



**Shitoshe v The Board of Management Shivanga Secondary School & another
(Cause E023 of 2024) [2024] KEELRC 2222 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2222 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE E023 OF 2024
JW KELI, J
SEPTEMBER 18, 2024**

BETWEEN

CALEB SHITOSHE CLAIMANT

AND

**THE BOARD OF MANAGEMENT SHIVANGA SECONDARY
SCHOOL 1ST RESPONDENT**

SHIVANGA SECONDARY SCHOOL 2ND RESPONDENT

RULING

(On the Notice of Preliminary Objection dated 25th July 2024 by the Respondents)

1. The Claimant/Respondent on the 3rd July 2024 filed a memorandum of claim dated 1st July 2024 and supported by a verifying affidavit of an even date seeking judgment and orders against the respondents as follows:-
 - a. Kshs. 4,725,000.00
 - b. Costs of the claim plus interest thereon.
 - c. Interests on (a) and (b) above from the date of filing the suit till the day of full payment.
2. The Respondents entered appearance and filed the instant Notice of Preliminary Objection dated 25th July 2024 premised on the following grounds:-
 - a. The Honourable Court Lacks the jurisdiction to admit, hear and determine this suit, as it has been filed outside the mandatory statutory limitation period prescribed under section 4(1) of the *Limitation of Actions Act* (Cap.22).
 - b. The Claimant's claim has been filed out of time In blatant violation of section 90 of the *Employment Act* (Cap.226).



Written Submissions

3. The Court directed that the Notice of Preliminary objection be canvassed by way of written submissions. The Respondents' written submissions dated 9th August 2024 were filed by Jette Adwar, Senior State Counsel of the office of the Attorney General. The claimant did not file submissions as directed.

Determination

Issues for determination.

4. The Respondent/Applicants addressed the following issues in their written submissions: -
 - a. Whether the suit herein is statute barred pursuant to the provisions of section 90 of the [Employment Act](#) Cap 226.
 - b. Whether the limitation period can be extended in Employment and Labour Relations matters.
 - c. Whether this Honourable court has the jurisdiction to hear, admit and determine this suit.
5. 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 Notice of Preliminary Objection was whether the claim was statute time barred.

The Respondents' submissions

6. The respondents submit that the Claimant's memorandum of claim dated 1st July 2024 indicates that the claimant was employed as a teacher for Biology and chemistry in 2010 and his employment officially terminated in 2014 and that the respondents allegedly unreasonably and unlawfully withheld his pay and benefits (Para. 2,5 and 6 of the Plaint dated 1/7/2024).
7. The respondents submit that the claimant's suit ought to have been instituted on or before December 2017 and that in light of Section 90 of the [Employment Act](#), Cap 226, the Honourable court is barred from entertaining the claim or awarding any reliefs as the same is statute barred.
8. The respondents submit that by virtue of section 90 of the Employment Act (Now Revised to Section 89); a claim based on a contract of Employment must be filed within three years from the date of the cause of action.
9. The Respondents to buttress the above assertion relied on the decisions in the following cases: - Mehta V Shah (1965) E.A 321, Gathoni v Kenya Commercial Creameries Ltd (1982) KLR 104; Nasra Ibrahim Ibren V Independent Electoral and Boundaries Commission & 2 others; Supreme court Petition [No. 19 of 2018](#);
10. The Respondents submit that the limitation period can be extended where there is a show of good and substantial reasons as enumerated in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2014) eKLR.
11. They further submit that while considering an application for granting leave to file suit out of time, the Court has to balance the competing interests of the applicant and those of the respondent relying on Portreizt Maternity v James Karanga Kabia Civil Appeal No. 63 of 1997.
12. The respondents submit that the Court in employment claims by dint of Section 90 of the [Employment Act](#), has no jurisdiction to extend the time for filing of suits if they are not filed in court



within three years from when the cause of action arose. To buttress this assertion the respondents relied on the decisions in John Kiiri Njiri V University of Nairobi (2021) eKLR and Butali Sugar Mills V Sahari & Another, Appeal No. E029 of 2022(2023) KEELRC 589 KLR.

13. The respondents submit that the question of limitation is a question that goes to the jurisdiction of the court and thus a clear point of law which ought to be argued as a preliminary point that may dispose of the suit at the onset as per the threshold in Mukhisa Biscuit manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696. To buttress the same assertion the respondents, rely on the decisions in Bosire Ongero v Royal Media Services (2015) eKLR; Benjamin Wachira Ndiithi v Public Service Commission & Anther (2014) eKLR; Gilu Giro Koto & another v GSU Camp (Galana Kulalu ranch) & 2 others (2021) eKLR; Attorney General & another v Andrew Maina Githinji & Another (2016) eKLR.
14. The respondents assert that the claimant's failure to file his claim within the statutory time cannot be said to be a mere technicality curable under Article 159(2) of *the Constitution* or the overriding objectives and the Court must determine the issue.

Brief facts of the claim

15. The Claimant pleaded that he was employed in the year 2010 and he was then verbally dismissed in December 2014. That his classes were allocated to other teachers leaving him with no class to teach.
16. The Claimant's filed documents indicate that he reported this case to the Ministry of Labour, which wrote the letters of 10th August 2015, 18th August 2015 and 2nd March 2016 addressed to the respondents. Thereafter, the respondents then invited the claimant to a conciliation meeting vide letters of 5th November 2015 and 10th March 2016. The claimant wrote the letter of 22nd November 2015 to the 2nd respondent complaining about the aborted conciliation meeting. The conciliation efforts with the respondents were unsuccessful.

Decision

17. The Court finds that it was undisputed fact that the claim was filed outside 3 years post termination of services of the claimant. Section 89 formerly section 90 (Rev. 2024) of the *Employment Act* reads:- '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.'
18. The claimant went through conciliation processes before coming to court with several correspondences the last *being of 2019*. A similar question of limitation of time in employment claims arose in *Michira & 41 others v Aegis Kenya Ltd t/a Leopard Beach Hotel (Cause E088 of 2023)* [2023] KEELRC 2551 (KLR) (19 October 2023) (Ruling). The claimants therein were sent on indefinite compulsory leave from April 2020 and the parties were engaged in Conciliation. Justice Mbaru upon considering the preliminary objection filed, held at paragraphs 18 & 19, that: -

“The conciliation process, even though allowed under statute does not stop time running. Parties are at liberty to file suit to secure their rights under section 90 of the Act and then seek to apply section 15 of the Employment and *Labour Relations Act*, 2011 which allow for conciliations while the matter is pending in court. To avoid going against the time limitations, a party with good cause is allowed to move the court and then seek to proceed for conciliation if that is found a viable option while retaining the right under Section 90 of



the Act. Hence, the reference of the claimants' matter to conciliation did not stop time from running and thus does not avail a defence against a plea of limitation as held in *Monicah Wanjiku Kanyingi v Our Lady of Mercy Secondary School* [2018] eKLR.”

To file a claim in August 2023 following a cause of action which arose in April 2020 is outside the limitation period, both for claims under continuing injury or a claim arising out of an employment contract. This is a matter addressed in the law, on the facts presented, the objections by the respondents are with good foundation, and the claim herein is time barred and filed contrary to the provisions of section 90 of the *Employment Act*, 2007. The court is denied the requisite jurisdiction to proceed further.”

19. This Court sitting at Bungoma held similarly in *Maxwell Sifuna v Teachers Service Commission* [2022] eKLR that: -

“ 6. The Claimant was dismissed for service vide a letter dated 19th January 2017. Three years ended on 19th January 2020 or thereabouts. The Claimant filed the Petition on the 4th June, 2021 over a year post the timeline under Section 90 of the *Employment Act*.

7. The Petitioner appealed against the dismissal on 12th April, 2017 (MSI E) and followed up the appeal vide letter dated 5th June 2017 (MS N (a) on 15th October 2018 he was invited for hearing of appeal. On 21st December 2018, the Respondent communicated to the Respondent that the dismissal was upheld. The Petitioner argues that the clock stopped ticking on appeal.

22. The provision of Section 90, *Employment Act*, 2007 on limitation of time is a juridical issue and not discretionary. The court has no choice but to down its tools in the matter. The court has no jurisdiction to issue prayers sought under the petition for the claim is time barred. The Petitioner was dismissed from service on the 19th January 2017 and filed the Petition on the 4th June 2021 outside the mandatory 3-year limitation period under Section 90 of the *Employment Act*, 2007.”

20. The present claim is similar to claims raised in a decision of the Court of Appeal in *The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018* (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) where the respondents therein claimed for back pay, underpayments and loss of purchasing power as s continuing injury. The Court of Appeal observed that: -

“ 34. The respondent's argument is that the claims in question constitute a continuing injury within the meaning of section 90 of the *Employment Act*. Specifically, she argued that the claim for back pay, underpayments and loss of purchasing power are a continuing claim that was not resolved during the pendency of her contract and the several amendments/alterations/additions made to the said contract, and, it was upon the unlawful termination of her contract that the claim crystalized, so, the institution of the suit for the recovery of the amounts claimed was within time as set out in section 90 of the Act.

35. There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. This



position was upheld by this Court in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* [2018] eKLR.”

21. Section 89 of the *Employment Act* (previously section 90- Revised 2024) is framed in mandatory terms. A claim based on a contract of employment or labour relations must be filed within 3 years of termination of service. 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.
22. The cause of action for unfair termination and claims for terminal benefits arises with the end of employment being the last day the employee exits the shop floor. Any accruing dues or claims concerning the termination must then be brought to court within 3 years of exit from service and any continuing injury claim within 12 months.
23. It is not in dispute between the Claimant and the Respondent that the Claimant’s employment came to an end in December 2014. Three years ended in December 2017. The Claimant filed the present claim on the 3rd of July 2024 over six (6) years 7 months post the timeline under Section 89 of the *Employment Act*.
24. The correspondence between the Claimant and the Respondent indicates that after the termination, the Claimant and the Respondent were engaged in that the Claimant reported the dispute at the Ministry of Labour for conciliation and the respondents invited the Claimant to an internal conciliation, which from the claimant’s letter of 22nd November 2015, did not materialize.
25. The labour office wrote to the respondent on 2nd March 2016 and no response is shown on the same. The claimant wrote a follow-up letter dated 23rd August 2018 and another of 3rd December 2018, requesting for his case to be dealt with, pursuant to the Ministry of Labour’s letter of 2nd March 2016.
26. The Claimant’s last correspondence on the conciliation efforts at the Ministry of Labour was the letter dated 3rd December 2018.
27. The Claimant in his claim asserts that the respondents withheld his pay and monthly house allowance by paying him piecemeal payments for a period of 60 months.
28. The Court upholds the decision in *The German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018)* (supra) that:--

“Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. 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. It follows that the appellant’s argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90”.
29. The claimant alleged he was not paid his salary or house allowance for 60 months which is the entire period of his engagement as a teacher from 2010 to 2014. Nonetheless, even if the Claimant’s claim for back pay and house allowance was to qualify as a continuing injury under Section 89 of the *Employment Act*, the termination having occurred in December 2017, for claim of continuing g injury



as relates withheld pay and house allowances, the same cause of action was to be filed within 12 months after his employment was terminated. The Claimant did not file his suit within the said statutory period and his claim became statute time barred.

30. In the upshot, the Notice of Preliminary Objection dated 25th July 2024 is upheld and the memorandum of claim dated 1st July 2024 dismissed for being statute time barred pursuant to the provisions of section 89 (formerly section 90) of the [Employment Act](#) (Revised 2024).
31. The Court makes no order as to costs.
32. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF SEPTEMBER 2024.

J.W. KELI.

JUDGE

Presentation

C/A Macheso

For Applicant – Obura Obwatinya and Co. Advocates

For Respondent- Office of the Attorney General Senior State Counsel,

Adwar Jette

