



**Kazungu v Mabati Rolling Mills Ltd (Cause E014 of 2023)  
[2024] KEELRC 35 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 35 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E014 OF 2023  
AK NZEI, J  
JANUARY 25, 2024**

**BETWEEN**

**SAMSON FURAHA KAZUNGU ..... CLAIMANT**

**AND**

**MABATI ROLLING MILLS LTD ..... RESPONDENT**

**RULING**

1. On 7<sup>th</sup> March 2023, the Claimant/Applicant filed an ex-parte Originating Summons dated 14<sup>th</sup> February 2023 seeking orders:-
  - a. that the Claimant/Applicant herein be granted leave to file suit out of time limitation.
  - b. that the annexed claim be deemed as duly filed on time upon payment of the requisite fees.
  - c. that costs of the application be provided for.
2. The application is predicated on by a supporting affidavit sworn by Joyce Chesaro Advocate on 12<sup>th</sup> February 2023. The said Advocate deponed:-
  - a. that she was instructed by the Applicant in this case and that in the process of shifting her office from Mombasa Trade Centre to KCB Building where her offices are currently located, the file was misplaced, and remained missing despite diligent search until 22<sup>nd</sup> December 2022 when the same was found.
  - b. that the Applicant believed that the case was ongoing, and did not visit the Advocate's office until in or about October 2021 when he went to enquire on his case.
  - c. that the Applicant gave sickness as the reason why he had not visited his Advocate earlier.
  - d. that had the Applicant visited his Advocate's office earlier enough, the Advocate would have searched for and found the file before limitation period lapsed.



- e. that the Applicant is interested and willing to pursue the case herein to conclusion if given a chance to do so, which he seeks vide the application herein.
  - f. that the delay in filing the suit is excusable, and was not deliberate.
3. The application was filed contemporaneously with a memorandum of claim dated 14<sup>th</sup> February 2023, the Applicant's affidavit sworn on even date in verification of the claim, the Applicant's written witness statement and a list of documents intended to be produced in evidence.
4. In the memorandum of claim, the Claimant/Applicant pleaded that he was, at all times material to the suit, an employee of the Respondent until 30<sup>th</sup> January 2012 when the Respondent summarily dismissed him on allegations of manipulating and corrupting the Respondent's computer system for purposes of creating discrepancies in overtime payment, which allegations the Claimant/Applicant denied.
5. The Claimant/Applicant seeks the following reliefs in the said memorandum of claim:-
  - a. a declaration that the Respondent unlawfully/unfairly terminated the Claimant's employment.
  - b. an order that the Respondent makes payment of gratuity to the plaintiff for the period he worked for the company.
  - c. costs of the suit and interest at Court rates.
  - d. any other or further relief that the Court may think fit and just to grant.
6. A copy of the said filed memorandum of claim was annexed to the supporting affidavit referred to and reproduced in paragraph 2 of this Ruling, and was iced with an averment that the Claimant/Applicant has a good case.
7. When the Claimant's ex-parte Originating Summons under consideration herein came up for directions before me, I directed the Claimant/Applicant to file written submissions thereon. Before he could do so, however, the Respondent filed a replying affidavit, sworn by one George Maina on 23<sup>rd</sup> May 2023; opposing the Claimant's application.
8. It was deponed in the Respondent's said replying affidavit:-
  - a. that this Court lacks jurisdiction to hear and to determine the claim (herein) as it was re-judicata, and for having been filed outside the mandatory statutory period.
  - b. that the Claimant worked for the Respondent in various capacities from 1992 until 31/1/2012 when he was dismissed from employment for systematically manipulating the Respondent's time and attendance system to earn overtime that he had not earned.
  - c. that pursuant to his dismissal, the Claimant filed suit against the Respondent on 19/1/2015 alleging unfair termination (Mombasa Industrial Court Case No. 11 of 2015), which the Court heard fully and delivered a judgment thereon on 27/1/2017, making a finding of unfair termination but declining to award any payment as none had been pleaded and proved.
  - d. that the Claimant's application for review of the Court's said judgment was dismissed by the Court vide a ruling delivered on 2/2/2018.
9. Documents annexed to the Respondent's said replying affidavit included the Claimant/Applicant's memorandum of claim dated 16/1/2015 and filed in Court on 19/1/2015, the Claimant's affidavit



sworn on 16/1/2015 in verification of the claim, the Respondent's response to the claim dated 27/2/2015, the Court's judgment delivered on 27/1/2017, the Claimant/Applicant's Notice of Motion dated 28/6/2017 seeking review of this Court's said judgment, the Claimant/ Applicant's supporting affidavit sworn on 29/6/2017, the Respondent's replying affidavit sworn by one Anthony Kungu on 18/7/2017 and the Court's Ruling delivered on 2/2/2018, dismissing the Claimant's said application for review.

10. The Claimant/Applicant did not deny or controvert any of the matters deponed to in the Respondent's said replying affidavit and set out in paragraphs 8 and 9 of this Ruling.
11. Both parties filed written submissions on the Originating Summons pursuant to this Court's directions in that regard, which I have considered.
12. Section 90 of the [Employment Act](#) 2007, which is couched in mandatory terms, provides as follows:-

“Notwithstanding the provisions of Section 4(1) of the [Limitation of Actions Act](#), 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.”
13. The Court of Appeal stated as follows in the case of [Rift Valley Railways \(Kenya\) v Hawkins Waguza Musonye & another](#) [2016] eKLR:-

“for us it is clear from the reading of Section 90 aforesaid that there are no exceptions to the three years limitation period, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof. This was not a case of a continuing injury or damage, but one of a single act of termination.”
14. The Claimant/Applicant's suit herein involves a single act of termination of employment which is shown to have occurred on 30/1/2012, some twelve (12) years before filing of the suit and application herein. The suit is statute barred and was dead, invalid, and incompetent on arrival; and can forever not be resuscitated, in view of the foregoing statutory provision. In the same breath, the Originating Summons dated 14/2/2023 cannot succeed.
15. I cannot conclude this Ruling without commenting on what appears to me to be a case of deliberate lack of honesty on the part of the Claimant/Applicant herein. I say so because despite having sued the Respondent herein in this court's case No. 11 of 2015, having fully prosecuted the defended suit whereupon the court delivered a judgment which the Claimant/Applicant unsuccessfully sought to review, the Claimant proceeded to file the present suit and application and made no mention of the said previous proceedings. He attempted to dishonestly mislead this Court. Honesty, as the saying goes, is the best virtue, and is second only to godliness.
16. Having said that, I will and for good course, not address in detail the doctrine of res-judicata, as doing so will be a mere academic exercise and unnecessary utilization of precious judicial time which can as well be utilized in writing another pending ruling and/or judgment.
17. The Claimant/Applicant's Originating Summons dated 14/2/2023 is hereby dismissed, and the suit herein is struck down for being statute barred and therefore incompetent. Each party will bear its own costs of these proceedings.
18. Orders accordingly.



**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> JANUARY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Applicant

.....Respondent

