Kimani v Board of Management General Mulinge High School (Employment and Labour Relations Cause E039 of 2021) [2024] KEMC 40 (KLR) (3 September 2024) (Judgment)

Neutral citation: [2024] KEMC 40 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

EMPLOYMENT AND LABOUR RELATIONS CAUSE E039 OF 2021

CN ONDIEKI, PM

SEPTEMBER 3, 2024

BETWEEN

MICHAEL MUNGE KIMANI .... CLAIMANT

AND

THE BOARD OF MANAGEMENT GENERAL MULINGE HIGH SCHOOL .... RESPONDENT

JUDGMENT

PART I: Introduction

1. The limitation period (of three years) fixed by section 90 of the Act is couched in mandatory terms. Unlike the limitation period fixed by the *Limitation of Actions Act* for torts, under no circumstances can the limitation period fixed by section 90 of the Act be extended.

PART II: The Claimant's Case

2. Vide a Memorandum of Claim dated 10th November 2021 and filed on even date, the Claimant brought this action against the Respondent seeking Judgment for: a sum of Kshs. 255,532 being retirement benefits and other unpaid dues; costs of this claim and interest on the foregoing heads.

3. The Claimant claims that he was an employee of the Respondent serving as a Grounds-man, between 2009 and 9th February 2015 when he reached the mandatory retirement age and retired. It is claimed that on 5th April 2017, the Claimant's Trade Union, KUDHEIHA negotiated a Collective Bargaining Agreement for payment of retirement benefits and other unpaid dues to the Claimant, totaling to a sum of Kshs. 255,532. It is claimed that the Respondent failed to honour the contractual obligation, leading to this claim.

4. At the hearing of the Claimant's case, CW1, the Claimant, adopted his witness statement dated 8th February 2023 and filed on even date, as his evidence-in-chief. In his said witness statement, the

Claimant rehashes the facts in the Memorandum of Claim and I find it unnecessary to reproduce it here.

5. In support of his claim, the Claimant exhibited the following documents: (i) a copy of payslip as the Claimant's Exhibit 1; (ii) a copy of letter by KUDHEIHA dated 29th March 2017 as the Claimant's Exhibit 2; (iii) a copy of letter by KUDHEIHA dated 17th May 2017 as the Claimant's Exhibit 3; (iv) a copy of letter dated 28th June 2019 by KUDHEIHA as the Claimant's Exhibit 4 and a Further List dated 28th February 2022 as Exhibits 5-8.

6. In cross-examination of the Claimant, he stated that his last day at work was 9th February 2015 when he left for retirement. He stated that he started serving the Respondent on 2nd January 2010. He stated that there was no agreement that his pay was to be deemed as school fees for his children. He conceded that he had one student in the school. He stated that he was a member of KUDHEIHA but he could not recall when he joined it. He stated that Kshs. 80 was being checked-off monthly from his salary to KUDHEIHA. He stated that he had a membership card but it was not produced. He was referred to the payslip which indicates no check-off and he maintained that he used to remit Kshs. 80 to KUDHEIHA monthly. He stated that there were negotiations between the school and KUDHEIHA. He stated that the board was represented but he could not recall the name of the board member. He stated that he did not receive a letter from the board confirming the resolutions.

7. In re-examination, he stated that he was a member of KUDHEIHA and made reference to the letters addressed thereby, exhibited as CEH 2-3.

8. CW2, adopted his witness statement dated 8th February 2023 and filed on even date, as his evidence-in-chief. In his said witness statement, CW2 states that he is aware that the Respondent owes the Claimant the sum claimed.

9. No question was put in cross-examination.

10. CW3, adopted his witness statement dated 8th February 2023 and filed on even date, as his evidence-in-chief. In his said witness statement, CW3 states that he is aware that the Respondent owes the Claimant the sum claimed.

11. No question was put in cross-examination.

12. In his written Submissions dated 10th May 2024 and filed on 14th June 2024, learned Counsel Mr. F. Musyimi instructed by the Firm of Messieurs Fred K. Musyimi & Associates, representing the Claimant, urges that since the Respondent failed to discharge its duty under section 10(1) of the *Employment Act* , the Claimant has discharged his duty to prove an employee-employer relationship in sync with section 9 of the *Employment Act*, citing *Yaa vs. SGA Security Solutions Limited (Employment and Labour Relations Appeal E002 of 2022*) [2022] KEELRC 1553 (KLR) (29 July 2022) (Judgment) to buttress this position.

13. It is submitted that it can be gathered from the Respondent's documents that it was not in a position to pay because the Respondent had not approved the payment and that this thus created a legitimate expectation in the Claimant's mind. In this regard, reliance is placed upon Kenya Chemical and Allied Union Workers Union vs. Bamburi Cement Limited [2017] eKLR.

PART III: The Respondent's Case

14. In its Memorandum of Response dated 17th December 2021 and filed on even date, the Respondent denied all material facts. The Respondent avers that the Claimant was given a chance to render services to the school so that his pay was used to pay school fees.

15. The Respondent raised a Preliminary Objection which this Court declined to determine because it was founded on issues of contested facts, as opposed to a pure point of law, which needed to be established in evidence. Determination of the issue was thus deferred to determination in this Judgment.

16. At the hearing of the Respondent's case, Felix Kyalo, the Principal of General Mulinge High School was the only defence witness and he adopted his witness statement dated 28th July 2023 and filed on 31st July 2023, as his evidence-in-chief.

17. In his said witness statement, Mr. Kyalo rehashed the position taken in the response that the Claimant was engaged on humanitarian grounds in 2014 for a period of one year, to render services to the school, so that his pay was converted as school fees for his son. He states that after he left on retirement, he turned against the school and started demanding the sums claimed.

18. In support of the defence, Mr. Kyalo exhibited the following documents: (i) a copy of a contractual letter dated 4th April 2014 as the Respondent's Exhibit 1; (ii) a copy of letter to KUDHEIHA dated 18th May 2017 as the Respondent's Exhibit 2; and (iii) a copy of letter to the Labour Officer dated 11th January 2018 as the Respondent's Exhibit 3.

19. In cross-examination of Mr. Kyalo, he stated that the Claimant was engaged on humanitarian grounds in 2014 for a period of one year, to render services to the school, so that his pay was converted as school fees for his son. He stated that he did not provide the names and documents of the students. He stated that in fact, by the time the Claimant left, there was a school fees balance of Kshs. 50,000. He stated that the contract is dated and stamped. He stated that the date is on the stamp impression. He stated that the contract is not signed by the Claimant. He stated that in the Respondent's Exhibits 2-3, he was responding to letters from KUDHEIHA and he denied liability of the school. He stated that the payslip had to be issued for proper accounting.

20. In his written Submissions dated 2nd July 2024 and filed on 4th July 2024, learned Counsel Mr. Mutia instructed by the Firm of Messieurs Mutia JM & Associates, representing the Respondent, has proposed three questions for determination as follows: (i) whether the Claim is statute-barred; (ii) whether the Respondent entered into a collective bargaining agreement; and (iii) whether the Respondent is entitled to the reliefs sought.

21. Regarding the question whether the Claim is statute-barred, it is answered in the affirmative. It is submitted that while under cross-examination, the Claimant confirmed that the last date he was in service was on 9th February 2015 and the three years contemplated under section 90 of the *Employment Act* expired on 9th February 2028. In this regard, reliance is placed upon Isaac Newton Kinity vs. Attorney General [2020] eKLR where the COA decision in Beatrice Kahai Adagala vs. Postal Corporation of Kenya [2015] eKLR, which held that section 90 aforesaid is couched in mandatory terms. It is further submitted that the time limited under section 90 cannot be extended, placing reliance in John Kiiri Njiiri vs. University of Nairobi [2021] eKLR.

22. It is thus concluded that this Court lacks jurisdiction to determine this matter, citing Samuel Kamau Macharia & another vs. Kenya Commercial Bank of Kenya Limited & another [2012] eKLR.

23. Regarding the question whether the Respondent entered into a collective bargaining agreement, it is submitted that there was no collective bargaining agreement which was entered between the Claimant and the Respondent, as evident from the exchange of correspondence.

24. It is thus urged that the Claimant is not entitled to the reliefs sought.

PART IV: Questions For Determination

25. Commending themselves for determination - gleaning from the Memorandum of Claim; Memorandum of Response; and the rival written Submissions - are four questions as follows:

    i. Whether this claim is time-barred in the context of section 90 of the *Employment Act*.

    ii. Whether the Claimant was an employee of the Respondent.

    iii. Whether the Claimant has proved on a preponderance of probabilities that there was a collective bargaining agreement between the Claimant and the Respondent and appropriate reliefs emanating therefrom.

    iv. Which party will shoulder the costs of this claim?

PART V: Analysis Of The Law; Examination Of Facts; Evaluation Of Evidence And Determination

26. This Court will determine each of the three questions in turn.

(i) Whether this claim is time-barred in the context of section 90 of the *Employment Act*

27. This issue was contested vide a Preliminary Objection (hereafter "PO"). In the Ruling of this Court dated and delivered on 23rd March 2023, the Objection failed the acid test of a PO, on account of having been based on a blend of both law and a contentious fact, contrary to the character of a PO anticipated by law. The contentious fact was thereby subsumed into the main suit, to be established in viva voce evidence.

28. A right to sue has a shelf-life. For many reasons, the law does not give an open cheque to right-holders of a latent suit. In this connection, diverse statutes have fixed diverse time limits.

29. Limitation of time for filing of claims is not without a philosophical foundation. The principal purpose of limitation of period within which one can institute a claim is to prevent a Claimant from prosecuting stale claims on the one hand and protect a Defendant who may have lost evidence from being prejudiced after along lapse of time. It is not the purpose of limitation of period by statute to extinguish claims. In Rawal vs. Rawal [1990] KLR 275, Bosire, J. (as he then was), following a position which had been taken in an earlier decision in Dhanesvar Mehta vs. Manilal M Shah [1965] EA 321, held that "The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he had lost evidence for his Defence from being disturbed after along lapse of time. It is not to extinguish claims."

30. However, it is should be underlined that limitation is not equivalent to extinction of a right. And so, it is not the purpose of the statute limiting the period within which to a claim can be instituted to extinguish the claim. In Iga vs. Makerere University [1972] EA 65, the Court held that: "A Plaint which is barred by limitation is a Plaint "barred by law". A reading of the provisions of sections 3 and 4 of the Limitation Act (Cap 70) together with Order 7 rule 6 of the Civil Procedure Rules seems clear that unless the Appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the Court "shall reject" his claim...The Limitation 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."

31. This Court will open this confab with the broad legal principles in this regard. Generally, the limitation period fixed for actions founded on contract are inelastic, quite dissimilar to the limitation period fixed for torts - based on negligence, nuisance or breach of duty – which are extendable in circumstances

where the damages claimed are in respect to personal injuries to the Plaintiff as a result of the tort. In Divecon Ltd vs. Samani [1995–1998] 1 EA 48 (hereinafter "the Divecon Ltd") , the Court of Appeal discussed the issue of elasticity or otherwise of the period limited to file actions based on both torts and contracts generally; ignorance of the Plaintiff in relation thereto; conditions to be fulfilled before time would be extended (material facts of decisive nature). In that action, the Respondent was the mother of a pilot of an aircraft belonging to the appellant and who died in an accident involving the aircraft. The Respondent successfully secured leave, ex parte, to file a suit out of time under the *Fatal Accidents Act* and the *Law Reform Act*. On appeal and in setting aside the leave granted by the High Court, the COA held that ignorance of the law on period of limitation was not a material fact. Kwach, Akiwumi and Pall JJA (as they then were), held as follows: "As regards the action in contract, the learned Judge of the Superior Court, having conceded that the Act did not provide for the extension of time after the lapse of the limitation period of six years, went on, however, to conclude that the wording of section 4(1) of the Act was nevertheless, such as could enable the Court to exercise its discretion and to extend time in deserving cases. To us, the meaning of the wording of section 4(1) that: "The following actions may not be brought after the end of six years from the date on which the cause of action occurred: (a) Actions founded on contract", is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded in contract. The corollary to this is that no Court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. The provisions of section 3 of the Act also support the view we have just expressed as to the meaning to be ascribed to section 4(1) of the Act. Part II of the Act is headed Periods of Limitation and covers sections 3 to 21 of the Act. Section 3 which is in the following terms: "This Part is subject to Part III, which provides for extension of the periods of limitation in the case of disability, acknowledgement, part payment, fraud mistake and ignorance of material facts", limits the instances and the circumstances in which any extension of the periods of limitation specified in Part II of the Act, may be granted. A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that "the wording of section 4(1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked."

32. The position in the Divecon Ltd case has been upheld consistently. See for instance Willis Onditi Odhiambo vs. Gateway Insurance Co Limited {2014} eKLR; Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Limited [2017] eKLR; Kenya Airways Limited vs. Transport & Allied Workers Union [2019] eKLR; Attorney General & another vs. Andrew Maina Githinji & another [2016] eKLR, et alia, where the Court of Appeal has consistently held that period limited for bringing an action can only be extended where the action is founded on tort and conditioned further on two acid tests: first, that the tort must be that of negligence, nuisance or breach of duty and second, the damages claimed should be in respect of personal injuries to the Plaintiff as a result of the tort.

33. It is without doubt that employment disputes fall under the category of claims based on contract (of employment). In this connection, the *Employment Act* has enacted an exclusive limitation period limited to disputes founded on a contract of employment, which ousts the application of section 4(1) of the *Limitation of Actions Act*. Section 90 of the *Employment Act* provides that "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."

34. The limitation period fixed by section 90 of the Act is couched in mandatory terms. See the COA decision in Beatrice Kahai Adagala vs. Postal Corporation of Kenya [2015] eKLR (hereinafter "the

Adagala case"), where Maraga, JA (as he then was), Gatembu & Murgor, JJA held unequivocally that "14. 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* 2007 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 -vs- Samani [1995-1998] 1 EA P.48, a decision relied upon by Radido, J. in Josephat Ndirangu - vs – Henkel Chemicals (EA) Limited, [2013] 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*. 15. Although for different reasons, as we have said Wasilwa, J. refused to extend the limitation period in the said Cause thus prompting this appeal. Even if the appeal was heard on 19th November 2014, we have no doubt that it was going to be dismissed. It follows that even if we allow the appellant's present application and restore her appeal, it will still be dismissed on the self-same ground that the limitation period is never extended in claims arising from contracts.16. As we have stated, much as we sympathize with the appellant, allowing this application will not only be an exercise in futility but will instead cause her to incur more costs. Consequently, we dismiss this application with costs to the Respondent."

35. And so, unlike periods under the *Limitation of Actions Act* for torts, which can be extended under certain limited circumstances, the limitation period fixed by section 90 of the Act cannot be extended. See John Kiiri Njiiri vs. University of Nairobi [2021] eKLR, where M. Mbaru, J. held that "The limitation period is never extended in matters based on an employment 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* which provisions do not apply in employment and labour relations claims."

36. Faced with a claim which was based on a contract of employment, and which was filed by the Respondent after not after acquittal but also long after the three years (fixed by section 90 of the *Employment Act*) had elapsed in Attorney General & another vs. Andrew Maina Githinji & another [2016] eKLR (hereinafter "the Andrew Maina case"), Waki, Nambuye & Kiage, JJA, held that if a matter is statutorily time-barred, there is no room for exercise of judicial discretion.

37. In the Adagala case too, Maraga, JA (as he then was), Gatembu & Murgor, JJA held that "14...A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of Divecon Limited -vs- Samani [1995-1998] 1 EA P.48, a decision relied upon by Radido, J. in Josephat Ndirangu - vs – Henkel Chemicals (EA) Limited, [2013] 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*."

38. The million-dollar question which will form the fulcrum upon which this dispute will turn is: when does time start to run for purposes of section 90 of the *Employment Act*?

39. A plain reading of section 90 leads to the conclusion that the time limited thereby commences to run from the date of any of the following four events or points of reference: (i) an act; or (ii) neglect; or (iii) default; or (iv) in the case of a continuing injury or damage, it will commence to run at the effluxion of 12 months after the cessation of the continuing injury or damage.

40. While under cross-examination, the Claimant stated that he retired from service (of General Mulinge High School) on 9th February 2015.

41. And when should it start running in the context of this claim? Put differently, of the four events or points of reference contemplated by the Act, which event or point of reference is applicable to the

special circumstances of this claim? Is it the date of the act or neglect or default or 12 months after cessation of the continuing injury or damage?

42. In the said Andrew Maina case, who approached the Court long after the three years had elapsed after acquittal, Waki, Nambuye & Kiage, JJA held that time starts to run from the date of dismissal and not the date of acquittal.

43. Similarly, in circumstances where a former employee is claiming unpaid work emoluments and terminal benefits, time started to run from the date of termination of employment and that unpaid work emoluments and terminal benefits do not constitute a continuing injury within the contemplation of section 90 of the Employment and the right to sue expires upon effluxion of three years enacted in section 90 of the *Employment Act*, from the time of termination of employment. In a matter which bears striking resemblance with this namely G4S Security (K) Limited vs. Joseph Kamau & 468 others [2018] eKLR (herein after "the Joseph Kamau case"), it was held by the trial Court (M.N. Nderi, J.) that as long as the Claimant's emoluments and terminal benefits remained unpaid, the act constituted a continuing injury within the contemplation of section 90 of the Employment, which then renewed the three years as long as it remained active. On appeal, the Court of Appeal (hereinafter "the COA") expressed a divergent opinion that in circumstances where a former employee is claiming unpaid work emoluments and terminal benefits, time started to run on the date of termination of employment and the act of non-payment does not constitute a continuing injury within the contemplation of section 90 of the Employment and the right to sue expires upon effluxion of three years enacted in section 90 of the *Employment Act*, from the date of termination of employment. In this case, GBM Kariuki, Mohammed and Kantai, JJA, pronounced themselves as follows: "[20] In the circumstances of this case we find that such 'unpaid terminal dues' do not constitute a continuing injury as contemplated under the proviso to Section 90 of the *Employment Act*. The Respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month. Regarding 'a continuing injury', the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the Claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred."

44. In this case, negotiations between KUDHEIHA and the Principal of General Mulinge High School, were cited to have taken a while and that when they collapsed, the Claimant decided to file this claim. How does this play out with section 90 of the *Employment Act*? It has been held that negotiations or conciliation does not stop time limited by section 90 from running. See the said Joseph Kamau case, where the COA held that conciliation does not stop time from running. GBM Kariuki, Mohammed and Kantai, JJA held thus: "[21] On the Respondent's contention that the parties were undergoing a conciliation process which occasioned a delay in the Respondents' filing suit pending the outcome of the conciliation process, we note that there is no documentary evidence to prove that contention. Indeed, there appears to have been no evidence to prove this fact before the learned Judge. [22] The statutory framework on the conciliation process is as provided for by the provisions of the *Labour Relations Act*, 2007. Section 62 (3) of the *Labour Relations Act*, 2007 provides that a trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within 90 days of the dismissal or any longer period that the Minister, on good cause, permits. It is not clear exactly when the Respondents reported this matter for conciliation. [23] Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under *the Constitution* or any other law." The COA was guided by its previous holding in Rift Valley Railways (Kenya) Ltd V Hawkins Wagunza Musonye and another [2016] eKLR, where it was

held as follows: "While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be Court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of Court negotiations. It was incumbent upon the Respondents to bear in mind the provisions of Section 90 of the *Employment Act* even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the Respondents' contracts of service."

45. Whereas, limited to the question of whether the period utilized for alternative dispute resolution (ADR) and/or ongoing criminal prosecution which leads to an acquittal of the Claimant constitutes a continuing injury, this Court subscribes to a school of thought divergent from the one subscribed by the COA in the Joseph Kamau and Andrew Maina cases, under the doctrine of stare decisis, this Court must defer to and is bound by the holding of the COA in the said cases.

46. My school of thought is to the effect that in circumstances where a Claimant who claims to have been dismissed or who claims unpaid emoluments and terminal benefits upon termination of employment, and the Claimant demonstrates on (a balance of probabilities) that he has not been indolent, by either engaging the former employer in ADR and/or that prosecution of a criminal case against the Clamant was underway and that the case was finally determined in his favour, then the period utilized for ADR or prosecution of the criminal case should be construed as a continuing injury, within the contemplation of section 90 of the Employment, and the right to sue should then last for twelve months next after the cessation thereof.

47. It would be imprudent and it would possibly be a latent avenue for judicial embarrassment if under pressure of the mentioned rigid timeframe, the Claimant files a civil matter and successfully secures civil remedies but later, the Claimant is found guilty in a criminal case. Besides, proceeding in that rigid posture provides a platform for possible prejudice to the Claimant. In my mind, although the statutory position under section 193A of the Criminal Procedure Code is that civil and criminal proceedings can run concomitantly, to avoid probable judicial embarrassment, it would be neater to permit criminal proceedings to run a full lap advised by the interplay between a determination of a criminal and civil fact housed in section 47A of the *Evidence Act* which decrees that a "final judgment of a competent Court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged", before pursuing civil remedies, in which case, the waiting period should be construed as a continuing injury so as not to be prejudicial to the Claimant who adopted this prudent and logical order of proceedings. See *Maina & 4 others vs. The Director of Public Prosecutions & 4 others (Constitutional Petition E106 & 160 of 2021* (Consolidated)) [2022] KEHC 15 (KLR) (Constitutional and Human Rights) (27 January 2022) (Judgment), where at paragraph 90, AC Mrima, J. reasoned that this is the logical order of proceedings whenever the matter in issue in any criminal proceedings which was also directly or substantially in issue in any pending civil proceedings, rendering himself as follows: "From the two scenarios, there is, therefore, logic in the general position that where there are concurrent criminal and civil cases based on similar facts and circumstances, the criminal case ought to be allowed to first be heard and determined."

48. This school of thought, which places premium on ADR and avoid potential judicial embarrassment, resonates most and enjoys affirmation by Article 159 (2)(c) of *the Constitution* of Kenya which enjoins the Court to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms and which ultimately best serves the ends of justice.

49. My judicial view is further woven on section 7(1) of the Sixth Schedule to *the Constitution* which addressed itself to laws which pre-existed *the Constitution* of Kenya 2010 and provides that statutes should be construed with necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution by providing as follows: "7. (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution." It is thus my strong view that section 90 of the *Employment Act* should be construed with necessary adaptation to Article 159(2)(c) of *the Constitution* of Kenya, as to accommodate ADR, where necessity so demands.

50. Besides, my judicial view is further fortified by the judicial view of Nduma Nderi, J. in the Joseph Kamau case and further cemented by the heavily persuasive authority - because the subject of discussion is extension of time relating to a tort of negligence about a personal injury under the *Limitation of Actions Act* - of David Stephen Gatune vs. Headmaster, Nairobi Technical High School & another [1986] eKLR (hereinafter "the Getune case", also reported as Gatune vs. The Headmaster, Nairobi Technical High School Another [1988] KLR 561), in which the COA allowed extension of time on basis of the fact time was wasted when parties were negotiating and the AG cannot turn around and cite effluxion of time when it was actively participating on the table of negotiation, without inferring that it was a decoy to buy time. Nyarangi, JA (as he then was) elegantly rendered himself as follows, with Hancox JA (as he then were) concurring but Platt, Ag. JA, dissenting, on grounds that the conduct of the Respondent submitting to negotiation did not amount to and meet the elements of promissory estoppel: "The appellant negotiated with the Attorney General from 1977 to October 1981. He had faith in the negotiations. The Respondents would now be barred from setting up the provisions of the Act; Halsbury's Laws of England, 14th edition, Volume 28, para. 608. Certainly the appellant pursued his claim which he believes is a good one with reasonable diligence – he has not been idle since he received the medical report: See also Board of Trade v Gayzer, Iruine Feo. [1927] A.C 610. I do not therefore regard it as accurate to say that the appellant waited from August 1979 to 1981. On the evidence as I understand it, the appellant should have brought his action by 2nd January 1980. The delay of 10 months appears to have been due to negotiations. In my view, the Attorney-General should have informed the appellant well before 2nd January 1980 that it was in his interests to file an action within three years from the 6th August 1967 and that by doing so he would not be prejudicing the negotiations out of Court. Having not done so and therefore having caused the appellant to continue the negotiations, it is only fair that the appellant should not be penalized for attempting to settle the dispute out of Court. I fear that a contrary view will operate harshly on the appellant who has been guilty of no laches and has negotiated in good faith." If carefully read in the context of the mischief highlighted in the Getune case, the conduct of the offending party of entertaining and actively participating in the negotiations, will properly so, constitute a continuing injury.

51. This claim was filed on 10th November 2021. On authority of the Joseph Kamau case, it follows that the three years expired on 8th February 2018, and with effect from 9th February 2018, the Claimant was thus deprived of the right to bring this action, by effluxion of time.

52. In any event, even if the act of negotiations was to be deemed a continuing injury in accordance with my school of thought, considering the last communication on record relating to the negotiations, is dated 28th June 2019, the 12 months lapsed on 27th June 2020 and since this claim was filed on 10th November 2021, the Claimant was on this plane too, deprived of the right to bring this action by effluxion of time.

53. It further follows that this Court lacks jurisdiction to determine questions (ii) and (iii), since they are substantive questions in character.

54. Consequently, this Court drops its tools.

PART VI: Disposition

55. Wherefore this Claim is dismissed with costs to the Respondent.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 3RD DAY OF SEPTEMBER, 2024

……………………

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Claimant:…………………………………………………………………

Advocate for the Respondent:………………………………………………………………

Court Assistant:……………………………………………………………………………