



**Thuri v Equity Bank Limited (Cause E127 of 2023)
[2024] KEELRC 1133 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1133 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E127 OF 2023**

JK GAKERI, J

MAY 2, 2024

BETWEEN

JOHN MUHUNGI THURI CLAIMANT

AND

EQUITY BANK LIMITED RESPONDENT

RULING

1. Before the court for determination is the Respondent’s Notice of Preliminary Objection dated 10th August, 2023 that the court lacks jurisdiction to admit, hear and determine this claim as it is time barred by virtue of the provisions of Section 90 of the *Employment Act*, 2007 in that from the Memorandum of Claim dated 14th February, 2023 and the Claimant’s employment was terminated on 13th December, 2019 and the claim was filed 3 years and 2 months later.
2. The Respondent prays for the dismissal of the claim with costs.

Response

3. In his grounds of opposition, the Claimant states that the Respondent’s Preliminary Objection is bad in law and unmerited as the suit is not statute barred since the Respondent neglected or failed to pay the Claimant salary arrears and terminal dues since termination of employment and the action is a continuing injury under Section 90 of the *Employment Act*, 2007 and the limitation period will only expire upon cessation of the continuing injury and the court has jurisdiction under Part III of the *Limitation of Actions Act* to extend the period of limitation as Section 90 of the *Employment Act*, 2007 is not a bar.



Respondent's submissions

4. Counsel for the submits that the Preliminary Objection is proper in law under the criteria in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696 and deserves consideration by the court based on the dates provided by the Claimant.
5. As regards jurisdiction of the court to hear and determine the suit, counsel submits that the decisions in *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank* [2012] eKLR are clear that a court of law can only exercise the jurisdiction conferred on it by *the constitution* or other written law or both and the *Employment Act, 2007* had a limitation clause.
6. That the Claimant was indolent and has not provided any explanation for the delay.
7. Counsel urges that the power of the court to extend limitation of time under Part III of the *Limitation of Actions Act* is restricted to situations in which there was a disability, mistake, fraud or ignorance of material facts.
8. As regards continuing injury, counsel submits that there cannot be a continuing injury after termination of employment and the Claimant's argument would require an examination of the evidence at this stage.
9. Reliance was made on the Court of Appeal decision in *The German School Society & another v Ohany & another* [2023] KECA 894 to urge that a wrong of a continuing nature involves an existing obligation and there was none in this case and the Claimant had only sought payments due at the time of termination.
10. Reliance was also made on the sentiments of the court in *Beatrice Kahai Adagala v Postal Corporation of Kenya* [2015] eKLR on extension of time.
11. Counsel urges the court to down its tools.

Claimant's submissions

12. Concerning jurisdiction of the court, counsel submits that the court has the requisite jurisdiction by virtue of Article 162(2) of *the Constitution* of Kenya, 2010. The decision in *Elias Kibathi & another v Attorney General* [2021] eKLR was relied upon to reinforce the submission.
13. Reliance was also made on the decisions in *United States International University (USIU) v Attorney General* [2012] eKLR and *Mugendi v Kenyatta University* [2013] eKLR.
14. As to whether the claim is statute barred, counsel cited the provisions of Section 4 of the *Limitation of Actions Act*, Cap 22 and Part III of the Act on extension of the period of limitation and cited the sentiments of the court in *Rosemary Wanjiru Kungu v Elijah Macharia Githinji & another* [2014] eKLR to urge that the Claimant is entitled to an extension of the limitation period under the law.
15. As regards continuing injury, counsel urges that in cases of continuing injury, the limitation of time is 4 years and cites the Court of Appeal decision in *Rift Valley Railways (K) Ltd v Hawkins Wagonza Musonye & another* [2016] eKLR to submit that the Claimant is not barred from seeking an extension of the period of limitation.



Determination

16. The issues for determination are;
- i. Whether the Respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection.
 - ii. Whether the Preliminary Objection is merited.
17. On the competency of the Notice of Preliminary Objection, it is common ground that the Respondent's notice raises the issue of limitation of time which implicates the court's jurisdiction to hear and determine the Claimant's suit.
18. It is trite that the question of limitation of time in seeking judicial redress in an action other than a constitutional petition is a jurisdictional issue which a court is obligated to determine at the earliest possible instance after it is raised.
19. Regarding the threshold of a Preliminary Objection, the often cited sentiments of Law JA and Sir Charles Newbold V.P, in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (Supra), are instructive.

The judge stated thus;

“... a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

20. Similarly, in the words of Sir Charles Newbold V P;
- “a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
21. The foregoing captures the foundation of the Respondent's Notice of Preliminary Objection, namely; limitation of time and the court's jurisdiction to hear and determine the instant suit.
22. In the circumstances, the court is satisfied that the Respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection.
23. As to whether the Respondent's Notice of Preliminary Objection is merited, counsel for the Respondent submits that the Claimant's suit is statute barred by virtue of the provisions of Section 90 of the [Employment Act](#), 2007 and there is no continuing injury.
24. It requires no gainsaying that as regards limitation of time to enforce claims arising from an employment relationship, the law applicable are the provisions of Section 90 of the [Employment Act](#), 2007 which provides that;

“Notwithstanding the provisions of Section 4(1) of the [Limitation of Actions Act](#), Cap 22, 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 3 years next after the act, neglect or



default complained or in the case of continuing injury or damage within 12 months next after the cessation thereof.”

25. As correctly observed in *Rosemary Wanjiru Kungu v Elijah Macharia Githinji & another* (Supra),
- “(a) the object of a limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he has lost evidence for his defense from being disturbed after a long lapse of time . . .”
26. The provisions of Section 90 of the *Employment Act*, 2007 are couched in mandatory tone, and in the negative for emphasis that no claim based on or arising under the Act or contract of service ought to be instituted after 3 years.
27. Similarly, in *Beatrice Kahai Adagala v Postal Corporation of Kenya Ltd* (Supra), the Court of Appeal stated as follows;
- “Much as we sympathise with the appellant, if that is true, we cannot help her as the law ties our hands. Section 90 of the *Employment Act*, 2007 which we have quoted verbatim above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this court stated in *Davecon Ltd v Samani* [1995 – 1988] EA 48, a decision relied upon by Radido J. in *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* [2013] eKLR, the limitation period is never extended in matter based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act*. Although for different reasons, as we have said, Wasilwa J. refused to extend the limitation period in the said cause thus prompting this appeal. Even if the appeal was heard on 19th November, 2014, we have no doubt that it was going to be dismissed. It follows that even if we allow the appellants present application and restore her appeal, it will still be dismissed on the self-same ground that the limitation period is never extended in claims arising from contracts.”
28. In the foregoing case, the appellant had filed a statute barred suit and simultaneously applied for extension of time to file the suit and the Respondent’s Preliminary Objection and application for extension were dismissed as was the application to review the dismissal of the appeal for non-attendance.
29. The Claimant’s Memorandum of Claim dated 14th February, 2023 and filed on 16th February, 2023 states that the Claimant’s employment was terminated on 13th December, 2019, a fact confirmed by the dismissal letter of even date.
30. The Claimant is claiming general damages for unlawful and unfair dismissal and terminal dues amounting to Kshs.962,307.69.
31. Evidently, the Claimant’s suit is grounded on unlawful or unfair dismissal from employment and it follows that the cause of action accrued on the date of termination, namely 13th December, 2019 and by simple arithmetic, the Claimant ought to have instituted the instant suit by 12th December, 2022, but filed it on 16th February, 2023, more than 3 years and 2 months later.
32. The Claimant’s suit is statute barred by dint of the provisions of Section 90 of the *Employment Act*, 2007 and the court lacks jurisdiction to hear and determine it.



33. In his grounds of opposition, the Claimant argues that his case relates to a continuing injury and limitation of time lapses 12 months upon cessation of the continuing injury.
34. It is unclear what the Claimant is relying upon as the alleged continuing injury which in the court's view ought to be continuing upto the time the instant suit was filed.
35. It would appear that it is the Claimant's case that the Respondent "refused to settle his terminal dues and continues to neglect settling Claimant's terminal dues" and arguably the injury continues or continued for 12 months after dismissal.
36. The letter of termination of employment states that the Claimant would be paid salary and leave, if any, upto and including 13th December, 2019 and one month's salary in lieu of notice net of any dues owed to the Respondent.
37. Finally, the Claimant prays for salary for December 2019, salary in lieu of notice, gratuity and unpaid leave as unpaid terminal dues.
38. Concerning continuing injury, the sentiments of the Court of Appeal in *The German School Society v Helga Ohany* (Supra) are instructive as follows;

". . . One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the Respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature capable of giving rise to a legal injury which assumes the nature of a continuing wrong . . ."
39. As correctly submitted by the Respondent's counsel, since the Claimant is not claiming monies or dues unpaid during employment, which in any case ought to have been claimed within 12 months of cessation thereof, the allegation that the Claimant's suit is founded on a continuing injury appears misplaced. At any rate, the court is not persuaded that non-payment of terminal dues is a continuing injury.
40. For the foregoing reasons, it is the finding of the court that the Claimant's suit is not based on a continuing injury within the meaning of Section 90 of the [Employment Act](#), 2007.
41. Finally, the Claimant asserts that this court has jurisdiction under Part III of the [Limitation of Actions Act](#) to extend the limitation period of matters falling under the [Employment Act](#), 2007.
42. Strangely, the Claimant relies on Part III of the [Limitation of Actions Act](#) without making reference to the specific provision(s) which confer upon this court jurisdiction to extend the limitation period in contracts of employment.
43. Part III of the Act provides for extension of periods of limitation in cases of disability, acknowledgement and part payment, as well as fraud, mistake and ignorance of material facts.
44. The Claimant appears unsure as to which of the provisions of the [Limitation of Actions Act](#) are relevant to his case.



45. More significantly, however, the Claimant has not filed any application for extension of the period of limitation to facilitate the filing of the instant suit, a tacit acknowledgement that the suit is statute barred.
46. For the foregoing reasons, it is clear that the Respondent's Notice of Preliminary Objection dated 10th August, 2023 is merited and is consequently allowed.
47. Having found that the Claimant's suit is statute barred, the court lacks jurisdiction to make one more step and hereby down its tools.
48. In the circumstances of this case, there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF MAY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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