



Njeri (Suing as the Legal Representative of the Estate of Anthony Nguri Karori) v East African Portland Cement Company PLC (Miscellaneous Application E841 of 2022) [2024] KEELRC 1744 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1744 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E841 OF 2022**

NJ ABUODHA, J

JULY 5, 2024

BETWEEN

EMILY WAMBUI NJERI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANTHONY NGURI KARORI) CLAIMANT

AND

EAST AFRICAN PORTLAND CEMENT COMPANY PLC RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary objection dated 16th December, 2022 seeking for dismissal of the suit in limine on the grounds that:
 - a. The Claim is time barred pursuant to the provisions of Section 90 of the *Employment Act*, the Claimant's employment services having been terminated on 29th June, 2019.
 - b. The Honourable Court therefore lacks jurisdiction to entertain this claim and the same ought to be struck out with costs to the Respondent.
 - c. The Claim is vexatious and an abuse of the court process.
2. In reply the Claimant filed her Replying Affidavit sworn on 26th February, 2023 and averred among others that:
 - i. the Respondent acknowledged that the employer-employee relationship between the later Antony Ngugi Karuri and the Respondent prematurely terminated on the 29th June, 2019 as a result of the death of the said employee.
 - ii. The Claimant averred that the Respondent stated that any claim seeking terminal dues ought to have been filed within 3 years.



- iii. The Claimant averred that the Respondent in a letter dated 16th January, 2020 to her former advocates advised that any terminal benefits in respect of the deceased would only be paid upon obtaining the letters of administration.
 - iv. The Claimant averred that the said letter was an admission of owing terminal dues and the confirmation of the willingness to pay the said amounts established a new cause of action.
 - v. The Claimant averred that subsequently the Respondent by a letter dated 28th June 2021 advised that it would only release the said terminal benefits and dues to the Estate of Antony Ngugi Karori once the court had determined how they would be administered.
 - vi. The Claimant further averred that from the above letter of 28th June, 2021 the Respondent meant that any action ought to have been instituted within 3 years from the date of this new admission.
 - vii. The Claimant averred that in the circumstances it was clear that cause of action was brought within 3 years from the last admission on 28th July, 2021 hence not time barred.
 - viii. The Claimant averred that it was in the interest of justice that the Notice of Preliminary Objection be dismissed with costs as against the Claimant for being a waste of judicial time.
3. The Notice of Preliminary Objection was disposed of by written submissions.

Determination

4. The Principle of preliminary objections was well established in the court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696* quoted in a number of cases that:-
- i. That the Preliminary Objection raises a pure point of law,
 - ii. That there is demonstration that all the facts pleaded by the other side are correct; and
 - iii. That there is no fact that needs to be ascertained.
5. In this particular case the Respondent has raised an objection of the claim being time barred under section 90 of the [Employment Act](#). This is a pure point of law with the facts in this case being clear and undisputed.
6. Section 90 of the [Employment Act](#) provides as follows:-
- “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”.
7. It is not in dispute that the deceased was involved in accident and died on 29th June, 2019. In as much as the Respondent admitted owing dues to the deceased, they stated clearly that the family should seek the courts intervention by obtaining the necessary grants and establish how the benefits were to be shared.
8. From the said letters the Respondent has never denied owing the said dues. The main question herein is then if time started running when the deceased died or upon the Respondent admitting liability.



9. A proper reading of the above provision of Section 90 of the *Employment Act* leads to the conclusion that the cause of action starts running after cessation of the contract. In this case the employer-employee relationship ended on 29th June,2019 when the deceased died. It cannot therefore be interpreted to when the Respondent admitted owing dues.
10. This therefore means that the Claimant was supposed to bring the claim within 3 years from 29th June,2019 hence the last day of filing the claim ought to be 29th June,2022. The Claimant was therefore late by filing this claim in November, 2022.
11. I note that no explanation has been given by the Claimant on why she filed this claim out of time or why they did not obtain a limited grant for the purposes of filing the claim.
12. In the case of *Michira & 41 others v Aegis Kenya Ltd t/a Leopard Beach Hotel (Cause E088 of 2023)* [2023] KEELRC 2551 (KLR) (19 October 2023) (Ruling) Lady Justice Mbaru addressed this issue as follows: -

Section 90 of the Act is framed in mandatory terms. A claim based on a contract of employment or labour relations must be filed within 3 years. This Court is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose. ...

The cause of action arises with end of employment. The last day the employee exits the shop floor, any accruing dues must to addressed within 3 years, any continuing injury must be addressed within 12 months.

13. From the above sentiments it is clear that the Claimant ought to have complied with the provisions of the law by filing the suit within 3 years when the employer-employee relationship ceased upon the death of her husband.
14. If the advice of the Court be sought, the Court sympathizes with the claimant who has been shut out by the provisions of the statute, but it ought not to be lost that the deceased was the respondent's employee and that save for the rigours of the statute, the respondent had indicated its willingness to settle the deceased's dues but upon being furnished with the letters of administration and how the benefits should be distributed. In the spirit of Alternative Justice that the Courts now encourage, may it the respondent deem it fit in the spirit Corporate Social Responsibility and Alternative Justice to settle the deceased's dues for the benefit of his family despite the operation of section 90 of the *Employment Act*.
15. The objection by the Respondent is however as per the law, sustained and the suit is hereby struck out as incompetent but with no orders as to costs.
16. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF JULY, 2024

DELIVERED VIRTUALLY THIS 5TH DAY OF JULY, 2024

ABUODHA NELSON JORUM

JUDGE

