



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**MISCELLANEOUS APPLICATION NO. 46 OF 2013**

**LABAN CHEMA LIBABU.....APPLICANT**

**VERSUS**

**BATA SHOE COMPANY (K) LIMITED.....RESPONDENT**

**RULING**

1. The Applicant herein on 29<sup>th</sup> July 2013 filed the Notice of Motion Application premised on Section 12(2) and 13(8) of the Industrial Court Act. The Application is dated 29<sup>th</sup> July 2013 and seeks orders of leave to file suit out of time. The Application is supported by grounds on the face of the Motion and the Affidavit of the Applicant Laban Chema Libabu. It was opposed by the Respondent.
2. Mr. Muturi for the Applicant urged the Court to allow the Applicant to file the suit out of time. Counsel stated that under the old regime the cause of action would have expired in September 2013 but under the new regime expired in September 2011 since it accrued in September 2008. He urged that since the claim was not denied the Court should grant leave sought. He submitted that the law allows a party to seek extension of time.
3. Mr. Kabaiku for the Respondent opposed the Application and stated that the Court had no jurisdiction to enlarge or extend time. He stated that Section 12 of the Industrial Court Act applies only to matters that are properly before Court. he submitted that the Limitation of Actions Act does not extend time for filing of claims on contract. He submitted that the Employment Act commenced on 2<sup>nd</sup> June 2008 and that the Act was in place when the cause of action accrued. He urged the Court to dismiss the Application as it had no merit.
4. In his brief reply, Mr. Muturi submitted that under Section 12(2) the Court has jurisdiction to entertain an application such as the one presented by the Applicant. He stated that under Section 12(3)(viii) the Court has jurisdiction to grant any appropriate relief. He submitted the Court has to go beyond procedural impediments. The impediments have come as a result of the passage of laws. He submitted that it is better to err on the side of caution. He stated that Section 90 is cited but the Work Injury Benefits Act is silent on the issue. In the absence of allegations of prejudice it was his prayer that the quest for justice should not be quelled by procedural impropriety except where prejudice is advanced. He therefore prayed the orders sought.
5. The Applicant seeks leave to commence proceedings for injuries suffered while in employ of the

Respondent. The Application for leave was not brought under the Limitation of Actions Act Section 27 or 28 but under Section 12 of the Industrial Court Act. Section 12 of the Industrial Court Act provides as follows:-

## **12. Jurisdiction of the Court**

*(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—*

- (a) disputes relating to or arising out of employment between an employer and an employee;*
- (b) disputes between an employer and a trade union;*
- (c) disputes between an employers' organisation and a trade unions organisation;*
- (d) disputes between trade unions;*
- (e) disputes between employer organisations;*
- (f) disputes between an employers' organisation and a trade union;*
- (g) disputes between a trade union and a member thereof;*
- (h) disputes between an employer's organisation or a federation and a member thereof;*
- (i) disputes concerning the registration and election of trade union officials; and*
- (j) disputes relating to the registration and enforcement of collective agreements.*

*(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.*

*(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—*

- (i) interim preservation orders including injunctions in cases of urgency;*
- (ii) a prohibitory order;*
- (iii) an order for specific performance;*
- (iv) a declaratory order;*
- (v) an award of compensation in any circumstances contemplated under this Act or any written law;*
- (vi) an award of damages in any circumstances contemplated under this Act or any written law;*
- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or*
- (viii) any other appropriate relief as the Court may deem fit to grant.*

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

6. The Section reproduced above makes it amply clear that the reliefs the Court may give vary from the reliefs between the employee and employer, employees organisation, trade unions, employers organisation etc. to the orders set out under subsection 3. The Applicant herein seeks refuge under Section 12(2) and 12(3)(viii).

7. The Applicant, it would seem, was injured while at work in 2008. The cause of action thus arose in September 2008. The claim, if any, ought to have been filed in Court within 3 years of the date of accrual of action. This is because Section 90 of the Employment Act 2007 was in place. Any cause of action that accrued from that date of the assent of the Act of 2007 had a bar of 3 years.

8. My brother the Hon. Radido J. has had occasion to delve into the issue of the applicability of the regimes in 2007 and pre-June 2008 in depth. I would refer parties to his decision in **Cause No. 1418 of 2010 – Charles Kiruthi Mwangi v. G4S Security** in which he held that the application of Section 90 of the Employment Act was not retrospective in Application. Section 90 of the Employment Act, 2007 provides as follows: ?

*Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based on 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.*

9. The In the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** the Court of Appeal held as follows (per Nyarangi JA)

*'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'*

10. The authority for this holding by the learned Judge is found in the writings of John Beecroft Saunders in **Words and Phrases Legally defined – Volume 3: I – N** which at page 113 states the following about jurisdiction:-

*“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”*

11. The Application herein was entitled to commence the suit within 3 years. There is no reason why he did not. His suit is time barred. The Court cannot confer jurisdiction upon itself and must uphold the finding that the Miscellaneous Application is thus not fit for grant and is dismissed with costs.

It is so ordered.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of December 2013**

**Nzioki wa Makau**

**JUDGE**