



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**MISC. APPLICATION NO. 10 OF 2012**

**ROSEBELLAH JEPKOECH RONOH ..... APPLICANT**

**VERSUS**

**TELKOM KENYA LIMITED ..... RESPONDENT**

**RULING**

This is an application dated 17<sup>th</sup> April 2012 brought by Notice of Motion under the Provisions of Section 26 of the Limitation of Actions Act, section 20(1) of the Industrial Court Act seeking leave to file the claim out of time. The claimant filed a Further Affidavit dated 26<sup>th</sup> November 2012. The respondent filed their Grounds of Opposition dated 17<sup>th</sup> July 2012 and Replying Affidavit dated 13<sup>th</sup> August 2012 on the basis that this court has no jurisdiction to extend time in matters of employment.

Both parties filed their written submissions dated 29<sup>th</sup> May 2013 and 5<sup>th</sup> June 2013 for the claimant and respondent respectively.

The application is supported by the Affidavit of the claimant Rosebellah Jepkoech Ronoh and on the grounds that the claim has already exceeded the provisions of the Limitation of Actions Act but this court has inherent jurisdiction to ensure justice is done noting that the claimant was terminated on 8<sup>th</sup> October 2002 on allegations of theft by servant and together with others were charged with the offence of stealing by servant contrary to section 281 of the Penal code. That the claimant underwent trial and was eventually acquitted of these charges under section 210 of the Criminal Procedure Code on 5<sup>th</sup> May 2008. That the limitation period therefore started running on the date of acquittal that is to say the 5<sup>th</sup> of May 2008.

That after the claimants acquittal, several notices have been sent to the respondent asking for dues owing but in vain noting that at the time of dismissal the claimant had served for over 11 years. That under section 26 of the Limitation of Actions Act, this court can extend time and allow the claimant to file the claim out of time upon finding that the claimant was dismissed unfairly and not paid dues owing. That section 90 of the Employment Act, 2007 had not come into force at the time of the termination of the claimant's employment on 8<sup>th</sup> October 2002 and this does not bar this suit.

The claimant further states that payment of terminal dues is a fundamental right of an employee and that this should protect this right to ensure the respondent does not violate them. That section 20(1) of the Industrial court Act implores the court to act without undue regard to procedural technicalities in similar terms as Article 159(2) (d) of the Constitution. That the claimant has a good claim against the respondent, has been reduced to almost a pauper and should be allowed to file his claim out of time.

In the Further Affidavit the claimant states that together with other they were charged in Criminal Case No. 2566 of 2002 and that instead of the summary dismissal they were subjected to by the respondent, they should have been interdicted pending the criminal trial facing them, of which they were eventually acquitted and that no civil proceedings could lie before the criminal proceedings were concluded and therefore the limitation period only started running after the conclusion of the same on 5<sup>th</sup> May 2008.

On the other hand the respondent is opposed to this application on the ground that the same is incompetent, fatally defective and bad in law, lack merit and that this court lacks jurisdiction to extend time. That this is an abuse of the court process.

This court is vested with all inherent powers of a Superior Court as enshrined under Articles 41, 162 and 165 of the Constitution. Further by the powers conferred to Parliament, all enacted legislation that give this court more powers to undertake its mandate particularly the Industrial Court Act as under Section 12, this court can arbitrate on all matters dealing with labour relations in their entirety. The claim herein emanate from an employment relationship, the orders ought herein relate to a cause of action that arose out of an employee/employer relationship and as under Article 165 of the Constitution, all such matters must be arbitrated upon by this court.

In employment contracts time is of the essence and must be respected or complied with. Also based on the nature of the subject matter of the contract or the surrounding circumstances that show time should have been considered to be of the essence then that should be complied with unless in express terms that time is extended by the parties to the contract. An employment relationship is one such contract that defines the terms as between the parties to it and if time is of the essence, then this must be adhered to without unreasonable delay.

The claimant herein was terminated on the 8<sup>th</sup> October 2002 after the commencement of the criminal charges that were pending in court. These criminal charges though reported by the respondent, were not running parallel to any civil claim that had been filed in court noting that the claimant's position with the respondents was subject of these criminal charges. Stealing by servant. It was therefore the duty of the claimant to seek and protect his rights when the criminal charges commenced or immediately when he was terminated from his position with the respondents. Nothing prevented him from commencing his civil claim at any stage within the permissible time. Nothing was done by the respondent in admission of the claim or part of it to extend the legal time under which the claim fell, that is within the meaning of the Employment Act, 226 (now repealed). Equally where the Trade Disputes Act, cap 234 (repealed) became applicable, the claimant failed to utilize its provisions.

Looking at the issues raised in the grounds of Opposition and Replying Affidavit, I note the law applicable at the time of the termination of the Claimant's services as of 8<sup>th</sup> October 2002, was the Employment Act; Cap 226. This law was repealed by the Employment Act, 2007. A pertinent question to the determination of the issues herein is therefore whether the limitation provisions in section 90 of the Employment Act, 2007 is applicable to contracts of service terminated before its commencement, in other words if the Employment Act, 2007 extinguished the Claimants right to bring the Claim. My reading of the Employment Act 2007 has not found any provision in the Act which states that it shall have retrospective application. The only respect in which the Employment Act, 2007 applies to contracts of service entered into before its commencement in 2008 is its amendment of the terms of such contracts which were still subsisting to be construed as if they were made in accordance with it.

The claimant contested that the time started running after acquittal. However my reading of the law is the other way round. A civil claim should give way to a criminal case but any acquittal from the criminal case is not a bar to civil proceedings. In the old case of ***Abdulla Ramadhan and Another versus Suleiman Haji and Another***, the court held that it is not necessary that criminal proceedings should have been instituted first even if available. Hence, the criminal charges for which the claimant was attending before the magistrate's Court was not a bar to him to commence his claim for unfair termination by the respondents. Whatever claim that he had against his employer in 2005 was governed by the applicable law and to say that time stopped running because of the criminal case is a wrong interpretation of the law. Time started running in his employment claim from the date of his termination being the 8<sup>th</sup> October

2002.

It cannot be denied that the cause of action herein is based on a contract of employment. The Claimant's employment was terminated on 8<sup>th</sup> October 2002, over 8 years from the date of filing this application in the Industrial Court on the 8<sup>th</sup> June 2012 and therefore by operation of the law, the claim had already lapsed. There are no good grounds advanced for the delay in causing the claimant/applicant from filing the claim in good time.

This is not a mere technicality as it touches on the substance of the claim and a fundamental flaw if not addressed before parties file their claims. This time can be extended upon the Court being moved by a party who on good grounds finds themselves under this circumstance. That is why the law exists to assist parties who for good reasons are unable to come to court in good time. This was not the case here.

This claim does not fall under the ambit of the Employment Act, 2007 as the cause of action arose as of 8<sup>th</sup> October 2002 and based on the provisions of section 84 of the Labour Relations Act and section 93 of the Employment Act on transitional provisions, this dispute should have been resolved as under Trade Disputes Act, cap 234 Laws of Kenya (now repealed). The application therefore does not conform to the mandatory time limitations. It must fail.

**The preliminary objection is upheld. With that I dismiss the application dated 17<sup>th</sup> April 2012. Each party to bear their own costs.**

**Dated and delivered in open court this 8<sup>th</sup> day of July 2013**

**Mbaru M.**

**Judge**

**In the presence of:**

**Court clerk: Jacob Kipkirui**

.....

.....

.....