



**Okello v University of Nairobi (Appeal E055 of 2024)
[2025] KEELRC 2964 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2964 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E055 OF 2024
NZIOKI WA MAKAU, J
OCTOBER 30, 2025**

BETWEEN

EZRA OKELLO APPELLANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

*(Being an appeal from the Judgment of Hon. Maureen Nyigei (PM)
delivered on 24th September 2024 in Kisumu CMCELRC No. E062 of 2024)*

JUDGMENT

1. Via a statement of claim dated 24th February 2024 the Appellant sued the Respondent before the Magistrate’s Court seeking the following reliefs:
 - a. A declaration that he was constructively dismissed from employment;
 - b. Payment of salary arrears amounting to Kshs. 463,000/- for the period between January 2014 and August 2020;
 - c. General damages for unlawful constructive dismissal from employment;
 - d. Costs of the suit; and
 - e. Interest on items (b), (c) and (d) above at commercial rates.
2. The Appellant’s case was that he had been employed by the Respondent as a part-time lecturer in 2009, attached to the School of Open and Distance Learning at the Kisumu Campus. He averred that although he taught several units between 2014 and 2017, he was never paid his dues, which accumulated to Kshs. 358,000/-. Further, he contended that he supervised diploma students and taught additional units for which he was equally not remunerated, bringing the total amount owed to Kshs. 463,000/-.



3. Despite issuing numerous reminders and demands to the Respondent, the Appellant stated that the arrears remained unpaid. This prolonged non-payment, he asserted, led to severe financial distress and ultimately forced him to terminate his contract. He claimed that as a result of the Respondent's conduct, he suffered loss of income, missed investment opportunities, and was unable to meet his financial obligations.
4. With respect to the issue of limitation, the Appellant contended that the question of time had been resolved through Kisumu CMCC Misc. No. E271 of 2023, where the court granted him leave to file the suit out of time.
5. In response, the Respondent filed a statement of defence and counterclaim dated 18th March 2024. It contended that the Appellant's engagement was irregular and unlawful, having been effected by an entity lacking statutory authority to employ. Consequently, the Respondent argued that such an appointment was void and incapable of grounding any enforceable claim. The Respondent further asserted that the Appellant's recruitment process lacked transparency, competition, and adherence to the rule of law, and therefore could not be upheld by the court. It also maintained that the claim was time-barred, as it was founded on a continuing injury contrary to section 90 of the *Employment Act*. On this basis, the Respondent urged the court to dismiss the suit and, by way of counterclaim, sought a refund of all monies paid to the Appellant since 2009, together with interest at 30% per annum until payment in full.
6. At the conclusion of the hearing the magistrate dismissed the claim, holding that it was statute-barred under section 90 of the *Employment Act*.
7. Dissatisfied with the judgment the Appellant lodged the current appeal faulting the trial court on the grounds that:
 - i. The Magistrate erred in law and fact by holding that his suit was time barred, without considering that leave had been duly granted in Kisumu MCC Misc. No. E271 of 2023 on 1st December 2023;
 - ii. The Magistrate erred in law and fact by failing to appreciate that the Appellant had diligently served the Respondent for over six years without pay, contrary to employment law; and
 - iii. The Magistrate erred in law and fact by Ignoring that the delay in filing the claim was occasioned by the Respondent's repeated promises to pay, which caused him to wait until the statutory timelines had lapsed.
8. On the basis of these grounds, the Appellant urged this Court to allow the appeal, set aside the magistrate's judgment, and enter judgment in his favour as prayed before the trial court. He also sought costs of the appeal.
9. Pursuant to directions that the appeal be disposed of by way of written submissions, both parties filed their respective submissions.

Appellant's Submissions

10. In support of his appeal, the Appellant identified three issues for determination:
 - a. Whether the Trial Court erred by dismissing the claim as time-barred despite the existence of a valid court order extending time;
 - b. Whether the Respondent's failure to pay salary for over six years amounted to constructive dismissal and a breach of employment law; and



- c. Who should bear costs of the suit.
11. On the issue of limitation, the Appellant asserted that the Magistrate erred by disregarding the order granting him leave to file his claim out of time. He submitted that the Respondent had not opposed the application for extension, and therefore the court had jurisdiction to entertain the claim. He relied on *Dhanji Ramji v Commissioner of Prisons & another* [2022] eKLR, which held that once leave is granted, limitation ceases to be a bar to a suit.
 12. The Appellant further contended that the delay was caused by the Respondent's repeated assurances that payment would be made. He thus urged the Court to prioritize substantive justice over procedural technicalities, invoking Article 159(2)(d) of *the Constitution*. In support of his position, he relied on *Kenya Ports Authority v Edward Otieno* [2022] eKLR, which frowned upon the locking out of litigants due to minor procedural omissions where the substance of the claim is justifiable. He also cited *Patrick Mwaniki Gachoki v Teachers Service Commission* [2023] eKLR, which held that delays occasioned by an employer's reassurances and eventual inaction should not prejudice employee rights.
 13. On the second issue, the Appellant submitted that the failure to pay him for over six years despite his continued service amounted to constructive dismissal. He relied on *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2022] eKLR, *Milton M. Isanya v Aga Khan Hospital Kisumu* [2017] eKLR, and *Godfrey Allan Tolo v Tobias O. Otieno & another* [2020] eKLR, to support his contention that sustained non-payment of salary creates an intolerable working environment that justifies termination by the employee.
 14. On costs, he urged the Court to award them in his favour, asserting that it was the Respondent's breach that necessitated the litigation.

Respondent's Submissions

15. The Respondent, on its part, maintained that the suit was rightly dismissed for being time-barred. It averred that the Magistrate's Court lacked jurisdiction to extend time under section 90 of the *Employment Act*, as the provision is couched in mandatory terms. In support of this position, the Respondent cited the cases of *Peter Nyamai & 7 others v M. J. Clarke Limited* [2013] eKLR, *John Kiiru Njiru v University of Nairobi* [2021] eKLR, and *J. Njunge v Muasya (Appeal E040 of 2023)* [2024] KEELRC 265 (KLR), which all hold that claims founded on employment contracts cannot be filed after the three-year limitation period.
16. The Respondent further submitted that the Learned Magistrate was correct in dismissing the suit on a pure point of law capable of disposing of the matter at an early stage. It relied on *Alba Petroleum Limited v Total Marketing Kenya Limited* [2019] eKLR, which explained that limitation statutes exist to protect defendants from stale claims and to promote diligence in litigation. Additionally, it cited *Michira & 41 others v Aegis Kenya Limited t/a Leopard Beach Hotel* [2023] eKLR, which underscored that there is no legal mechanism for reviving a claim that is time-barred.

Disposition

17. The appeal herein hangs on one aspect only. The approach to the courts for resolution of an employment dispute is anchored in provisions of the law and section 90 of the *Employment Act* is paramount. Article 159 cannot be waved in the face of express legal provisions. The said 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.

[Emphasis supplied]

18. In the case of *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* [2013] KEELRC 890 (KLR) Radido J. held as follows:-

31. Section 4(1) of the *Limitation of Actions Act* was amended partly by section 90 of the *Employment Act*. Section 90 provides for a limitation of three years but it has no provision for extension of time to bring a claim out of time.

32. This Court has in the recent past dealt with the question whether it has power or jurisdiction to extend time.

33. The Court's answer and what I understand to be the correct legal position is that the Court has no jurisdiction to extend time to commence claims arising out of contract, employment contract included once time has expired or lapsed.

[Emphasis supplied]

19. The Learned Magistrate read the section to mean there was no basis for the suit before her. A correct reading of section 90, which is what the Learned Magistrate held, means that no one shall have the right or power to bring after the end of three years from the date on which a cause of action accrued in case of disputes in the employment sphere. I cannot fault the Learned Magistrate for applying the law and despite there having been an illegal extension of leave to file suit out of time, the same did not confer any right on the Appellant or any Court to deal with a dead claim. As the case had no business being in court, this Appeal is dismissed with costs to the Respondent.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF OCTOBER 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

