



**Osolo v Maseno University & 2 others (Cause E010 of 2022)
[2024] KEELRC 2018 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2018 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E010 OF 2022
CN BAARI, J
JULY 25, 2024**

BETWEEN

PROF AGOLA AUMA OSOLO CLAIMANT

AND

MASENO UNIVERSITY 1ST RESPONDENT

MASENO UNIVERSITY COUNCIL 2ND RESPONDENT

REGISTRAR, MASENO UNIVERSITY 3RD RESPONDENT

JUDGMENT

1. Before Court is the Claimant's Memorandum of Claim dated 1st March, 2022, and filed on 2nd March, 2022. The Claimant seeks an order for payment of salary for 16 months amounting to Kshs. 3,916,160 and payment for sabbatical leave in the sum of Kshs. 4,728.32/ and an award of costs of the suit.
2. The Respondents entered appearance on 4th April, 2022, and proceeded to lodge their statement of defence to the memorandum of claim on the same date.
3. The Claimant's case was heard on 9th September, 2022, with one Pius Stephen Opiyo testifying on behalf of the Claimant, on the premise that he had a power of attorney to conduct the matter on his behalf.
4. Mr. Pius Stephen Opiyo adopted his witness statement and produced documents filed in support of the Claimant's case, and there being no other witnesses, he closed the Claimant's case.
5. The Respondents' case was subsequently heard on 3rd July, 2023, where one Millicent Akinyi Madara, a Senior Assistant Registrar of the 1st Respondent, testified in support of the Respondents' case. Ms. Madara adopted her witness statement and produced documents filed in support of the Respondents' case. The Claimant's advocate did not attend Court during the hearing of the Respondents' case, hence the witness was not cross-examined on this hearing date.



6. The Claimant lodged an application dated 18th October, 2023 seeking to arrest the judgment in the matter that had been reserved for 2nd November, 2023, and to re-open the Respondent's case to enable the cross-examination of the Respondent's witness.
7. The application was heard on 7th November, 2023 and a ruling on the motion rendered on 9th November, 2023, wherein the matter was re-opened allowing the Claimant to cross-examine the Respondent's witness.
8. The Respondent's case was again closed and a judgment date set for 22nd February, 2022 before the cross-examination of the Respondent's witness on account of non-attendance of the Claimant's Advocate on the date the cross-examination was to take place.
9. The matter was re-opened once more by consent of the parties and the Respondent's witness was finally cross-examined on 23rd April, 2023, bringing the matter to a close, and paving way to filing of submissions.
10. The Respondent sought to rely on the submissions they filed earlier and the Claimant who had not filed, subsequently filed their submissions.

The Claimant's Case

11. The Claimant's case is that: -
 - i. He was an employee of the Respondents from 12th July, 1999 up to 14th January, 2016, when he retired from the service of the Respondents.
 - ii. It is his case that he was entitled to one month of leave for every year of service, but that at the request of the Respondents, he remained on duty and never utilized his leave and neither was he paid in lieu of the leave. It is his further case that he suffered loss of earnings and for which he now claims for the entire period served.
 - iii. It is his case that at the time he retired from the service of the Respondents, his monthly salary was Kshs. 295,552/-.
 - iv. He further states that during his time with the Respondents, he was entitled to sabbatical leave which he did not take. He states that he claims payment of Kshs. 5, 319, 360 on this account.
 - v. It is his case that his claim is for payment in lieu of leave and sabbatical leave from the date of employment to retirement being an aggregate 16 years of service.
 - vi. On cross-exam, the witness told the Court that though he is not the Claimant he has a power of Attorney which is specific to this case, but which he says is related to Cause No. 35 of 2020, to which the power of attorney specifically relates. He denies not having a power of Attorney in relation to this matter.
 - vii. It is CW1 testimony that he does not have prove that the Claimant applied for sabbatical leave, or any evidence related to sabbatical leave. He further admits not having justified the claim for sabbatical leave.
 - viii. It is his prayer that the Court allows the Claimant's claim and award him the listed reliefs.

The Respondents' Case.

12. The Respondents' case is as follows: -



- i. That the Respondents deny having requested the Claimant to stay on duty during his leave and failing to pay him in lieu of the leave not taken.
- ii. The Respondents further deny that the Claimant is entitled to payment on account of sabbatical leave or at. It is their case that the Claimant is not entitled to any salary in lieu of leave as he did not at any point apply for leave, or having applied, that the same was denied.
- iii. It is the Respondents' case that the suit as filed is statute barred by dint of Section 90 of the Employment Act, 2007, and seek that it be dismissed.
- iv. The Respondents further state that the Claimant's claim is res judicata the same issue having been determined under Kisumu Industrial Court Case No. 36 of 2020, resulting in the dismissal of the claim.
- v. It is the Respondents' case that this suit does not disclose a cause of action or reasonable cause of action against them and pray that it be dismissed.
- vi. The Respondents' witness (RW1) in her testimony told this Court that leave is an entitlement which is granted by application, and that the Respondents records does not indicate that the Claimant applied for leave and that the same was declined.
- vii. It is her further testimony that sabbatical leave is only approved by the 1st Respondent's Vice-Chancellor, and that the Claimant did not request to proceed on sabbatical leave. It is her further evidence that an application for sabbatical leave is supported by indication of the course that one intends to take, course duration, costs of the course, financial assistance required by the applicant and production of academic work schedules.
- viii. It is RW1's case that the records held by the Respondents, does not support the Claimant's assertions.
- ix. It is her prayer that the Claimant's claim be dismissed with costs.

The Claimant's Submissions

13. The Claimant submits that an employer has the duty to ensure every employee has taken annual leave as and when due, and that the defence that the Claimants failed to taken annual leave and thus forfeited the same is not a position supported by law. Reliance was had to the holding in the case of *Rajab Barasa & 4 Others versus Kenya Meat Commission* (2016) e-KLR to support this position.
14. The Claimant further sought to rely in the case of *Mwende Mbiti v Citrus Inn Limited* (2018) eKLR for the holding that: -

“The Claimant is entitled to leave as there was no proof that she took any leave during her employment with the Respondent.”
15. It is further submitted for the Claimant that the Respondent did not contest the fact that the Claimant did not take his leave days, and instead, the Respondent's defence was only that the Claimant did not apply for the leave for the duration of employment.
16. It is the Claimant's submission that he has presented documents before this court showing that the Respondent has paid other employees the salary in lieu of their leave, and yet when it comes to the complainant's payment, the Respondent continues to withhold the salary in lieu of leave in order to keep denying the Claimant his rightful dues despite the years of service given to the Respondent.



17. It is finally submitted that Claimant has proven his case and pray that the suit be allowed and judgment entered for the Claimant as prayed in the claim together with costs of the suit.

The Respondents' Submissions

18. It is submitted for the Respondents that Pius Stephen Opiyo (CW1) is a stranger and has no locus standi to testify or even participate in these proceedings. It is submitted that his purported evidence has no probative value. The Respondents had reliance in the case of Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR to support this position.
19. It is further submitted that the question as to whether one has capacity to testify is not a technical issue, one either has it or they don't. the Respondents submit that this ground alone is sufficient to dispose off this claim with finality. They sought to rely in Francis Mwangi Mugo Vs David Kamau achago [2017] eKLR, to buttress this position.
20. It is the Respondents' submission that there no shred of evidence that the Claimant ever applied for leave and was denied. It is further submitted that his assertion that he continuously worked for 16 years at the request of the Respondent owing to pressure of work is without any legal basis.
21. The Respondents submit that Section 28 of the Act, deals with the issue of clarity. It is their further submission that leave not take within the stipulated period is deemed to have been forfeited.
22. The Respondents submit that sabbatical leave was not a matter of right and that the condition precedent for grant of such leave are well set out under the CBA.
23. The Respondents submit that the Claimant had previously filed a claim against the Respondents over the same subject matter being Kisumu ELRC Cause No.35 Of 2020- Prof. Agola Osolo Versus Maseno University and Another, which matter was dismissed with costs.
24. The Respondents pray that the Claimant's claim be dismissed with costs.

Analysis and Determination

25. I have considered the pleadings herein, the witnesses' oral testimonies and the parties' submissions. The issues that arise for determination are: -
 - i. Whether the claim is statute barred.
 - ii. Whether Pius Stephen Opiyo has locus to prosecute this suit.
 - iii. Whether the Claimant is entitled to the reliefs sought.

Whether the Claim is statute barred

26. The Respondents raised this issue in their statement of defence but did not address it either in their submissions or during the hearing. An issue of time limitation goes to the jurisdiction of the Court and the Court has thus to address the issue whether or not the parties prosecuted it.
27. A litigant's right to file a claim for violation of a legal right, is not exercisable in perpetuity due to the operation of the statutes of limitation, which limits the time periods within which certain types of actions may be brought by a Claimant.



28. The time limitation applicable to contracts of service such as the one before court, is regulated under Section 90 of the [Employment Act](#), 2007, which states thus:

“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.”

29. For this reason, the Claimant’s claim had a three-year life span, beyond which, his right of action is extinguished and become unenforceable against a Respondent.

30. In *Gathoni vs. Kenya Co-Operative Creameries Ltd.* [1982] KLR 104, Potter, JA at page 107 expressed himself thus:

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

31. To determine whether or not the Claimant’s suit is statute barred, the Court has to first determine when the cause of action subject of the suit accrued. For starters, it is not disputed that the Claimant left the service of the Respondent on 16th January, 2016. Further his claim concerns payment on account of sabbatical leave and payment for leave not taken in the 16 years he was in the service of the Respondent.

32. Section 90 of the [Employment Act](#), creates two separate instances when a cause of action accrues. The first one is a cause that arises from a contract of service in general, which has a three-year life span, and secondly, is what the Act refers to as continuing injuries whose time limit is one year.

33. The issue then is whether leave or payment in lieu thereof, is a continuing injury or not. Leave accrues to an employee within a year of service, and so in my view, such a claim accrues at the end of every year of service, and which then extinguishes within one year upon its accrual. This is in tandem with Section 28 of the [Employment Act](#), which states as follows: -

“(1) ‘An employee shall be entitled—
(a) after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay; ...”

34. Further, even if this were to be construed as a general claim arising from a contract of service for reason of the claim for sabbatical leave which is not clear as to when the Claimant needed to take it, the Claimant ought to have been paid for any leave days accrued and not utilized by the date of his retirement as part of his terminal benefits. The Claimant having retired in January, 2016, means that by simple arithmetic, his claim extinguished in January of 2019.

35. In *Iga vs. Makerere University* [1972] EA it was held:

“A plaint which is barred by limitation is a plaint barred by law.The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

36. In the upshot, I hold the Claimant’s claim statute barred, and is for striking out.



37. On the issue of locus, Mr. Pius Stephen Opiyo, while testifying on behalf of the Claimant, admitted on cross-examination, that the power of attorney that he had from the Claimant, was only in relation to Cause No. 35 of 2020. This admission confirms that the witness was nothing but a busy body with no known interest to protect in the suit before this court.
38. In the premise, to determine the remaining issues will be an academic exercise, and I thus let them fall by the way side.
39. The Claimant's claim dated 1st March, 2022, and filed on 2nd March, 2022, is hereby struck out with costs to the Respondents.
40. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF JULY, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Lumallas present for the Claimant

Mr. Siwolo present for the Respondents

Ms. Anjeline & Debra- C/As

