



**Okoth v New Kenya Co-operative Creameries (Cause 1761 of 2015)  
[2025] KEELRC 817 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 817 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1761 OF 2015  
CN BAARI, J  
MARCH 13, 2025**

**BETWEEN**

**ISAAH ODHIAMBO OKOTH ..... CLAIMANT**

**AND**

**NEW KENYA CO-OPERATIVE CREAMARIES ..... RESPONDENT**

**JUDGMENT**

1. The Claimant lodged this claim vide a Memorandum of Claim filed in court on 2<sup>nd</sup> September, 2015. His claim is for the award of the following reliefs:-
  - a. A declaration that his termination was unlawful and unfair
  - b. An order for payment of Kshs.1,430,000/=-, comprising of salary in lieu of notice, salary for November, 2010, leave, house allowance and compensation for the unfair termination.
  - c. Costs of the suit
2. The Respondent entered appearance on 16<sup>th</sup> October, 2015 and subsequently lodged a reply to the claim on 29<sup>th</sup> October, 2015, denying the allegations and further asserting that the Claimant's termination was lawful, procedural, and justified, in accordance with the *Employment Act*, 2007, and the Company's Code of Regulations.
3. The Claimant's case was heard on 21<sup>st</sup> January, 2020. When the matter came up for hearing of the Respondent's case on 17<sup>th</sup> March, 2021, both parties were absent, and the Court (differently constituted) dismissed the suit for non-attendance.
4. The suit was subsequently reinstated on 27<sup>th</sup> April, 2022 on the application of the Claimant, and the Respondent's case heard to conclusion on 24<sup>th</sup> October, 2024, paving way for filing of submissions.
5. Submissions were filed for both parties, and which have been duly considered.



### **The Claimant's Case**

6. The Claimant's case is that he was employed by the Respondent in January, 2006 as a sales representative at a monthly salary of Kshs.33,710.00 which was gradually increased to Kshs.50,000 due to what he terms excellent performance of his role.
7. It is his case that he worked for the Respondent honestly and diligently for a period of 4 years and 5 months, and that he exerted himself to the best of his ability that he rose through the ranks to the position of the Regional sales manager, Nyanza and Western regions.
8. He avers that on 24<sup>th</sup> February, 2010, he was promoted to the position of Area Sales Manager for Nyanza and Western regions, and that on 1<sup>st</sup> March, 2010, he was issued with a warning letter for deteriorating performance in meeting sales targets, after he had been in the new office for only 5 days.
9. The Claimant states that he was taken through a sham disciplinary process which was meant to sanitize his subsequent termination. He states that the reasons given in the show cause letter and those given for his termination were different.
10. The Claimant states that on 23<sup>rd</sup> November, 2010, he was shocked to receive a termination letter on account of abuse of office on allegations of spending company money without due authorization and failing to refund the same. That the Respondent further alleged that he allowed salesmen to accumulate underpayments leading to loss of company funds of up to a total of Kshs.500,000 /=.
11. The Claimant prays that his claim be allowed.

### **The Respondent's Case**

12. The Respondent states that the Claimant was employed as a Sales Representative on 4<sup>th</sup> January 2006, earning a salary of Kshs.33,710, which later rose to Kshs.50,000 upon promotion to Area Sales Manager, Western Region on 24<sup>th</sup> February 2010.
13. The Respondent states that it issued the Claimant with a warning letter to caution him on the decline of sales, as a result of his negligence through a letter dated 1<sup>st</sup> March 2010. It states further, that on 20<sup>th</sup> July 2010 and 23<sup>rd</sup> August 2010, the Claimant was informed of his continuous poor sales performance in the western region through a letter of even date.
14. That despite the issuance of these letters, the performance of the Claimant did not improve, and the Respondent was left with no choice, but to issue a suspension from employment letter dated 24<sup>th</sup> September 2010, to allow for investigations on a number of disciplinary issues including accumulated underpayments and a loss of Kshs.509,596.00.
15. It is the Respondent's case that the Claimant was subjected to due process as envisioned under the *Employment Act* by affording him a disciplinary hearing and an opportunity to respond to the issues raised by the Respondent.
16. It states further that the Claimant was terminated on 23<sup>rd</sup> November 2010 due to gross misconduct, financial mismanagement, and breach of company policies, as set out in the Company's Code of Regulations.
17. The Respondent prays that the suit be dismissed.



### **The Claimant's submissions**

18. It is the Claimant's submission that having established prima facie that he was unprocedurally terminated after diligently serving the Respondent, it is clear that his termination was unfair in terms of procedure.
19. It is his submission that Section 35 *Employment Act* 2007, provides for issuance of termination notice, which he was not given, hence his termination was unfair both in substance and procedure.
20. The Claimant submits that he is entitled to the remedies sought on account of unfair termination due to the Respondent's failure to follow due process.

### **The Respondent's Submissions**

21. It is the Respondent's submission that the Claimant was terminated on 23<sup>rd</sup> November 2010, but filed this claim on 2<sup>nd</sup> September, 2015, five years after the cause of action arose. The Respondent placed reliance in the case of *John Kiiru Njiiri v University of Nairobi* [2021] eKLR where the court while quoting the case of *James Mugeria Igati v Public Service Commission* [2014] eKLR held as follows:-

“The court held that the accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination of employment as stated in the letter communicating the same.”

22. The Respondent submits further that this Honourable Court is barred from extending the time in matters based on an employment contract.
23. It is submitted that the Claimant being aggrieved with the decision by the Respondent to terminate him, he ought to have filed this claim in the year 2013 at the latest, but chose to sleep on his rights and this Honourable Court can therefore not come to his aid.
24. The Respondent further submits that the Claimant's termination met both the procedural and the substantive fairness tests.
25. The Respondent prays that the Claimant's suit be dismissed.

### **Analysis and Determination**

26. I have considered the pleadings herein, the witnesses' testimonies and the submissions by both parties. The issues that fall for determination are:-
  - i. Whether the suit is statute barred
  - ii. Whether the Claimant was unfairly dismissed.
  - iii. Whether the Claimant is entitled to the reliefs sought.

### **Whether the suit is statute barred**

27. The Respondent contends that the Claimant's suit is time barred, the same having been lodged 5 years after the accrual of the cause of action.
28. A question of limitation goes to the jurisdiction of the court; hence the court has to pause and first deal with the issue of jurisdiction stemming from the question of time limitation before addressing any other issues in the case.



29. The Claimant's claim is premised on a contract of service, which by law has a limited period within which one must lodge their claim. Section 90 of the Employment Act, 2007, states as follows:-

“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.”

30. By dint of the foregoing provision, a claim premised on an employment contract, should by law be instituted within three years upon the accrual of the cause of action.

31. In the case of Gathoni vs. Kenya Co-operative Creameries Ltd Civil Application No. 122 of 1981, Potter, J. observed in obiter that;

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

32. The Claimant herein, was dismissed from the service of the Respondent on 23<sup>rd</sup> November, 2010. He filed this suit on 2<sup>nd</sup> September, 2015, close to 5 years after the said dismissal.

33. The Court of Appeal in Attorney General v Andrew Maina Githinji & Another (2016) eKLR, held that once the employee received the termination letter, the termination took effect and the cause of action accrued, and that was the date time began to run.

34. Further, and as correctly submitted by the Respondent, the limitation period set under Section 90 of the Employment Act, 2007 is not elastic, and therefore, the court has no latitude to expand/extend that time. In the case of Wariahe v Teachers Service Commission (Employment and Labour Relations Petition E011 of 2023) [2023] KEELRC 2777 (KLR) (3 November 2023) (Ruling) quoting the case of Beatrice Kahai Adagala v The Postal Corporation of Kenya [2015] eKLR the Court of Appeal held that:-

“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 three 3 years. As the court stated in Divecon Limited v Samani [1995-1998] 1 EA p. 48 ... the limitation period is never extended in matters based on contract.”

35. The suit herein having been filed in 2015, is five (5) years late by Section 90 of the Employment Act. It no doubt is statute barred.

36. I therefore find and hold that the Claimant's claim filed on 2<sup>nd</sup> September, 2015 is statute barred, and the court lacks jurisdiction to entertain the same, and must now down its tools.

37. The suit is hereby struck out in its entirety with no orders as to costs.

38. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 13TH DAY OF MARCH, 2025.**

**C. N. BAARI**



## **JUDGE**

Appearance:

Mr. Ochieng h/b for Mr. Khalwale for the Claimant

Ms. Kariuki h/b for Mr. Gitonga for the Respondent

Ms. Esther s- C/A

