



**Otimah v Sameer Africa Limited t/a Sameer Africa PLC (Cause E701 of 2024) [2025] KEELRC 1613 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1613 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E701 OF 2024**

**SC RUTTO, J  
MAY 30, 2025**

**BETWEEN**

**KENNEDY MAKONJIO OTIMAH ..... CLAIMANT**

**AND**

**SAMEER AFRICA LIMITED T/A SAMEER AFRICA PLC ..... RESPONDENT**

**RULING**

1. The matter herein is part of a series of 31 similar causes that were filed against the Respondent. On 24<sup>th</sup> February 2025, the parties herein agreed that this matter (Cause No E701 of 2024) be tried as a test suit pursuant to Rule 62 of the Employment and Labour Relations Court (Procedure) Rules 2024.
2. The record bears that the Claimant brought the instant suit through a Statement of Claim which was filed on 30<sup>th</sup> August 2024. The Claimant avers that he was employed by the Respondent through a contract of service as a tire builder from 1<sup>st</sup> July 2001.
3. The Claimant further avers that sometimes in early 2015, the Respondent embarked on a staff rationalization process in which he would be paid gratuity.
4. It is the Claimant's case that on 16<sup>th</sup> July 2015, the Respondent notified him that pursuant to a memorandum of understanding between the Union and the Respondent on 6<sup>th</sup> July 2015, it was agreed that his total accrued gratuity of Kshs 464,978 had been frozen effective 1<sup>st</sup> June 2015. That the total accrued gratuity would be transferred to a provident fund established by the Respondent.
5. The Claimant contends that he is aggrieved by the decision of the Respondent to calculate gratuity on the basis of age and/or his categorization on the basis of age in that; employees who were 45 years and above were to be paid at the rate of 32 days for every completed year while employees who were 45 years and below were to be paid at the rate of 19 days for every completed year.



6. It is against this background that the Claimant sought several declaratory orders against the Respondent together with an order directing the Respondent to pay him equally without discrimination the sum of Kshs 339,572/=. In addition, the Claimant has asked the Court to award him compensation for constitutional rights violation, the costs of the suit, plus interest.
7. Upon being served with the Statement of Claim, the Respondent filed a Reply to the Memorandum of Claim dated 22<sup>nd</sup> November 2024. This was followed by a Notice of Preliminary Objection dated 30<sup>th</sup> December 2024, which is premised on the following grounds;
  1. That the present Motion alike as drawn and filed is incompetent, fatally defective and unsustainable in law or at all.
  2. That the issues as ventilated in the Statement of Claim and Verifying Affidavit on proposed amendments are barred and caught up by statutory limitation as provided under Section 89 of the Employment Act 2007 (Legislation as at 26 April 2024) and/or Section 4 (1) of the Limitations of Actions Act Cap. 22 Laws of Kenya.
  3. That in view of the above, the Respondent/Applicant's Application should be dismissed for contravening both law and equity.
  4. That in whole, the Applicant herein is a vexatious and frivolous litigant and the proceedings herein, an abuse of the court process.
8. The Claimant opted to respond to the Respondent's Notice Preliminary Objection by filing a Replying Affidavit sworn on 25<sup>th</sup> March 2025 in which he deposes that Section 89 of the Employment Act does not deal with any preliminary issue of law but on contracts made abroad and hence the preliminary objection is vexatious and bad in law.
9. That the Claim raises constitutional issues on discrimination on the basis of age which constitutional issues have no timelines.
10. According to the Claimant, the impugned letters calculating gratuity were for the years 2015 and 2016, a period of less than 10 years, which in his view, is not inordinately long.
11. He further avers that the reason for the delay is that they did not have the funds to file a case. That as early as 2023, they had approached Kituo Cha Sheria who referred them to a volunteer advocate, but due to lack of funds, they were referred back to Kituo Cha Sheria.
12. In the Claimant's view, there will be no prejudice on the part of the Respondent to defend this claim as it will utilize the same documents in Cause No. 617 of 2018; Benson Mutuku Kakunzu vs Sameer Africa Limited to defend the suit.
13. It is the Respondent's Preliminary Objection that is the subject of this Ruling.

### **Submissions**

14. The Preliminary Objection was canvassed by way of written submissions. In support of the Objection, the Respondent has submitted that a Court of law can only deal with a question whose jurisdiction it has. On this score, the Respondent has submitted that the Employment and Labour Relations Court is a specialized court rather than an unlimited jurisdiction and as such, it has no jurisdiction to entertain constitutional questions. To buttress this argument, the Respondent has sought to rely on the case of Governor, County Government of Kakamega & 4 others v Omweno & 12 others [2025] KECA 190 (KLR).



15. On the other hand, the Claimant has submitted that the constitutional violations he is urging are not founded on termination or a disciplinary process rather the employer's action of paying them gratuity based on age, which is a constitutional issue. According to the Claimant, the question of whether an employer has discriminated against employees by paying them gratuity based on age is not governed by the [Employment Act](#), and hence the only means he could approach the court is through a constitutional process.
16. Referencing the case of Marwa v [National Police Service Commission & 3 others \(Constitutional Petition E195 of 2022\)](#) [2024] KEELRC 2292 (KLR) (26 September 2024) (Ruling), the Claimant has further argued that the matter is constitutional in the sense that the calculation of the total gratuity accrued was never the subject of a Memorandum of Understanding and a Collective Bargaining Agreement.
17. In further support of his argument, the Claimant has placed reliance on the case of Wamwere & 5 others v Attorney General [2023] KESC 3 (KLR) and submitted that his claim raises constitutional issues hence has no timelines.
18. It is the Claimant's view that a period of less than 10 years is not inordinately long.

### **Analysis and Determination**

19. It is clear to my mind that the singular issue for determination is whether the suit herein is subject to statutory limitation by dint of Section 89 (formerly Section 90) of the [Employment Act](#).
20. The Claimant has argued that the question of calculation of gratuity is not governed by the [Employment Act](#). I must say that this argument is inconsistent with the record in that the Claimant's claim is based on the existence of a contract of service he executed with the Respondent.
21. In addition, it is undisputed that gratuity is a benefit which is often provided for in an employment contract. Therefore, it accrues based on a contract of service.
22. Accordingly, it goes without saying that the [Employment Act](#) is applicable in this case as the Claimant's claim is based on a contract of service. Indeed, without the contract of service, the Claimant has no claim.
23. What's more, the Claimant has sought a declaratory order to the effect that the Respondent fundamentally breached her statutory obligations under the [Constitution](#) of Kenya and the [Employment Act](#), 2007 by categorization of the Claimants and/or unfairly applying a gratuity calculation system that was discriminatory.
24. In light of the foregoing, it is not clear why the Claimant would seek to dissociate his claim from the [Employment Act](#) at this juncture.
25. With respect to Section 89 of the [Employment Act](#), a claim arising out of a contract of service must be instituted within three (3) years from the date the cause of action arose. The said statutory provision is couched as follows: -
  - (89) 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. Underlined for emphasis
26. The import of Section 89 aforesaid is that a matter becomes statute-barred if it is not filed within three (3) years from the date the cause of action arose.



27. In this case, the Claimant has averred that he was notified by the Respondent on 16<sup>th</sup> July 2015 that his total accrued gratuity had been frozen effective 1<sup>st</sup> July 2015.
28. As can be discerned from the record, the Claimant's contention revolves around the computation of the gratuity that was frozen by the Respondent.
29. Strictly applying the provisions of Section 89 of the Employment Act, it becomes clear that the cause of action arose on 16<sup>th</sup> July 2015 when the Claimant became aware of the computation of his gratuity, hence it follows that he ought to have filed his claim on or before 16<sup>th</sup> July 2018.
30. Submitting against the instant Preliminary Objection, the Claimant has argued that the Claim raises constitutional issues of discrimination on the basis of age hence has no timelines.
31. The general principle is that there is no specific time bar for filing a claim to enforce fundamental rights and freedoms. However, this does not mean that such claims are timeless and can be brought at any time long after the cause of action arose.
32. In addressing this question, the Court of Appeal had this to say in the case of *Mitei v National Social Security Fund Board of Trustees* [2022] KECA 974 (KLR):

“Even though there is no limitation period for bringing an action alleging violation of a party's constitutional rights and freedoms, the court is entitled to consider whether the claim was lodged within a reasonable time.”
33. And similarly, in the case of *James Kanyiiita Nderitu v Attorney General & another* [2019] eKLR, it was held that:

“Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under ... the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim. Just as a petitioner is entitled to enforce its fundamental rights and freedoms, a respondent must have a reasonable expectation that such claims are prosecuted within a reasonable time.”
34. In this case, the Claimant holds the view that the delay in bringing the instant claim is not inordinately long.
35. As stated herein, the cause of action arose on 16<sup>th</sup> July 2015. However, it was not until 30<sup>th</sup> August 2024 that the Claimant moved the Court by filing the instant suit. By simple arithmetic, the intervening period is approximately nine (9) years.
36. With tremendous respect to the Claimant, this Court finds the period of nine (9) years to be inordinate, more so in view of the relevant time frame for bringing actions founded on a contract of service.
37. In the case of *Mitei v National Social Security Fund Board of Trustees* (supra), the Court of Appeal concurred with the trial Judge that a delay of seven (7) years was inordinate.
38. Coupled with the inordinate delay in bringing the instant suit, the Court finds the explanation advanced by the Claimant for the delay to be implausible. According to the Claimant, he did not have sufficient funds to file the suit. Notwithstanding the Claimant's assertions, he has not indicated, let alone suggested, that he moved the court to be exempt from paying legal fees. Indeed, such a situation



is envisaged under Order 33 of the Civil Procedure Rules and Rule 81 of the Employment and Labour Relations Court (Procedure) Rules, 2024.

39. Needless to say, the Claimant's explanation for the delay is not valid and is rejected by the Court.
40. I adopt the sentiments of the Judges of Appeal in the case of Daniel Kibet Mutai & 9 others v Attorney General [2019] eKLR that delay is an anathema to fair trial which is one of the key fundamental rights provided to all litigants under Article 50 of the *Constitution*. The Court in that case further reckoned that it would be an abuse of the court process and contrary to the constitutional principles espoused in Article 159 that requires justice to be administered without delay, to allow a party who alleges violation of constitutional rights, to bring their action after undue inordinate delay, without any justifiable reason.
41. Indeed, I cannot help but question whether the Claimant's suit was buoyed by the Judgment in favour of the Claimant in the case of Kakunzu v Sameer Africa Company Limited [2023] KEELRC 1495 (KLR), which, as admitted by the Claimant, bears striking similarities with the instant suit.
42. For the foregoing reasons, the Court finds and holds that the Claimant herein failed to institute his claim within the timelines prescribed by law, and in addition, finds the delay to be inordinate.
43. As a parting shot, I find it imperative to mention that the Respondent's submissions that this Court has no jurisdiction to entertain constitutional questions to be quite faulty and off the mark.
44. Case law on this Court's jurisdiction to enforce labour rights and to interpret the *Constitution* on matters within its exclusive domain now form a well-trodden path. I will do no better than to quote what the Court of Appeal stated in the case of Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR, thus: -

“The learned judge had in the proceedings before him been addressed on the aspect where it was alleged that fundamental rights relating to employment and labour (Article 41 Constitution) had been violated, and whether the Industrial Court could entertain such claims. While adopting the position enunciated in the South African case of Gcaba Vs Minister of Safety and Security & Others CCT 64/08 (2009) ZACC 26, Majanja, J proceeded:

- “44. ...I would adopt the position of the Constitutional Court of South Africa in Gcaba Vs Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the *Constitution* and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the *Constitution* within the matter before it.”



We have quoted in extenso the pertinent parts of the judgment above for the relevance attached to this appeal. In sum on this ground of jurisdiction, we find as we had stated earlier that the High Court had no jurisdiction to entertain the claim which essentially was based on breaches of contract of employment along with some unstated claims of breaches of rights, as the learned judge did find.”  
Underlined for emphasis

45. I will say no more on this issue.
46. In the final analysis, the Respondent’s Notice of Preliminary Objection dated 30<sup>th</sup> December 2024 is sustained, with the consequence that the Claim dated 29<sup>th</sup> July 2024 is struck out for being time-barred.
47. Each party shall bear its own costs.
48. As this matter was being tried as a test suit, the finding herein shall apply to all the other matters in the series being ELRCC No. E683/2024-Rodgers Muindi; ELRCC No. E692/2024-Tilas Kivaya; ELRCC No. E694/2024-Tonny Otieno Ogallo; ELRCC. No. E695/2024-Mark Osoro Atembi; ELRCC No. E696/2024-Benson Mutuma Murungi; ELRCC No. E697/2024-Vincent Abok Ngala; ELRCC No. E698/2024-Jeremiah Ogeto Omaribah; ELRCC No. E699/2024-John O. Gor; ELRCC No. E700/2024-John Oundo Karume; ELRCC No. E702/2024-Martin Ogallo; ELRCC No. E703/2024-Nicholas Ndambuki; ELRCC No. E704/2024-Nicholas Kisavi; ELRCC No. E709/2024-Frank Owuor Deya; ELRCC No. E710/2024-Peterogoti Atembi; ELRCC No. E711/2024-Alfred Ombiji Amemba; ELRCC No. E712/2024-Athanas Mutuku Muindi; ELRCC No. E713/2024-Christinus Ojwang Okemasisi; ELRCC No. E714/2024-Charles Ombiri Nyandeje; ELRCC No. E715/2024-Barasa Vincent Ndombi; ELRCC No. E716/2024-Denis Wabuge; ELRCC No. E717/2024-Dominic Momba; ELRCC No. E718/2024-Erick Ouma Odhiambo; ELRCC No. E724/2024-George Berenato Wafula; ELRCC No. E725/2024-Odundo Harrison; ELRCC No. E726/2024-Isaac Okumbi Omollo; ELRCC No. E727/2024-Jacob Otieno; ELRCC No. E728/2024-James Ochieng Odalloh; ELRCC No. E729/2024-John Benson Otwoma; ELRCC No. E730/2024-Fidel Omondi Wanga and ELRCC No. E758/2024-Stephen Mbugua Muthandi.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2025.**

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**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Mr. Mwariri

For the Respondent Ms. Muthama instructed by Mr. Kamau

Court Assistant Millicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article



159(2)(d) of the [Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the [Constitution](#) and the provisions of Section 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

