



**Mwinyi v Bulkon Builders Limited (Cause E110 of 2023)
[2024] KEELRC 1921 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1921 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E110 OF 2023**

**AK NZEI, J
JULY 25, 2024**

BETWEEN

MWAZIMU MWINYI CLAIMANT

AND

BULKON BUILDERS LIMITED RESPONDENT

RULING

1. On 2/10/2023, the Claimant filed in this Court a memorandum of claim dated 25/9/2023 seeking the following reliefs against the Respondent:-
 - a. A declaration that the Respondent is in breach of the contract of employment
 - b. An order to pay:-
 - i. Underpaid salary for the months of May 2017 to April 2018.....kshs 7,765.80
 - ii. Accumulated unpaid house allowance (2,520x131 months).....kshs. 330,120
 - iii. Underpaid salary for the months of May 2018 to April 2020 (1,519x23 months).....kshs. 34,948.50
 - iv. Accumulated unpaid leave at the rate of (21 daysx704.60x11 years).....kshs. 163,224.60
 - v. Compensation for unfair termination (18,319.50x12 months).....kshs. 774,212.4
2. The Claimant pleaded that he was employed by the Respondent as a painter in June 2009 and was subsequently upgraded to an Artisan, earning a monthly salary of kshs. 18,319.50, and that his employment was on 10th April 2020 terminated by the Respondent without notice and without reason for the termination.



3. The memorandum of claim/suit documents were filed contemporaneously with a Notice of Motion dated 25th September 2023 whereby the following orders are being sought:-
 - a. That the applicant be granted leave to file suit against the Respondent out of time.
 - b. That the intended application and suit annexed herein be deemed to have been filed within the time specified.
4. The application, expressed to be brought under Sections 1, 1A, 3 and 3A of the Civil procedure Act, Section 4(1) (a) of the Limitation of Actions Act and Order 12 Rule 7 of the Civil Procedure Rules, is based on the supporting affidavit of Yusuf Mahmud Aboubakar Advocate sworn on 25th September 2023.
5. On 20/2/2024, the Respondent filed evenly dated grounds of opposition stating:-
 - a. that this Court lacks jurisdiction or discretion to grant leave to the Claimant to file the intended claim out of time.
 - b. that the intended claim is time barred pursuant to Section 90 of the Employment Act.
 - c. that the Claimant intends to circumvent the mandatory provisions of Section 90 of the Act by placing reliance on the Limitation of Actions Act which does not apply in matters related to claims arising from the Act or an employment contract.
 - d. that it is clear from the Claimant's documents that the cause of action arose in 2011 and was time barred in 2013, over 11 years ago.
 - e. that the application is devoid of merit, (is) misconceived and is an abuse of the Court's process and resources.
6. On 22nd February 2024, Counsel for the Respondent, in the absence of Counsel for the Claimant/Applicant, told the Court that the Respondent had filed a preliminary objection (P.O.) dated 20th February 2024, and sought directions that the same be heard first. There is no preliminary objection on record bearing the aforesaid date, which is the date of the foregoing grounds of opposition. Reference to a preliminary objection in the Court's directions given on 22/2/2024 on filing of written submissions should be construed to refer to the Claimant's Notice of Motion herein. Counsel representing parties, being Officers of the Court, must at all times assist the Court, and should always avoid misleading the Court.
7. Nevertheless, both parties have filed written submissions for and against the Notice of Motion dated 25th September 2023, which I have considered. The single issue for determination in the application is whether this Court has jurisdiction to extend time for filing claims based on the Employment Act or arising from contracts of service generally.
8. Section 89 of the Employment Act (formerly Section 90) provides as follows:-

“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.”
9. It is unambiguously clear from the foregoing statutory provision that Section 4(1) of the Limitation of Actions Act does not apply to matters based on the Employment Act or arising from contracts of service.



The Court of Appeal stated as follows in the case of *Beatrice Kaliai Adagala v Postal Corporation Of Kenya* [2015] eKLR:-

“Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the *Employment Act*, which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years.

As this Court stated in the case of *Divecon Limited v Samani* [1995-1998] EA P. 48, a decision relied upon by Radido, J in *Josephat Ndirangu v Henkel Chemicals [E.A] Limited* [2014] eKLR, the limitation period is never extended in matters 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*.”

10. In *Joseph Wafula Masibo v Kenya Power And Lighting Company Limited* [2021] eKLR, the Court stated as follows:-

“9. The Court of Appeal in *Rift Valley Railways (Kenya) Limited v Hawkins Wagunza Musonye & Another* [2016] eKLR, held that there is no exception to the 3 year limitation period save for cases of continuing injury or damage. Where a statute limits time for bringing an action, no court has power to extend time, unless the statute itself allows extension of time. The Court of Appeal in the decision above cited, with approval, *Divecon v Samuel* [1995-1998] IEA 48 at P.54.”

11. From the Claimant/Applicant’s pleadings herein, the alleged cause of action arose on 10th April 2020 when the Claimant’s employment was allegedly terminated. The suit documents herein were filed on 2/10/2023. This was clearly outside the statutory limitation period of 3 years, which this Court Cannot extend as already demonstrated in this Ruling. The application must fail, and the statute-barred suit documents filed herein must be struck off.

12. Consequently, the Notice of Motion dated 25th September 2023 is without merit, and is hereby dismissed; and the suit documents filed alongside the application are hereby struck off. The court file herein shall be closed forthwith.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH July 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant



.....Respondent

