



Wachira v British American Tobacco Kenya (Employment and Labour Relations Cause E051 of 2024) [2025] KEELRC 1474 (KLR) (16 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1474 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E051 OF 2024**

ON MAKAU, J

MAY 16, 2025

BETWEEN

JOSEPHINE WACHIRA APPLICANT

AND

BRITISH AMERICAN TOBACCO KENYA RESPONDENT

RULING

1. This ruling relates to the Applicant's originating summons dated 29th November 2024 seeking the following orders:
 - a. That leave be granted to the applicant, Josephine Wangui Wachira to file suit against British American Tobacco for unlawful declaration of redundancy after the limitation period.
 - b. That the costs of this Application be provided for in the intended suit.
2. The Application is premised on the grounds set out on its body and the Applicant's affidavit sworn on 25th November 2024. In brief, she contends that the failure to file suit within the limitation period was due to an excusable mistake, ill health and fraud on the part of her legal counsel who failed to institute suit. She maintains that she has a good claim against the Respondent since the redundancy was discriminatory and due process was not followed.
3. In her written submissions, it was argued that redundancy is a process that ought to be carried out in accordance with the law in order to protect employees from unfair dismissal. For emphasis, she relied on the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR.
4. It was further argued that, her medical condition is central to her plea for extension of time, as the same has rendered her unable to engage in basic daily activities, limiting her functional mobility and crippling her ability to seek legal recourse. It is submitted that the Court has inherent discretion to



grant extension in accordance with Article 162(2) of *the Constitution* that empowers this Court to do justice. In support, reliance was placed on the case of Edith Gichugu Koine v Stephen Njagi Thoithi [2014] KECA 485 (KLR).

5. It was submitted that the delay to file suit in time was occasioned by her former legal counsel who she had instructed and duly paid the requisite fees. It argued that mistake of counsel amounts to sufficient cause for delay. To fortify this point, reliance is placed on the case of Hamam Singh & others v Mistri [1971] EA.
6. It was further submitted that it is important to prioritize the circumstances that led to the delay rather than merely the timelines. It was contended that the Applicant is not merely seeking to bypass legal times but rather she is advocating for her constitutional right to justice. It was further argued that denial of the leave sought would not only deny her right to redress for the Respondent's wrongs but also set a precarious precedent for persons with disability.

Analysis

7. The only issues falling for determination is whether the Court should grant leave to Applicant to file suit against the respondent as prayed.
8. To begin with, I must observe that the cause action herein arose on 30th April 2001 when a redundancy notice dated 22nd January 2001 took effect. The said notice listed down the terminal benefits payable to the claimant of which she has not revealed whether or not she was paid.
9. In view of the said date of the applicant's exit, the applicable law to this matter was the Limitations of Actions Act since *Employment Act* 2007 had not been passed into law. Section 4(1) provided that:

- “(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued –
- a. action founded on contract;
 - b. ...”

10. Courts in this country have interpreted the above provision to mean that once the limitation period for a cause of action founded on contract lapses, the court has no jurisdiction to extend it. In *Devecon v Samani* [1995-1998] 1 EA p.48 the Court of Appeal stated as follows:

“...to us, the meaning of section 4(1) is clear beyond 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 arose, an action founded on 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...”

11. More recently, in *Anadet Kalia Musau v Attorney General & 2 Others* [2020] eKLR the Court of Appeal held that: -

“...the overriding purpose of all limitation statutes is based on the Maxim interest reipublicae ut sit finis litium, that is, it is in the public interest that there be an end to litigation. A party will not be permitted to prosecute stale claims.”



12. The question that follows is whether extension of time can be based on a claim of disability under section 22 of the Limitations of Actions Act which provides as following terms:

“

“22. Extension of limitation period in case of disability

If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired:

Provided that—

- (i) this section does not affect any case where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;
- (ii) when a right of action which has accrued to a person under a disability accrues, on the death of that person while still under a disability, to another person under disability, no further extension of time is allowed by reason of the disability of the second person;
- (iii) an action to recover land or to recover money secured on a mortgage of land may not be brought by a person by virtue of this section after the end of thirty years from the date on which the right of action accrued to that person or to some person through whom he claims;
- (iv) this section does not apply to an action to recover a penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law;
- (v) in actions for damages for tort—”

13. I am bound by the decision in the Devecon case, supra, on the lack of jurisdiction to entertain a stale cause of action. In that regard, I do not really see any iota of discretion on my part to extend the limitation period in this case.

14. Even if extension under section 22 of the *Limitation of Actions Act* was applicable to this claim, the Applicant’s explanation falls below the requirement that the disability existed at the time when the cause of action arose, and which prevented her from filing suit. She was active in office when she was served with the redundancy letter but did nothing to save her job until the separation matured. Thereafter she again stayed for 15 years and when she learned that her position was never declared redundant and she instructed counsel who never filed suit.

15. The delay of 15 years was unreasonable and it was not occasioned by her incapacity or the person she described as rogue advocate. The decision to challenge the redundancy was provoked by the new information that her position was never declared redundant. The instant summons was brought after a further delay of nine years making the total time taken to move the court 24 years from the date when the cause of action accrued.

16. The delay of 24 years is unreasonable in every way one looks at it. The cause of action lapsed six years from 30th April 2001 when the redundancy took effect. Reviving the claim now will prejudice the



respondent who may not have the witnesses and the necessary documents upon which to mount its defence in court.

17. The Court in *Gathoni v Kenya Co-operative Creameries Ltd* [1982] eKLR had this to say when dealing with a similar issue:

“... The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”

18. Looking at the circumstances of the case, I reject the invitation to grant extension of time. The claim is stale and beyond resuscitation. Consequently, the originating summons is dismissed with no costs due to its ex-parte nature.

DATED, SIGNED AND DELIVERED AT NYERI THIS 16TH DAY OF MAY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

