Board of Management Nzeveni Secondary School v Makumbi (Appeal E001 of 2025) [2025] KEELRC 1846 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1846 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

APPEAL E001 OF 2025

B ONGAYA, J

JUNE 26, 2025

BETWEEN

BOARD OF MANAGEMENT NZEVENI SECONDARY SCHOOL .. APPELLANT

AND

MICHAEL MUSYIMI MAKUMBI ..... RESPONDENT

(Being an appeal from the Ruling delivered by Hon. P.N. Gesora, Chief Magistrate delivered on 31.01.2025 in the Chief Magistrate's Court at Makueni ELRC Cause No. E001 of 2023)

JUDGMENT

1. The appellant filed the memorandum of appeal dated 05.02.2025 through the Office of the Attorney General. The appellant's grounds of appeal are that the trial Court erred in law and fact as follows:
    a. By misapprehending the law relating to limitation of actions and in particular the mandatory provisions of section 90 of the *Employment Act*.
    b. By failing to hold that the court lacked jurisdiction to entertain a time barred claim and thus an erroneous decision not founded and/or backed with law.
    c. By misapprehending the principles governing and/or what constitutes a preliminary objection thereby arriving at an erroneous decision with the regard to the preliminary objection raised by the appellant.
    d. By entertaining and/or delving into issues of fact while making a determination on the preliminary objection raised by the appellant.
    e. By treating the submissions before him superficially hence an erroneous decision.
2. The appellant prayed for orders:

a. That this appeal be allowed with costs.

b. The ruling delivered on 31.01.2025 by the Hon. P.N. Gesora Chief Magistrate be set aside in its entirety.

c. That cost of this appeal be borne by the respondent.

3. The background to the appeal is as follows:

a. On 26.06.2023 the Respondent filed a Memorandum of Claim through Nyaata & Nyaata Advocates claiming and praying for:

i. A declaration that the termination of employment of the claimant by the respondent was unlawful and amounts to wrongful dismissal.

ii. An order compelling the respondent to pay the claimant all lawful terminal dues due to the claimant amounting to Kshs 283,606.00

iii. Costs of the claim and interest thereon.

4. In reply the Appellant filed a preliminary objection dated 02.08.2023 through the office of the Attorney General and upon the following grounds:

a. The claim herein is time barred by dint of section 90 of the *Employment Act*, 2007.

b. This Honourable Court lacks the requisite jurisdiction to hear and determine the claim herein.

c. The claim herein is incompetent, bad in law, an abuse of the court process and the same ought to be struck out with costs.

5. The parties subsequently filed submissions on the preliminary objection. The trial Court in a ruling delivered on 31.01.2025 dismissed the preliminary objection dated 02.08.2023 with costs. The appellant has appealed against that ruling.

6. The appellant filed submissions on the appeal and also for the respondent were filed through Nyaata & Nyaata Advocates.

7. The Court has considered the parties respective positions and considers or returns as follows:

a. At paragraph 3 of the memorandum of claim the respondent pleaded thus, "3. At all material times relevant to this claim , the Respondent had employed the claimant with effect from 1/3/2025 to 30/12/2017 when the claimant's services were illegally, unfairly, unprocedurally and unlawfully terminated." The appellant's preliminary objection was that the suit was time barred per section 90 of the *Employment Act*, 2007 which provides for a time of limitation to be 3 years from the date of termination. The Court finds that indeed the three years of limitation had lapsed by the time the suit was filed on 25.06.2023.

b. However, the respondent in an amended memorandum of claim dated 29.02.2024 it was pleaded that the respondent was a member of a trade union, the KUDHEIHA Workers and in a meeting held on 04.11.2022 the respondent had agreed to tabulate and pay the respondent his terminal benefits. Further, the respondent had failed to honour that agreement or undertaking, hence, the filing of the suit.

c. It was submitted for the appellant that on-going negotiations between the parties did not stop the time of limitation from running. Further in Mukisa Biscuits Manufacturing Co.Ltd v Westend Distributors [1969] EA 696 it was held,

> " A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit...It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion."

It was submitted for the appellant that the test per the holding had been met.

d. For the respondent it was submitted that negotiation and non-adjudicatory dispute settlement mechanisms are commonplace in labour disputes and are anchored on Article 159 of *the Constitution*. Further, where parties engage in administrative appeal, conciliation, negotiation and other non-adjudicatory dispute settlement mechanisms before coming to court, the clock stops and the time stops running and restarts at the breakdown in negotiations. The respondent relied on Kenya Union of Commercial, Food and Allied Workers v Water Resource Management Authority & Another [2015] eKLR. It was further submitted that the respondent had pleaded salary discrimination by way of salary underpayment and in that regard the holding by Rika J in Bilton Etobo Barasa Okhonjo & 33 others v Kenya Ports Authority [2015] eKLR thus:

> " 8. The Claim is based on salary discrimination. The first observation made by the Court is that the Claimants have not expressly invoked the *Employment Act* 2007. It cannot be presumed that they have come to Court pursuant to the *Employment Act* 2007, while they have not pleaded any provision of that law. It is not therefore entirely correct to rely on a temporal provision of the law, which is contained in a law which has not been invoked in filing of the Claim. The Claimants have not stated that their contracts were made pursuant to the *Employment Act* 2007.
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> 9. Salary discrimination, particularly the kind that is historical in nature, is a kin to historical injustices, which are corrected principally through constitutional principles, and cannot be wished away through statutes of limitation.
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> 10. Even without this resort to constitutional thinking, the Court found in the case of David Muhoro Wanjau vOl Pejeta Ranching Limited that it was wrong to apply the 3 year or 6 year time limit, in Claims for salary discrimination. Relying on comparative jurisprudence, the Court held that salary discrimination frequently occurs in small increments, over a large period of time. The Employer knowingly carries forward past pay discrimination. Time-limit, if any resets with each new pay cheque affected by the discriminatory act. The Court would therefore not apply Section 90 of the *Employment Act* 2007, even were it to be demonstrated that this law, is the law pursuant to which this Claim is made.

11. The second view of the Court is that if the *Employment Act* 2007 is applicable, the submission by the Claimants on the role and effect of alternative dispute resolution must prevail. The Court has held in the decisions cited at paragraph 4 above, that time does not run while Parties are engaged in attempts at voluntary settlement. Such mechanisms need not be statutory mechanisms such as those under the *Labour Relations Act*; it includes other forms of voluntary settlement mechanisms such as negotiations involving Parties' Advocates [see the cases of Desidery Tyson Otieno v Rift Valley Railways Limited and Hawkins Wagunza Musonye v Rift Valley Railways Limited- both [2015] e-KLR]. If it can be shown Parties were engaged in formal negotiations, the Court must take into account the time involved in such negotiations.

e. The learned trial Chief Magistrate found that indeed the parties had engaged in the negotiations and per minutes of 28.05.2029 the appellant committed in good faith to pay all pending retirement benefits due to the claimant but it kept dilly-dallying until the period set out in section 90 of the *Employment Act* lapsed, and, "The objection herein is an attempt to steal a match from the claimant that when parties engage in negotiations and conciliatory mechanism time stops to run until such time when the same formally collapses. The objection herein does not meet the threshold set out in the celebrated case of Mukhisa Biscuits & West End Distribution. The same does not go to the root of this matter so as to determine it with finality. I proceed to dismiss it with costs."

f. In Attorney General & another v Andrew Maina Githinji & another [2016] KECA 817 [KLR] [CORAM: WAKI, NAMBUYE& P.O. KIAGE, JJA] in majority decision and per Waki J.A, the Court of Appeal held that the time of limitation in section 90 of the *Employment Act*, 2007 was mandatory thus:

> " 17. Were the respondents time barred in filing their claim in this case?
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> Section 90 of the *Employment Act* provides:-
>
> > "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."
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> Such provision did not exist in the repealed *Employment Act*, Cap 229 which did not have elaborate provisions on 'Termination and Dismissal' as its supplanter does. Time limits in the former Act were subject to the *Limitation of Actions Act* which in some cases could be as long as 12 years and amenable to extension. By expressly inserting Section 90, the intention of Parliament , in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and

counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word 'shall'." Further, Kiage J.A in the same judgment held thus:

> " It is quite clear to me that the learned Judge fell into error in holding that time could only run from 23rd October 2013 when the respondents were acquitted of criminal charges that arose from the same facts and circumstances giving rise to the dismissal. I am not persuaded that the acquittal was a prerequisite to the claim for reinstatement and or damages for unlawful termination of employment. The learned Judge proceeded on the basis that it was in much the same way as it is for a claim in malicious prosecution, his reliance on Mbowa v East Mengo Administration [1972] Ea 352. In that he erred since a dismissal is lawful or unlawful and therefore actionable or not on the date it is effected. A dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal. If he chooses to do so, it is at his own peril should the statute bar him, as happened herein."

g. From the foregoing holding of the Court of Appeal, the Court returns that it is settled that existence of pending criminal or alternative dispute resolution processes does not stop the time of limitation in section 90 [revised to section 89] of the Act from running. That is the holding by the Court in subsequent cases cited for the appellant including Baari J in Teachers Service Commission v Ngowe [2021] eKLR; Gakeri J in Douglas Evans Awino v Insight Management Consultants Limited [2023] eKLR; and, Keli J in Caleb Shitoshe v The Board of Management Shivanga Secondary School [2024] eKLR.

h. The Court has considered whether the agreement in the minutes of a trade dispute on 28.05.2019 between the union for the respondent and the appellant operated, first, to render the preliminary objection invalid as not based on a pure point of law, or second, operated as an acknowledgement of a debt or undertaking reviving the cause of action per section 23[3] of the *Limitation of Actions Act* Cap 22 thus:

> " [3] Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment: Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt."

i. As to whether the agreement in the minutes of a trade dispute on 28.05.2019 between the union for the respondent and the appellant operated to render the preliminary objection

invalid as not based on a pure point of law, the Court finds that it did not so operate. In particular, the existence of the agreement was a pleaded fact and which was not in dispute. It was a pure point of law to be considered in the preliminary objection as being based on undisputed fact that the parties had negotiated and concluded the agreement.

j. As to whether the agreement operated as an acknowledgement of a debt or undertaking reviving the cause of action per section 23[3] of the *Limitation of Actions Act* Cap 22, the Court returns that it did so operate but only to the extent of time of limitation in the said section 90 of the Act, because, it was concluded in view the employment relationship or as part of the further agreed terms and conditions of the termination agreement. Whether as a continuing injury as debt due from the appellant or otherwise, the Court returns that the agreement was concluded on 15.05.2015 and the suit filed on 26.06.2023 after lapsing of 12 months about 15.05.2020 as a continuing injury or three years on about 15.05.2022 as an otherwise cause of action under section 90 of the Act.

k. Thus the Court finds that the trial Court had erred in finding that the cause of action was not time barred in view of the negotiations or that the preliminary objection did not meet the set threshold. The Court has considered all circumstances of the case and the issues in the appeal and suit leading to clarity and growth of jurisprudence in a rather blurred circumstances of the case and each party to bear own costs of the suit and appeal.

6. In conclusion, the appeal is hereby allowed with orders as follows:

1. The ruling delivered on 31.01.2025 by the trial Court herein is set aside.

2. The preliminary objection is upheld and the suit struck out.

3. Each party to bear own costs of the appeal and the suit before the trial Court.

4. The Deputy Registrar to return the case file to the Machakos Sub-registry forthwith.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 26TH JUNE, 2025.

BYRAM ONGAYA,

PRINCIPAL JUDGE