



Naftali (Suing as the Legal Administrator and/or Representative of the Estate of the Late Monica Nafula Lucheli - Deceased) v County Government of Kakamega (Miscellaneous Case E001 of 2024) [2024] KEELRC 1781 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1781 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
MISCELLANEOUS CASE E001 OF 2024**

**JW KELI, J
JULY 11, 2024**

BETWEEN

PATRICK KAMADI NAFTALI APPLICANT

**SUING AS THE LEGAL ADMINISTRATOR AND/OR REPRESENTATIVE OF
THE ESTATE OF THE LATE MONICA NAFULA LUCHELI - DECEASED**

AND

COUNTY GOVERNMENT OF KAKAMEGA RESPONDENT

RULING

(On the Chamber Summons application dated 11th April 2024 by the Applicant and the Notice of Preliminary Objection dated 7th June 2024 by the Respondent)

1. The ruling is on the application by way of Chamber Summons by the Applicant dated 11th April 2024 and filed on 19th April 2024 brought under the provisions of Sections 27 and 28 of the *Limitation of Actions Act*, Orders 37 Rule 6, Order 50 Rule 6 of the Civil Procedure Rules, and Section 90 of the *Employment Act*; and the Respondent's Notice of Preliminary Objection dated 7th June 2024 and filed on even date.
2. Under the Chamber Summons, the Applicant sought the following reliefs:-
 - a. That leave be granted to the Applicant Patrick Kamadi Naftali (Suing as the legal administrator and/or representative of the Estate of the Late Monica Nafula Lucheli(Deceased) to file a suit against the County Government of Kakamega after the limitation period of instituting a suit for enforcing the award by the Director of the Occupational Safety and Health Office Kakamega under the *Work Injury Benefits Act* in favour of the deceased Monica Nafula Olucheli.



- b. That costs of this application abide by the results of the intended suit.
3. The Respondent's Notice of Preliminary Objection was premised on the following points of law:-
 - a. The Summons herein offends the provision of Section 90 of the Employment Act and further is barred by effluxion of time by dint of Section 90 of the Employment Act.
 - b. The summons herein is bad in law for being instituted before this Honourable Court which lacks jurisdiction to entertain the summons herein by virtue of the aforementioned provision of the law.
 - c. The applicant is guilty of laches in that the summons has been brought with undue delay and as such offends the aforementioned provision of the law.
 - d. The summons herein are otherwise incompetent, bad at law, misplaced, and an abuse of this Honourable Court and therefore unsustainable in obtaining circumstances hence a good candidate for striking out and/or dismissal with costs.
 4. The Chamber Summons application was premised on the grounds on the face of the application and the grounds in the supporting affidavit sworn by the applicant on 17th April 2024 as follows: -
 - a. That the Applicant is the widower to the late Monica Nafula Lucheli who had been employed by the Respondent until her demise as a result of acute respiratory arrest due to Grade IV Glioblastoma multiforme(Diabetic and Hypersensitive) (DM/HTN)(PK-01).
 - b. The deceased had been diagnosed with an occupational-related disease of Glioblastoma multiforme as per the Director of Occupational Safety and Health Department(DOSH) award(PK-02) and had been diagnosed with a permanent disability of 90 % as she could no longer work, partake her duties or take care of her self(PK-03-Notice by Employer of occupational disease/accident form).
 - c. That she died on 7th March 2020 a few months after the award by DOSH of Kshs. 3,926,880/- on 12th September 2019(PK-05).
 - d. The respondent acknowledged the death of the deceased as having arisen from a work-related disease in their letter of 9th March 2023(PK-04) and the DOSH award remains unpaid by the Respondent to date.
 - e. The employer was informed of the DOSH award and upon the applicant's inquiry, the applicant was informed that the same had been acted upon as the Employer sought funds from the insurance company but the same remained unsettled(PK-08-Letter from Respondent dated 8th February 2022).
 - f. The applicant states that due to the logistics, time, and expenses involved in caring for the deceased a huge blow was occasioned to the family, which led to emotional scaring to their children who required therapy sessions.
 - g. The applicant has processed a Limited Grant Ad Litem to pursue the suit on behalf of the deceased estate (PK-09) and has outlined circumstances that occasioned the delay in filing the suit.
 - h. The applicant seeks leave to file the suit after the period of limitation which has been made approximately three years since the demise of the deceased and three years and ten months since the award.



- i. That the delay to institute the suit for recovery of the award was not intentional and the application is made in pursuit of justice and fairness.
5. The application was opposed by the Respondent who filed the Notice of Preliminary Objection set out above.

WRITTEN SUBMISSIONS

6. The court directed that both the application and the Preliminary Objection would be canvassed concurrently by way of written submissions. The parties complied. The Applicant's written submissions dated 11th April 2024 were filed by Makonjio, Nyamberi & Co. Advocates on 1st July 2024. The Respondent's written submissions dated 11th June 2024 were filed by Arwanda & Associates Advocates on 12th June 2024.

DETERMINATION

Issues for determination.

7. The Applicant addressed the following issues in his written submissions: -
 - a. Whether the court has the jurisdiction to entertain the application herein.
 - b. Whether the application is time-barred.
 - c. Whether the applicant has advanced justifiable reasons for delay in instituting the suit.
 - d. Whether the order sought in the application should be granted.
8. The Respondent addressed the following issues in its written submissions: -
 - a. Whether the Preliminary objection is proper and raises legal issue.
 - b. Whether the application offends the provisions of Section 90 of the [Employment Act](#) and;
 - c. Whether on the basis of issue 2 above, this Honourable Court lacks jurisdiction to entertain the application herein.
9. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issues placed before the court by the parties for determination of the application are: -
 - a. Whether this court has jurisdiction to entertain the application.
 - b. Whether the application was merited.

Whether this court has jurisdiction to entertain the application.

10. The Applicant submits that contrary to the Respondent's assertions in its response that the present application is statute-barred under Section 90(sic) of the [Employment Act](#), the Applicant asserts that the present application does not fall under the confines of the [Employment Act](#), but the same is a unique case under the [Work Injury Benefits Act](#), under which no timelines for enforcement of an award are outlined but the same are inferred from the date the employer receives the notice of award. To buttress this the applicant relied on the decision in *Elijah Kisyanga Ndende v Manager Zahken International Construction Ltd(2022)eKLR*.
11. The Applicant submits that the award notification was in 2019, and the respondent has not confirmed when they received the award. He submits that the respondent implanted the idea that they were in the



process of settling the award through their letter dated 8th February 2022 addressed to the insurance which was copied to the applicant and thus the applicant contributed to the delay by the applicant to make an application. He relies on the case of *Malaba v Securex Agencies(K) Limited (2024) KEELRC 548(KLR)(8 March 2024)(Ruling)*.

12. The applicant submits that a cause of action arises when a person who is statutorily enjoined to perform an act within a specific period fails to act within the set timelines. He submitted that the respondent failed, neglected, or defaulted to settle the award on the 90th day, and enforcement can thus be pursued from the lapse of the 90 days. That under section 26(4) of the *Work Injury Benefits Act*, an employer is required upon receipt of the notification of an award by DOSH to settle it within 90 days and thereafter the employer is deemed to have failed to settle the award.
13. The applicant submits that the limitation period is not extended on matters of contract under Section 90 of the *Employment Act*, but can only be extended in claims founded on tort, and only when the applicant satisfies the requirements under sections 27 and 28 of the *Limitation of Actions Act* and to buttress this point he relies on the case of *Beatrice Kahai Adagala v Postal Corporation of Kenya(2015)eKLR*.
14. The applicant submits that the reasons for delaying in instituting the claim are sound as the family underwent a difficult moment caring for his deceased wife who had been sickly for a long time and additionally that the Respondent showed that they were willing to settle the award by forwarding a letter to their insurer after the applicant's inquiry(PK-7).
15. The applicant states that the filing costs for the claim would have been Kshs. 71,000 which is very high and the applicant was financially drained. He further submits that the award herein is within the jurisdiction of the court to grant leave under the *Civil Procedure Act*, and the *Employment and Labour Relations Act*.
16. The respondent submits that its preliminary objection is on a point of law for the application being statute barred under the provisions of Section 90 of the *Employment Act* relying on *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd(1969)EA 696*.
17. The respondent relying on the celebrated case in *Owners Motor Vessel & Lilian 'S' v Caltex Oil Kenya LTD91989) klr* and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited and 2 others (2012)eKLR* submits that the court lacks jurisdiction to entertain the present application by virtue of Section 90 of the *Employment Act* as the same is outside the limitation period and thus statute barred.
18. The respondent submits that a claim based on a contract of employment must be filed within 3 years and the court has no jurisdiction to extend the time. That the cause arose on 12 September 2019 when the award by DOSH was issued and its enforcement was subject to section 90 of the *Employment Act*.
19. The respondent submits that sections 27 and 28 of the *Limitations of the Actions Act, Cap 22* does not apply to the instant application which arises from an Employment contract.
20. The respondent submits that the court has no authority to enlarge time as the time for filing the suit was not held in abeyance relying on the decisions in *G4S Security Services (K) Limited v Joseph Kamau & 468 others (2018) eKLR* and *Waluchio V teachers Service Commission (cause E006 of 20230(2024)KEELRC 604 KLR)14 March 2024)(Ruling)*.



Decision

21. The present application is made by a dependant of a former employee of the respondent who is now deceased.
22. The preamble to the [Work Injury Benefits Act](#), Cap 236 provides that: “An Act of Parliament to provide for compensation to employees for work-related injuries and diseases contracted in the course of their employment and for connected purposes”.
23. The applicant’s wife was diagnosed with an occupational disease(glioblastoma multiforme) and later succumbed to it. The award by DOSH was made on 12th September 2019 and the applicant’s wife died on 7th March 2020.
24. Section 89 of the [Employment Act](#)(Rev. 2024)(formerly Section 90), provides that:-“Limitations. 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 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”.
25. The present application does not relate to an employer-employee relationship under the [Employment Act](#), but rather falls within the application of WIBA whose preamble provides ‘...for compensation to employees for work-related injuries and diseases contracted in the course of their employment’.
26. The limitation period under Section 89 of the [Employment Act](#) (Rev. 2024) of three years does not apply in the present application as the award sought to be enforced was under WIBA. There was no issue under a contract of service of the deceased employee to be adjudicated by this court under the [Employment Act](#) for section 89 to apply.
27. Section 26 of WIBA provides that “Claim for compensation(1)A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.
 - (2) If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21.....” The compensation claim was assessed on 12th September 2019 by DOSH just a few months before the employee died on the 7th March 2020.
28. The filed DOSH form(Notice by Employer of occupation Accident/disease of an employee)(PK-03) states that the Respondent notified the date of the occupational disease as 10th November 2017 and the claim was awarded by the DOSH on 12th September 2019(PK-05).
29. By dint of section 27 of WIBA: “Lapse of right to benefits. (1)A right to benefits in accordance with this Act shall lapse if the accident is not reported to the employer within twelve months after the date of such accident.
 - (2) Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source....”
30. The benefits that accrued to the applicant’s spouse were already awarded by DOSH and as per WIBA, the only instance when the benefits under the Act can lapse is if an accident was not reported, or if



the employer was not aware. This is not the case here. The Employer was aware and the occupational accident /disease was notified to DOSH and an award was issued.

31. Under Section 26(4) of WIBA provides that:-
- “(4) An employer or insurer against whom a claim for compensation is lodged by the Director under this section, shall settle the claim within ninety days of the lodging of the claim.
 - ...
 - (6) An employer or an insurer who fails to pay the compensation claimed under this subsection commits an offence and shall on conviction be liable to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both.”
32. The award was made on 12th September 2019. As to when the respondent received the notice of the award is unknown. In that case, pursuant to Section 26(4) of WIBA, the respondent was mandated to settle the claim within ninety days of the lodging of the claim by DOSH. The 90 days lapsed on 12th December 2019, the Respondent did not make a payment.
33. Under section 29 of WIBA,“(1)The right to compensation for temporary, total or partial disablement expires—
- (a) upon the termination of the disablement or if the employee resumes work;
 - (b) if the employee resumes any other work at the same or greater earnings; or
 - (c) if the employee is awarded compensation for permanent disablement.....”
34. In the applicant’s wife’s case, she died before the compensation was made and thus the right to compensation did not expire.
35. Under Section 34 of WIBA: “Amount of compensation in case of death.
- (1) If an employee dies as a result of an injury caused by an accident, compensation shall be paid to the dependants of the employee in accordance with the provisions of the Third Schedule, subject to the maximum and minimum amount determined by the Cabinet Secretary after consultation with the Council.
 - (2) No amount may be deducted from the compensation awarded under this section to a dependant in respect of any compensation awarded to the employee in respect of the same or any other accident.
 - (3) For the purposes of this section, a dependant is deemed to have been wholly financially dependent upon the employee at the time of the accident, unless the contrary is proved.
 - (4) In addition to the compensation payable under this section, the employer is liable to pay reasonable expenses for the funeral of the deceased employee subject to the maximum amount determined by the Cabinet Secretary, after consultation with the Council.”
36. The Respondent did not settle the award even after the death of the applicant’s wife.
37. Under section 36 of WIBA, “Payment of compensation



- (1) Compensation payable in accordance with the provisions of this Act may, for reasons deemed by the Director to be sufficient, be—
 - (a) paid to the employee or the dependant of an employee entitled thereto, or to any other person on behalf of such employee or dependant, in instalments or in such other manner as the Director may deem fit;
 - (b) invested or applied to the advantage of the employee or the dependants of an employee;
 - (c) paid to the Public Trustee to be applied for the benefit of the dependants of a deceased employee; or
 - (d) applied as specified in paragraphs (a), (b), and (c).
 - (2) On the death of an employee the unpaid balance of any compensation awarded to the employee does not form part of the employee's estate and shall be paid to the employee's dependants as specified in the Third Schedule.
 - (3) Where there is no dependant, the Director may authorise payment of the balance of the compensation to the estate of the deceased.”
38. Under Section 6 of WIBA:- “Meaning of dependant
- (1) In this Act "dependant" means—
 - (a) the widow or widower of an employee;
 - (b) a child of the employee who has not attained the age of eighteen years including a posthumous child, a stepchild and an adopted child, adopted prior to the accident, but excluding a child who is married or who is self-supporting;
 - (c) a parent, step-parent, or an adoptive parent who adopted such employee if he adopted prior to the accident or death;
 - (d) a child of the employee not contemplated by paragraph (b);
 - (e) a brother, sister, half-brother, half-sister or parent, grandparent, or grandchild of an employee; and
 - (f) any other person who at the time of the accident was wholly dependent upon the employee for the necessaries of life.
 - (2) In the case of an employee who leaves two or more widows, such widows shall be entitled to share such compensation as would be payable to a single widow of the deceased employee”.
39. The applicant was the widower.
40. Under Section 4(4) of The [Limitation of Actions Act](#), Cap 22,:-
- “ 4. An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of



interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

41. The award by DOSH directed the Respondent to pay Kshs. 3,926,880/- which is an order contemplated under Section 4(4) of the *Limitation of Actions Act*, Cap 22(supra), to wit;... “An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due”.
42. The award by DOSH was made on 12th September 2019 and the same was payable within 90 days. The 90 days lapsed on 12th December 2019. The applicant’s application seeking leave was made on 19th April 2024 approximately four years and four months from when the payment of the award was due. By dint of section 4(4) of the *Limitation of Actions Act*, an action cannot be instituted where twelve years have lapsed from when an order to make a payment became due. In the applicant’s case, only four years have so far lapsed with a remainder of approximately eight years to beat the limitation period set out in the *Limitation of Actions Act*.
43. The applicant’s application does not require the court to extend time, as the same is yet to lapse.
44. The Jurisdiction of this court emanates from Section 12(3) of the Employment and Labour Relations Court which provides that:-

“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.”

45. The Applicant’s application requires the court to grant leave to the applicant to file a suit after the period of limitation. However, the limitation period is yet to lapse. The Applicant argued that the court has jurisdiction to grant leave to the applicant to file a suit outside the limitation period. On the other hand, the respondent argued that the court had no jurisdiction to grant leave where a cause of action is statute-barred under Section 89(Rev. 2024) of the *Employment Act*.
46. The Court holds that the application is not outside the limitation period. Consequently, the court is not called to grant leave for the applicant to file a suit after the period of limitation. The applicant’s



application is within the Limitation period and thus the court cannot grant leave where none is required.

47. In *Willis Onditi Odhiambo v Gateway Insurance Co Limited*, the Court of Appeal held:-

“...The appellant moved the High Court by his Originating Summons filed on 19th September, 2011 for leave to file suit out of time under the provisions of Sections 27 and 29 of the *Limitation of Actions Act*. Section 29 is of no relevance in this appeal. Under Section 27, as can be gleaned from the provisions cited above, time to file suit can only be extended where the action is found on tort and must relate to the torts of negligence, nuisance, or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort. The section clearly does not give jurisdiction to the court to extend time for filing suit in cases involving execution of decrees. In the matter before us, it matters not that the original suit was founded on the tort of negligence and damages claimed were in respect of personal injuries as a result of the tort of negligence. Here, the extension was sought to enforce a judgment and/or decree. Time within which to lodge such action cannot be extended under the provisions of Section 27 of the *Limitation of Actions Act*.”

48. The applicant’s application is for an extension of time to enforce an order of DOSH which by dint of section 4(4) of the *Limitation of Actions Act*, is to be brought within twelve years which in this case are yet to lapse.

49. The Applicant’s application was grounded on the wrong provision of the law as Section 27 relates to extension of time for claims of torts of negligence, nuisance, or breach of duty and the damages claimed should be in respect of personal injuries to the plaintiff as a result of the tort. That is not the case here, as the applicant wishes to execute an order of the DOSH already granted as relates to the principal cause of an occupational accident/disease.

50. In the upshot, the court cannot grant leave as the same is premature as the time to execute/enforce the Award by DOSH is yet to expire. The Court’s jurisdiction was thus invoked prematurely.

51. For the above reasons, the application dated 11th April 2024 is held as premature as there is no suit to be filed by DOSH having made the award. Further, an application to enforce the decision would be within the Limitation Act on enforcement of decisions according to Section 4(4) of The *Limitation of Actions Act*, Cap 22 to wit:-

“ 4. An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

52. The preliminary objection dated 7th June 2024 fails for the foregoing reasons. The application was held to be premature.

53. Neither party succeeded in the quest hence no order as to costs.

54. It is so Ordered.



DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11TH DAY OF JULY 2024.

J.W KELI

JUDGE

IN THE PRESENCE OF: -

Court Assistant: Macheso

Applicant: - Mbetera

Respondent: Arwanda

