on 1 December 2006 and it is based on a decision by the Respondent to dismiss the applicant. In essence it is a dispute based on breach of contract.
4. I have duly considered the submissions and authorities relied on by both parties.
5. Because the applicant was dismissed in 2006, the applicable statute at the material time was the Employment Act, Cap 226 which has since been repealed by the Employment Act, 2007, and the Limitation of Actions Act. The statutory limitation period for causes of action based on contract under the Limitation of Actions Act is 6 years but this has since been reduced to 3 years by section 90 of the Employment Act in respect of contracts of service or causes of action arising out of the Employment Act, 2007.
6. The explanation given by the applicant for the delay are that the applicant has been in dire financial straits, that she was of the belief that the Respondent would pay her any accumulated earnings outstanding and that she was intimidated from seeking appropriate remedies.
7. I have duly considered the submissions by the parties and the authorities cited. *Stephen Ndungu Kariuki v G4S Security Services Ltd, Nairobi Industrial Cause No. 1296 of 2010* was decided on the basis that the Claim had been filed without leave of Court and not on whether the Court had the jurisdiction or discretion to grant leave or extend time and therefore is distinguishable from the case under consideration.
8. I also decline to be persuaded by or follow the persuasive authorities cited by the applicant,

Eastern Produce (K) Ltd v Earnest Omoso Osore, Eldoret High Court Civil Appeal No. 50 of 2000 and James Muchunku Mbaabu v PS Ministry of Education & Another, Meru High Court Misc Case No. 17 of 2011 because of reasons which follow hereinafter in my discussion.

9. In my view sections 27 and 28 of the Limitation of Actions Act are not applicable in the case under discussion because the cause of action is not based on *negligence, nuisance or breach of duty*. I take comfort in holding thus by the very brief ruling by Justice Visram in *Timothy M Mukalo v Reuben Alubale Shiramba & 3 others* [2005] eKLR to the effect that sections 27 and 28 of the Limitation of Actions Act are only applicable on actions based on *negligence*. I would add to actions based on *negligence*, actions based on *nuisance and breach of duty*.

10. Before the coming into operation of section 90 of the Employment Act, the statutory limitation period for causes of action based on breach of employment contract or contract of service was that provided for contracts in general, in section 4(1) of the Limitation of Actions Act, and it was 6 years. Section 90 of the Employment Act has now amended the Limitation of Actions Act to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the Employment Act.

11. I now have to determine whether this Court has the jurisdiction to grant leave or extend time in respect to causes of action based on breach of contract generally and breach of contract of service or actions arising out of the Employment Act specifically.

12. The precedent in this regard was set out by the Court of Appeal in *Divecon Ltd v Samani* [1995-1998] 1 EA 48 at 54 that section 4(1) of the Limitation of Actions Act was clear beyond any doubt and that the section meant that

no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that 'the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked'.

13. When I brought this to the attention of the applicants Advocate he submitted that section 31 of the Limitation of Actions Act should be interpreted such that the provisions of Part III of the Limitation of Actions Act should be construed as if it had been incorporated into the Employment Act and thus by implication the Court had the *jurisdiction and discretion* to grant the application to extend time.

14. In my view, this would only apply in relation to causes of action grounded on the three areas of *negligence, nuisance and or breach of duty*.

15. The applicant also made reference to section 12(3)(viii) of the Industrial Court Act which empowers the Court to grant any other appropriate relief as the Court deem fit to grant. This is akin to the inherent powers of the Court. It is true the Court has wide discretionary powers but my problem in exercising such discretion in favour of the applicant in this type of scenario is that section 4(1) of the Limitation of Actions Act has given to a Respondent/Defendant a substantive right of limitation of which it would not be fair to divest him/her.

16. The position and approach taken by Justice Visram reflects the correct legal interpretation, and though the Judge did not refer to the Court of Appeal decision I have cited, his decision is to the same legal effect as the Court of Appeal decision which binds me save to the extent that now the statutory limitation period in causes of action based on breach of contract of service or actions arising out of the Employment Act is three years.

17. In my humble opinion this Court neither has the statutory jurisdiction nor discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out of the Employment Act, 2007.

18. In the circumstances I do decline to accept the invitation by the applicant to grant her leave to file suit out of time and dismiss the application with no order as to costs.

Dated, delivered and signed in open court in Mombasa on this 15th day of March 2013.

Justice Radido Stephen
Judge

Appearances

Mr. Mwakireti instructed by

Mwakireti Ndumia & Co. Advocates For Applicant

Ms. Okata instructed by

V.N. Okata & Co. Advocates For Respondent