



REPUBLIC OF KENYA

Industrial Court of Kenya

Civil Miscellaneous Application 6 of 2012

HUMPHREY NYAGOE MAKORICLAIMANT/APPLICANT

VERSUS

KENYA PORTS AUTHORITYRESPONDENT

RULING

1. This ruling relate to the Notice of Motion dated 3rd May 2012 by the Claimant/Application Mr. Humphrey Nyagoe Makori. It is brought under the provisions of Section 90 of the Employment Act, Section 26 of the Limitation of Actions Act, Section 20(1) of the Industrial Court Act, Section 3 and 95 of the Civil procedure Act and all other enabling statutes. The Respondent filed their Replying Affidavit dated 15th March 2013 and sworn by George Njoroge Karanja, the Payroll Administrator of the Respondent.

2. This application is based on the grounds that the Applicant's claim has already exceeded the provisions of the Limitations of Actions Act and now seeks to file it out of time prescribed by the rules of this court. That the delay was occasioned by the fact that the applicant has been restrained by his doctor from any rigorous and outdoor activities that may worsen his health due to his hypersensitivity and diabetic condition and that by the time he was allowed to undertake such outdoor activities the prescribed time of filing the claim had already lapsed. That the applicant's claim relates to his termination and non-payment of terminal dues and that the Respondent took advantage of his medical status to defraud him of his terminal dues.

3. That under Section 26 of the Limitation of Actions Act it allows this Court to extend time and allow the applicant to file his case and the delays herein were caused by circumstances beyond his control. Thus the application to extend time to file the claim out of time should be allowed not to shut him out from accessing his fundamental rights as an employee.

4. He further states that under Section 90 of the Employment Act had not come into force at the time of the applicant's termination in 2004 and that this therefore does not bar his claim after being enacted in 2007. That Section 20(1) of the industrial Court Act implores this Court to act without undue regard to technicalities in similar terms as Article 159(2) (d) of the Constitution of Kenya. That the claim is good, it will not occasion any prejudice to the respondent and will meet the ends of justice and should be allowed.

5. In his affidavit in support of his prayers, the Applicant states that his delay to come to court was occasioned by the fact that he was restrained from any rigorous and outdoor activities that may worsen his health due to his hypersensitivity and diabetic condition and by the time his doctors allowed him to undertake such activities, the prescribed time of filing his claim had lapsed. He attached a medical note from his doctor.

6. In reply that Respondent stated that the Applicant has failed to give satisfactory reasons as to why this court should exercise its discretion in his favour by extending time to enable him file his claim out of time. That under Section 90 of the Employment Act that came into force in 2007 the applicant cannot benefit as he was terminated in 2004 and technically these provisions are not applicable in this case and under the Limitation of Actions Act he had 6 years to file his claim which he did not and now it is 8 years after the event, a time too long. That in any event his claim is based on non-payment of his terminal dues which is not correct as annexure "GNK1" to the affidavit indicate that all dues were all paid.

7. The respondent further states that the medical note from the applicant's doctor does not lay the basis for his sickness nor give the history of his treatment and appears to be an afterthought. That whatever the medical condition that the applicant may have suffered from he was not prevented from instructing an advocate from his home to lodge his claim and therefore no prima facie case exists and the application is therefore frivolous, vexatious and an abuse of court process.

What is the applicable law in this case?

Has the Applicant complied with the applicable law?

When should the Court extend time to a party to file a claim?

8. It is admitted by both parties that the Applicant herein was employed by the Respondent and that his employment relationship terminated on the 19th February 2004. Based on this termination the applicant now seeks to extend time to file his claim for non-payment of his terminal dues arising due to this termination way back in 2004. He also seeks to rely on the Employment Act, 2007 and that the section relevant to time within which claims should be lodged with the Industrial Court being Section 90 does not apply in his case as his termination related to a period before the enactment of this section.

9. It is important to note here that all parties with labour related disputes have had a forum to address their cases in a structured manner well outlined in the Kenyan law since independence. This can be surmised from various laws that have been in existence. The Industrial Court was first established in 1965 under the Trade Disputes Act, 234 which Act has now been repealed by Section 84(1) of the Labour Relations Act 2007. Originally the Industrial Court was classified as a Tribunal to handle industrial relations issues regarding unionized employees. Then in 2007 various legal changes were effected and the Labour Relations Act received assent on 22nd October 2007 and became operational on 26th October 2007. Equally the Industrial Court in its current form was established as a superior court under Article 162(2) of the Constitution. In equal measure the Labour Institutions Act and the Employment Act received assent on 22nd October 2007 and came into force on 2nd June 2008.

10. Thus when this case arose, all the new laws operative herein had not been enacted and they had not come into effect and the termination of the Claimant was way before on 19th February 2004. Therefore the applicants claim was governed by the laws before amendment as stated above. The laws upon which the Claimant now seeks to rely on particularly the Employment Act, 2007 was not operational and only took effect from 2nd August 2008 and a Gazette Notice was issued to this effect. Laws do not operate retrospectively and the law in effect at the time was the Trade Disputes Act, Cap 234 which only governed disputes between unionized employees and all other matters were filed before ordinary court that is the High Court or Resident Magistrate's Courts.

11. Section 90 of the Employment Act deal with limitation of actions at the Industrial Court being three years since the cause of action arose. Thus by operation of section 90, this matter is herein filed out of time and the claim herein does not comply with Schedule Six of the Labour Relations Act, 2007 that

stipulate how cases that were ongoing before the operationalisation of the Court were to be treated.

12. Under the Employment Act [as repealed] and under the Trade Disputes Act [repealed] and the Limitations of Actions Act, the applicant's claim being based on a contract of employment and or a labour relations claim had a period of six [6] years to lodge his claim in the High Court or in the subordinate courts. His termination arose on 19th February 2004 and therefore had until 19th February 2010 to lodge his claim. This application was filed in this Court on 3rd May 2010, approximately 2 years and 3 months after the due date.

13. Why then did the applicant not come to court in good time despite having 6 years within which time to do so? I note from his averments that his doctors advised him not to engage in any activities that were rigorous or outdoors due to his hypersensitivity and diabetic condition. I note the medical note attached to his affidavit as stating the following:

Marie Stopes Pangani Clinic

Tel: 0721 537 168

Nairobi, Kenya.

Email: Pangani@mariestopes.or.ke

12th April 2012

Our ref: 538/12

Humphrey Nyagoe Makori,

P.O. Box 12557-00400,

Tel: 0733 719 748

Nairobi.

Dear Sir/Madam,

TO WHOM IT MAY CONCERN

The above named person has been our patient since 2007. He has been advised to avoid rigorous and outdoor activities from then so as not to worsen his condition. He is known to be hypersensitive and diabetic. Currently, he is not on medication but on diet control and regular clinical checkups. He is now medically fit to undertake outdoor activities.

Any assistance accorded to him will be highly appreciated.

Dr. Kyalo

Marie Stopes Pangani.

14. I need to note that this is not a medical report. This is a general notification of the Applicant's condition. Formal medical records from a registered medical practitioner or registered establishment ought to be formally written preferably on a letter-head of the medical practitioner or establishment. To produce such a note as the applicant has, indicate he is either not keen to convince this Court about his reasons as to why he was not able to come to Court in good time or he never had such a medical condition as stated preventing him from coming to court. He ought to have done more in this regard to convince this Court that indeed he had a medical condition preventing him from rigorous and outdoor activities.

15. Even in taking the supposed medical note seriously, the same states '*... the above named person has been out patient since 2007. He has been advised to avoid rigorous and outdoor activities...*' therefore, from the applicant's own records, his supposed doctor only started attending to him since 2007. This is crucial if this medical note is to be taken in good faith. He therefore had several years from 2004 to 2007 to come to Court and lodge his claim. He does not give account as to why he did not take advantage of this time at all. The adage that the law aids the vigilant and not the indolent comes out here as very true.

16. Section 4(1) (a) of the Limitation of Actions Act is very instructive, claim as the applicants has 6 years to be lodged in court. By citing Section 26 of the same law, the applicant does not outline what mistake or fraud was committed. In any case if there was fraud or mistake, I note the detailed attachments to the respondent's affidavit and the annexed Memorandum of Claim of the Claimant that bases his claim

on acts of discrimination against him. Without going into the merits of the claim, what was before court for determination was the extension of time to file this claim?

17. Section 3 of the Civil Procedure Act only serves the special jurisdiction and powers of the Court with respect to procedural matters under other laws. Where there is a specific procedure prescribed by statutes or the rules, a party should not invoke the courts' inherent jurisdiction although there is not rule of law that the court itself is precluded from exercising its inherent jurisdiction by the mere fact that there exists another remedy. This is well outlined in an old authority on the subject in **Taparu versus Roitei (1968) EA 618**. Also see this same argument well outlined in the case of **Adonia versus Tukekanga (1970) EA 432**.

18. Section 95 of the Civil Procedure Act on enlargement of time relate to cases where court may enlarge time for doing of any act prescribed or accorded in law, the court may in its discretion enlarge such discretion. In my reading of this section, my opinion is that this enlargement of time relate to a claim already admitted and not the enlargement of time as to seek to admit a claim not already allowed in law. If the applicant case had already been admitted and for one reason or the other omitted to do or take steps to do that which in law he ought to have done, then the court may enlarge his time to do so but not in a case like the one before court.

19. Indeed where the law prescribes a specific procedure for parties to follow, that goes without saying, apply that procedure unless there is a lacuna. The reference to Article 159 of the Constitution and Section 20 of the Industrial Court Act should not be used in place and instead of the applicable procedure. This is not the intention of the constitution or the Industrial Court Act. If the drafters of the two intended to replace other laws and rules where procedure is prescribed, they could have stated so. This does not stand out as such and this Court cannot agree more. The law is intended to keep administration of justice and by prescribing the procedure on how a party is to access justice, these procedure are part of such administration of justice. Without reasonable grounds, this court will not read the law otherwise.

20. The rules of procedure are intended to ensure a proficient and effective system and process by which matters and pleadings would be brought to court. These are mandatory and cannot be wished away in the civil process as this would cause confusion and confrontation and entirely disrupt the administration of justice. Justice in itself is not only to an alleged wronged party but equally to an alleged aggressor. That is why courts exists to ensure due compliance to set rules and regulations otherwise, there would have been no need to the Civil Procedure Act and there rules thereto as well as the Industrial Court Act and the Rules thereto.

21. Article 159 (2) (d) of the Constitution cannot be relied upon in the face of the specific provision of Section 4(1)(a) of the Limitations of Actions Act and Section 90 of the Employment Act expressed in mandatory terms. For the Court to go against these provisions there must be overwhelming reasons. This does not stand out as one such case.

I find the application lacks merit and will dismiss it with costs to the Respondent.

Read in open Court this 10th day of April 2013.

M.W. Mbaru
Judge

Before:

Court Clerk

Claimant

Respondent

