



Mung'athia v Principal Secretary, State Department of Labour and Social Services & another (Employment and Labour Relations Appeal E002 of 2024) [2025] KEELRC 1329 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1329 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E002 OF 2024
ON MAKAU, J
MAY 9, 2025

BETWEEN

SALESIO MUNG'ATHIA APPELLANT

AND

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF LABOUR AND SOCIAL SERVICES 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

(Being an appeal from the Judgment of Honourable R.Ongira (SRM) delivered on 2nd February, 2024 in Tigania ELRC Cause NO. E001 of 2022)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 27th February 2024, the appellant seeks the following reliefs: -
 - a. This appeal be allowed with costs.
 - b. The judgment of the Hon.R.Ongira, SRM at Tigania in Tigania ELRC No.E001 of 2022, delivered on 2nd February 2024 be set aside and therewith be substituted with an order granting the Appellant prayers in the lower court plaint.
2. The appeal stands on the following grounds: -
 1. The learned trial Magistrate erred in law and in fact in dismissing the suit for being time barred whereas the issue of limitation of time had been decided and settled when leave to file out of time was granted.



2. The learned trial Magistrate further erred in law and in fact in disregarding court orders issued by the same court granting the appellant leave to file the suit out of time and acting in a manner resembling one sitting as an appellate court on its own orders.
3. The learned trial Magistrate further erred in law and in fact in failing to consider that the Appellant was not accorded a fair hearing before his termination on unsubstantiated claims of desertion of duty.
4. The learned trial Magistrate further erred in law and in fact in failing to consider that the 1st Respondent did not prove that he made any efforts to reach out to the Appellant or put him on notice that termination of employment on the ground of desertion is under consideration.
5. The learned trial Magistrate erred in law and in fact in failing to consider that Article 159 (2) (d) requires the courts to administer justice without undue regard to technicalities by failing to consider the pay slips attached on the Appellant's submissions yet he had earlier produced an employment letter as evidence of his employment.

Background

3. The appellant was employed as Adult Education Teacher by the Ministry of Labour and Human Resource Development for 25 years from 18th June 1979 to 8th October 2004 when he was dismissed for absenting himself from work. He appealed against the dismissal on 10th November 2004 but the same was dismissed vide a letter dated 10th June 2005.
4. On 7th December 2020, he sought and obtained leave from the lower court to file suit out of time. He then brought suit in the lower court, against the respondents seeking the following reliefs: -
 - a. A declaration that the dismissal of the claimant vide a letter dated 8th October, 2004 was unfair;
 - b. That the claimant be paid full salary and other allowances from the date of his dismissal up to the appointed retirement date.
 - c. That the claimant be paid all his terminal dues up to the date of his retirement; and
 - d. Costs of the suit and interests.
5. In brief the appellant's case was that the reason for the dismissal was not valid. He contended that even if the alleged absence was true, the employer should have penalized him by salary deduction considering his long service of 25 years. He blamed his predicament on one Simon K.Limberia who had a grudge against him.
6. The respondents filed a reply to the claim plus Notice of Preliminary Objection dated 10th November 2021. In brief the defence case was that the suit is statute barred under section 90 of the [Employment Act](#) and the Public Authorities [Limitation of Actions Act](#) as the cause of action arose 16 years before filing the suit.
7. It was further defence case that the appellant had since 2001 failed/neglected to perform his duties, he attended work while intoxicated rendering him incapable of working, he used abusive language and was quarrelsome during work, and intentionally absented himself from work and teacher's meetings without permission. As such the respondents maintained that the dismissal was justified and fair procedure was followed. During the trial the appellant testified as PW1 while the respondents called Priscilla Ciankere Maitai, Sub-County Adult and continuing Education Officer Tigania West, as DW1. The appellant denied the alleged absence from work and maintained that he diligently attended his



duties in the various places he was required to work. However, DW1 maintained that the appellant was dismissed for absence from duties and that he was accorded fair hearing.

8. After hearing the witnesses, the trial court (Ongira SRM) framed two issues for determination, whether the dismissal of the appellant was unfair, and whether the suit was statute barred. He then concluded that the suit was time barred pursuant to section 90 of the *Employment Act* since it was filed after the lapse of the 3 years limitation period. Accordingly, the court dismissed the suit for lack of jurisdiction to entertain the same.

Submissions on the appeal

9. It was submitted for the appellant that the trial court erred by dismissing the suit as being time barred yet Hon.Wechuli SRM, had granted leave to file suit out of time. It was argued that it was strange for the trial court to make an about-turn and dismiss the suit as being time barred after giving leave to file the same out of time.
10. It was further submitted that the appellant was unfairly dismissed for desertion without being given an opportunity to be heard. It was also submitted that the trial court failed to consider his pay slip for January 2003 showing that he was earning Kshs.7,915 per month.
11. Finally, it was submitted that the appeal has merits and it should be allowed, and the reliefs sought in lower court be granted. The court was also urged to award the costs of the appeal.
12. On the other hand, it was submitted for the respondents that the trial court lacked jurisdiction to determine the suit because it was time barred and the court cannot extend the limitation period. Reliance was placed on a number of court decisions that agree that once limitation period in contracts of service lapses, the court lacks jurisdiction even to extend the time for commencing a suit.

Determination

13. This being a first appeal, my mandate is to re-evaluate the evidence on record and arrive at my own independent conclusions noting to exercise caution that I never observed the witnesses when they gave evidence. (See *Selle v Associated Motor Boat Company Ltd* (1968) EA 123)
14. Having considered the matter pleadings, evidence and submissions the following issues fall for determination: -
 - a. Whether the appellant suit was statute barred.
 - b. Whether the dismissal of the appellant was unfair.
 - c. Whether the appeal should be allowed as prayed.

Statute barred suit

15. The cause of action herein arose in 2004 when the appellant received the dismissal letter dated 8th October 2004. It follows that the limitation period was governed by the *Limitation of Actions Act* and not the *Employment Act* 2007 since it had not been enacted. Section 4 (1) of the *Limitation of Actions Act* provides 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. Actions founded on contract;



b. ...”

16. The claim herein is founded on an employment contract and therefore under the foregoing section, it ought to have been commenced in court within six years from 8th October 2004 when the dismissal was communicated. Six years lapsed on 8th October 2010 and therefore any suit filed thereafter was statute barred. Once the limitation period lapsed, no extension could rightly be granted by the court.
17. I gather support from *Divecon v Samani* (1995-1998) EA 48 where Court of Appeal held that: -
“...to us the meaning of the wording of section 4(1) ... 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 accrues, 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 bringing of the action.”
18. The foregoing binding authority rebuts the appellants submissions that the trial court had granted leave to file the suit out of time. In my view, leave to file suit out of time does not bar the opposite party from raising the issue of limitation during the course of the proceedings. In fact, the leave to file suit out of time touches on jurisdiction and it should be an issue for determination during trial or even on appeal.
19. Having so said, I must now conclude that the cause of action herein expired after the lapse of six years from 8th October 2004 when the dismissal was communicated to the appellant. The lower court had no jurisdiction to extend the limitation period prescribed by the Legislature under section 4(1) of the Limitation of Action Act. Consequently, I agree with the trial court that the suit was statute barred and the trial court lacked jurisdiction to entertain it.
20. For the said reason, I am satisfied that the appeal herein lacks merits and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment 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

