



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

Cause No. 27 Of 2012

(Before D.K.N. Marete)

TOM JOSEPH ORINA.....APPLICANT

versus

KENYA BUREAU OF STANDARDS1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

RULING

This is an application by way of Notice of Motion dated the 24th October, 2012 and filed on the same date by the applicant for orders;

1. *THAT* the claimant be granted leave to file suit out of time against the *Respondents as per the annexed draft Memorandum of Claim*
2. *THAT* costs of this application be costs in the cause.

It is based on the grounds that:-

- a. *The matter in dispute herein is an employment dispute within the meaning set out in the Employment Act, 2007.*
- b. *The cause of action arose on 9/4/2009 when the claimant was dismissed from service though he appealed against his dismissal and the appeal was rejected on 30/11/2010.*
- c. *The Claimant after the dismissal and rejection of his appeal, sought the advice and assistance of an advocate who communicated with the 1st Respondent on 6/2/2012 but did not file this claim in time and mistake of counsel should not be visited on the innocent litigant.*
- d. *The time limited for filing this cause of action expired on 9/4/2012, and unless leave to file the suit out of time is granted, the claimant shall be barred from doing so due to the effluxion of time.*
- e. *In view of the time that has lapsed since the cause arose, it is necessary that this honourable court grant leave to the claimant to file this suit out of time.*
- f. *The claimant is desirous of prosecuting this claim against the respondents expeditiously to its logical conclusion and it is only fair that he be given a chance to be heard on merit.*

g. In the circumstances, it is necessary for this Honorable Court to grant orders to institute the suit out of time at the Industrial Court for hearing and final determination.

The facts of this matter is that the applicant was an employee of the respondent between 20th August, 2008 until 9th April, 2009 when he was dismissed from office on grounds of misuse of the 1st respondent's Motor Vehicle Reg. No. KAV 501E. He was a driver.

Upon dismissal, the applicant mounted an appeal vide a letter dated 27th April, 2009 and this was determined on 30th November, 2011 by the Staff and General Purpose Committee of the National Standards Counsel which

upheld the dismissal. The claimant had sought the services of counsel, Onkoba Omwange & Co. Advocates who on 6th February, 2012 who through

J. Omwange, Advocates made a demand letter to the respondent who thereon on 9th March, 2013 responded stating that the dismissal was lawful and procedural.

The Applicant submits that by virtue of Section 90, Employment Act, 2007 the time for filing of a claim in this matter lapsed on 9th April, 2012.

Advocate Omwange had advised the claimant that the time limitation period started running on 1st December, 2010, the appeal against dismissal having been made on 30th November, 2010.

The respondents in their submission acknowledge the limitation of action for the applicant and capitalize on this to rubbish the applicant's endeavor and dismiss his quest for filing of the claim in out of time.

So what is the legal position on this salient issue of limitation? The law on the subject is as follows;

S. 90 Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

The law on the subject is succinct and clear. Three years is the limitation period and even the applicant seems to agree with this and hence this application for leave to file the claim out of time. I would agree with his

interpretation of the limitation clause but not its application in the circumstances of this case.

The issue for determination and which issue closes the matter is when the

time for limitation started running. It is trite law and practice that this would begin when all channels and processes of appeal are exercised and closed.

The applicant submits that he launched an appeal in terms of the 1st

respondent's Human Resource Policy, 2008 and this process of appeal was exhausted by a dismissal of the appeal were on 30th November, 2010.

Mr. Omwange, Advocate advised him that this is the time the limitation

period began to run. I agree. The limitation period began to run when all avenues for appeal were exhausted, that is, on 1st December, 2010.

The applicant therefore need have no fear as he is on time to file his claim in accordance with the law.

This court need not even intervene as the applicant does not need extension of time for filing his claim. It is now the onus of the applicant to formalize

his claim within time and space provided by the law.

Dated, delivered and signed the 3rd day of October, 2013.

D.K.Njagi Marete

JUDGE

Appearances:

1. Mr. Rakoro instructed by Rakoro & Company Advocates for the applicant.
2. Mr. M'Mbwanga instructed by M'Mbwanga – Advocates for the 1st respondent.
3. Mr.Fedha instructed by the State Law Office for the 2nd respondent.