



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Miscellaneous Application 13 of 2013**

**ANDREW MWANJALA MWANDAWIRO.....CLAIMANT/APPLICANT**

**VERSUS**

**SDV TRANSAMI (K) LTD.....RESPONDENT**

**RULING**

1. The Claimant has filed a Miscellaneous Application dated 16<sup>th</sup> April 2013. In it, the Claimant seeks leave of the Court to institute a suit out of time on account of the dispute between him and the proposed Respondent. It is premised on Order 37 Rule 6 of the Civil Procedure Rules, Section 27 and 28 of the Limitation of Actions Act and Section 3A of the Civil Procedure Act. It is supported by the Affidavit of the Claimant/Applicant.

2. Miss Ibrahim urged the Court to grant the prayers in the ex parte Originating Summons. She submits that the Claimant's contract of employment terminated on 27<sup>th</sup> June 2007. She submitted that the Contract of service had an arbitration clause and that in the course of pursuing his rights, the Claimant sought to have the matter resolved by arbitration. As this was ongoing, the time the Claimant has reckoned elapsed and the Claimant now seeks leave to file the suit.

3. She admits readily that the Claimant had filed a suit without leave and he withdrew the suit hence the current application for leave.

4. The Employment Act 2007 came into operation on 2<sup>nd</sup> June 2008. The Act replaced cap 226 which had hitherto been in force. Cap 226 made no provisions on limitation. Recourse was to the Limitation of Actions Act cap 22 of the Laws of Kenya. Section 4 of the Act provides as follows:- 4. (1) *The following actions may not be brought after the end of six years from the date on which the cause of action accrued -*

*(a) actions founded on contract;*

*(b) actions to enforce a recognizance;*

*(c) actions to enforce an award;*

*(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;*

*(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.*

5. The Claimant's services were allegedly terminated on 27<sup>th</sup> June 2007 this is before the coming into force of the Employment Act 2007. In the reckoning of time, even if we were to go by the reckoning under statute and not the extended period during the settling on an arbitrator, the Claimant should have initiated the cause before expiry of 6 years. That means, he should have filed a claim before 27<sup>th</sup> June 2013. The time is yet to expire. He is entitled to file a Claim without leave as limitations has not set in in terms of Section 4 of the Limitation of Actions Act.

6. I hold that the Claimant is at liberty to file a Claim before the end of day on 27<sup>th</sup> June 2013. He will need the leave of this Court to file after that date.

7. The Application for leave is not granted for the reasons above.

It is so ordered.

Dated and delivered at Nairobi this 27<sup>th</sup> day of **May** 2013

**Hon. Mr. Justice Nzioki wa Makau**  
**Judge**