



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 18 OF 2013

STELLAMARIS MBATHA MASHACLAIMANT

VERSUS

KENYA KAZI SERVICES LIMITED.....RESPONDENT

RULING

By an Originating summons dated 15th May 2013 and filed in court on the same date the applicant seeks the following orders;

1. That the Applicant prays for leave to file suit out of time against the Respondent herein.
2. That the Respondent ought to be held liable for illegally and unfairly summarily dismissing the applicant on 1st July 2009 and failing to adhere to their statutory duty by not paying her terminal benefits that had accrued as of right by virtue of her employment with the Respondent.
3. That the applicant was aware of her right to sue and filed a memorandum of claim in case number 542 of 2010 on 14th May 2010 seeking her right of compensation from K.K. SECURITY LIMITED.
4. That the claim was dismissed by this Honourable Court vide ruling dated 6th of February 2013 for joinder of the wrong party as a Respondent.
5. That the Applicant now wishes to claim her right of compensation from the respondent herein Kenya Kazi Services Limited.
6. That no prejudice will be occasioned to the respondent with the application.

The application is made under Section 27 and 28 of the Limitation of Actions Act and is supported by the Affidavit of STELLAMARIS MBATHA MASHA the applicant herein sworn on 15th May 2013.

In the Supporting Affidavit the applicant depones that she was unfairly dismissed by the Respondent on 1st July 2009, that she was not paid terminal dues and severance benefits that accrued by virtue of her employment, that she was aware of her claim and instructed her advocates on record to take charge of the matter, that the advocates filed the suit on 14th May 2010 before it was time barred under cause No. 542 of 2010, that the Respondent therein was K.K. Security Limited and not Kenya Kazi Services Limited, that the case was dismissed on 6th February 2013 for joinder of the wrong party, that there is no suit pending between the parties herein before this court or any other court. She further depones that she has not been indolent in her pursuit of legal redress and prays that her application be allowed.

The Application was heard on 12th June 2013 when Mrs. Gakoi appeared for the Applicant. The application was exparte. Mrs. Gakoi relied on the supporting affidavit. She submitted that the Applicant's case in which she had sued KK SECURITY LTD instead of KENYA KAZI SECURITY

LTD was dismissed on 5th February 2013 by which time the claim had lapsed by virtue of limitation period, that the claimant works in Mombasa and could not get time to come and discuss the filing of her claim and that the claim was within the ambit of the Limitation of Actions Act.

I have considered the application which is made under section 27 and 28 of the Limitation of Actions Act. The Sections read as follows.

27. Extension of limitation period in case of ignorance of material facts in actions for negligence

(1) Section 4 (2) does not afford a defence to an action founded on tort where –

- a. *the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and*
 - b. *the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and*
 - c. *the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and*
 - d. *the requirements of subsection (2) are fulfilled in relation to the cause of action.*
2. *The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –*
- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and*
 - (b) in either case, was a date not earlier than one year before the date on which the action was brought.*

(3) This section does not exclude or otherwise affect

- (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4 (2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or**
- (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.**

28. Application for leave of court under section 27

(1) An application for the leave of the court for the purposes of section 27 shall be made ex parte, except in so far as rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.

(2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient –

(a) to establish that cause of action, apart from any defence under section 4 (2); and

(b) to fulfil the requirements of section 27 (2) in relation to that cause of action.

(3) Where such an application is made after the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be

sufficient -

(a) to establish that cause of action, apart from any defence under section 4 (2); and

(b) to fulfil the requirements of section 27 (2) in relation to that cause of action,

and it also appears to the court that, until after the commencement of that action, it was outside the knowledge (actual or constructive) of the plaintiff that the matters constituting that cause of action had occurred on such a date as (apart from section 27) to afford a defence under section 4 (2).

(4) In this section, "relevant action" in relation to an application for the leave of the court, means any action in connexion with which the leave sought by the application is required.

(5) In this section and in section 27 "court", in relation to an action, means the court in which the action has been or is intended to be brought.

Section 27 provides for extension of limitation period in case of ignorance of material facts in actions for negligence, nuisance or breach of duty. Counsel for the applicant did not demonstrate how the section is applicable to the applicants case which is a contractual matter.

Section 28 of the Act provides for the procedure of making the application and is subject to the applicant fulfilling the requirements of Section 27(2). Under section 27 the applicant must prove that material facts relating to the cause of action were or included facts of a decisive character which were at all times outside the actual or constructive knowledge of the applicant until a date after the prescribed limitation period or one year before the end of the limitation period and not outside one year before action was brought.

In the present case, the claim is not one founded on tort and secondly the applicant has not demonstrated that the material facts of the claim were not within her knowledge.

Even if the court were to overlook section 27 and determine the matter on equity on the basis that the claimant actually filed a claim on 14th May 2010 as Industrial Court Cause No. 542 of 2010 which was dismissed on the basis of misjoinder of parties, no copy of a Memorandum of Claim and Defence have been availed to the court to confirm that such a claim in fact existed.

The applicant has also not filed a copy of Judgment, ruling or order of the court to prove that in fact an order was made by the court dismissing the claim on the grounds of misjoinder of parties. It is also not explained why the applicant did not apply for substitution of the respondent in the suit filed earlier with the correct respondent if indeed that suit existed.

Again no explanation has been proffered to the court on how the claimant could have made a mistake about the identity of her former employer.

Whichever way, I look at the application I do not find any avenue through which I can grant the orders sought. Perhaps the best I can do is to advise the applicant to apply for review of the decision dismissing the earlier case so that the dismissal is set aside and the applicant is allowed to substitute the respondent.

For the foregoing reasons the application herein is dismissed.

Read in open Court this 29th day of July 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

MUNENE H/B FOR GAKAI MAINA for Claimant

NO APPEARANCE

for Respondent
