



Riva Petroleum Dealers Limited v Ndumia (Employment and Labour Relations Appeal E018 of 2024) [2025] KEELRC 2376 (KLR) (13 August 2025) (Judgment)

Neutral citation: [2025] KEELRC 2376 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E018 OF 2024
ON MAKAU, J
AUGUST 13, 2025

BETWEEN

RIVA PETROLEUM DEALERS LIMITED APPELLANT

AND

ANTHONY WANJOHI NDUMIA RESPONDENT

(Being an appeal from the ruling delivered on 3rd July 2024 by Honourable Alfred G.Kibiru-CM in the Nyeri CMELRC No.E067 of 2023)

JUDGMENT

1. The Appeal herein is premised on the Memorandum of Appeal dated 12th August 2024 which raised the following grounds:
 - a. That the learned magistrate erred in law and fact by failing to appreciate that section 90 of the [Employment Act](#) requires that a suit arising out of the Act or contract of service be instituted within 3 years from the date of the act, default or neglect complained of.
 - b. That the learned magistrate erred in law and fact by taking account the order by Hon. E. Gaithuma (RM) on 31st August 2023 which was inconsistent with the laws guiding the Court.
 - c. That the learned magistrate erred in law and fact by finding that it had jurisdiction under the Act to hear and determine the claim as three years had lapsed since the Respondent's termination.
 - d. That the learned magistrate erred in law and fact by failing to take into account the submissions by the Appellant before it arrived its decision.
2. The appeal basically seeks quashing of the impugned ruling of the lower court.



3. The facts of the case were that the appellant employed the respondent on 1st June 2016 as a Pump Assistant earning a monthly salary of Kshs. 17,820. On 7th December 2017, he was arrested for alleged missing money and he was arraigned in court on 11th December, 2017. On 22nd February 2023, he was acquitted of the said criminal charges and then sued the appellant seeking compensation for wrongful termination, salary in lieu of notice, accrued leave, service pay and unremitted NSSF, Certificate of Service, costs and interests. Before filing the suit, he applied for and obtained leave to file suit out of time.
4. The appellant filed a Statement of Response objecting the suit for being time barred by dint of section 90 of the Employment Act as it was filed more than three years from the time when the cause of action arose. It further filed a Notice of preliminary objection dated 24th April 2024 raising the same ground.
5. The objection was disposed of by written submissions and upon consideration, the trial court dismissed it after observing that:

“... prior to filing this suit, the claimant had obtained an order for extension of time under Nyeri ELRC Misc. Application No. E024 of 2023. That order was made by a court of equal status as this court. The respondent is seeking that this court do strike out the claim for being time-barred. With the existence of an order extending time, this court would be sitting on appeal on an order by a court of equal status. That would fly on the face of clear provisions of the law.

The respondent’s recourse is only through an appeal to a higher court.”

6. The appeal herein was also disposed of by written submissions. On behalf of the appellant, it was submitted that the suit was time barred as the claim was filed on 13th September 2023 yet the summary dismissal was effective from 20th March 2018 as per the letter of summary dismissal dated 11th December 2017 (page 213 of the Record of Appeal). Consequently, it was argued that the suit ought to have been filed by 19th March 2021. For emphasis, reliance was placed on several decisions including Ndirangu v Henkel Chemicals E.A. Ltd [2013] eKLR and Peter Kathithi Kithome v Laboratory Allied Limited [2021] eKLR.
7. The Respondent, on the other hand submitted that he moved the Court in Nyeri Misc Application E024 of 2023 seeking extension of time to file suit out of time, and the orders were granted. Subsequently, he filed the Nyeri ELRC cause E067 of 2023, wherein the Appellant raised the issue on limitation but the same was disregarded.
8. It was contended that the trial court and this court are not privy to the Misc.Application E024 of 2023 and therefore cannot purport to review or set aside unless the Appellant appeals in the case where the order was sought. It was further submitted that the issue was one of res judicata as a competent court already opined that the Respondent had the right to sue. Therefore, the court was urged to dismiss the appeal as it is unprocedural and ill-advised.
9. The mandate of the first appellate court is to re-evaluate the evidence on record and make its own conclusions as guided by Selle v Associated Motor Boat Company Ltd (1968) EA 123 the court held thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in



mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

10. Having considered the record of appeal, there is no dispute that the suit was filed out of time. The main issue for determination is, what is the proper procedure for challenging leave to file suit out of time? Section 90 of the [Employment Act](#) categorically provides that: -

"90. Limitations

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."

11. The purpose of limitations was explained by the Court of Appeal in [Anadet Kalia Musau v Attorney General & 2 Others](#) (2020) eKLR as follows: -

"...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. In this case the respondent obtained leave of the court (Hon Gituma SRM) to file suit out of time and the appellant pleaded a defence of limitation and further raised a preliminary objection to the suit for being time-barred. The trial court (Hon. Alfred Kibiru CM) dismissed the preliminary objection on ground that the procedure adopted by the appellant was wrong as that would make him sit on appeal over a fellow magistrate's decision. This case is materially similar to [Oruta & another v Nyamoto](#) [1988] eKLR, where the Court of Appeal held that:

"It will be up to the Judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of preliminary issue that would cause the suit for plaintiff to be struck out is not encouraged by the [Limitation of Actions Act](#) particularly where leave to file an action against the defendant has been granted *ex-parte*."

13. Again, in [Mary Wambui Kabugu Legal Representative of Kabugu Mutua v Kenya Bus Services](#) [1997] eKLR the Court of Appeal held:

"In a situation such as I have outlined the defendant only becomes aware of the order extending time when he is served with summons, plaint and the order extending time. There is no provision in the Act itself to enable the defendant to have the order extending time set aside. In my humble view the only time when such defendant can challenge the order granting extension of time is at the time of the trial, either on facts brought out at the trial, or by way of arguments at the trial if the circumstances and facts allow such arguments at the trial, that is to say if there is no dispute as to facts."

14. The above binding precedents confirms that leave to file suit out of time is not a final order but can be challenged by the defendant during the trial. The defendant is allowed like in the instant case to plead



the defence of limitation and then challenge the grounds given for securing the extension order. It is not open for the defendant to challenge it in the same file where the order was granted because leave application is ex-parte in nature. The challenge on the leave is also not supposed to be by preliminary objection but during the trial proceedings.

15. It follows that it is the trial court, after hearing the evidence, to make the final determination as to the merits of the leave granted after hearing the evidence from both sides. In doing so the trial court is not sitting on appeal over its own leave order or that of a fellow magistrate, (if the order was made by another court of equal status). Consequently, I find that the trial court erred by finding that he could not sit on appeal over the leave order made by fellow magistrate, and that the only way open to the appellant was appeal against the leave order before a higher court.
16. As demonstrated above, the trial court can consider the merits of an extension order and set it aside based on the evidence adduced during the trial. It follows that the proper procedure for challenging leave granted to file suit out of time is by pleading and then adducing evidence during the trial.
17. The foregoing conclusion notwithstanding, I take the view that, when it comes to suits founded on contracts of employment, a defendant can challenge leave granted to file suit out of time by a preliminary objection because it is now well settled that time in such matters cannot be extended. The Court of Appeal, in *Devecon v Samani* (1995-1998) 1 EA p.48 held that: -

“...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...”

18. The foregoing binding precedent is to the effect that a court of law cannot extend the limitation period set by the statute for filing suits founded on contract, including employment contract. The court has neither jurisdiction nor discretion in such matters. Even parties cannot confer jurisdiction by consent to entertain a time barred suit. Consequently, I find that the trial court erred by failing to allow the preliminary objection by the appellant.
19. In conclusion, therefore, I find that the appeal herein has merits and is allowed in the following terms:
 - a. The ruling and order of the lower court made on 3rd July 2024 is quashed and replaced with an order allowing the preliminary objection dated 24th April 2024.
 - b. The statement of claim dated 31st August 2023 is struck out with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF AUGUST, 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

