



**Shetty v Lean Energy Solutions Ltd (Miscellaneous Application
E293 of 2023) [2024] KEELRC 423 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 423 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E293 OF 2023
JK GAKERI, J
FEBRUARY 29, 2024**

BETWEEN

SURESH NARASIMHA SHETTY CLAIMANT

AND

LEAN ENERGY SOLUTIONS LTD RESPONDENT

RULING

1. Before the court for determination is the Claimant’s Notice of Motion dated 15th December, 2023 filed under Certificate of Urgency seeking Orders That:-
 1. Spent.
 2. Leave be granted to the Applicant to file a suit against the Respondent after expiry of the limitation period.
 3. The Draft Memorandum of Claim filed herewith be deemed as duly filed within time and admitted as a Statement of Claim for purposes of the intended suit.
 4. Costs of this application abide the results of the intended suit.
2. The Notice of Motion is expressed under Article 50(1) and 159(2)(d) and (e) of the *Constitution* of Kenya, 2010 as well as provisions of the *Civil Procedure Act*, *Employment and Labour Relations Court Act*, 2011 and the *Employment Act*, 2007 and is supported by the Affidavit of Suresh Shetty sworn on 15th December, 2023 who deposes that she joined the Respondent as the Plants Operations and Logistics Manager on 9th May, 2018 and was forced to resign in July 2020.
3. That a suit filed at the Chief Magistrates Court on 5th May, 2021 was terminated on 6th July, 2023 on account of a Preliminary Objection which the learned trial Magistrate upheld as the Claimant’s salary was above the Kshs.80,000/= threshold.



4. The affiant deposes that her counsel's efforts to secure a copy of the ruling have fallen through as the same had not been typed out on 13th December, 2023.
5. That the dismissal of the suit was attributable to counsel's mistake and the same ought not be visited on her and that she had a strong case of constructive dismissal and unilateral deduction of salary.
6. It is the affiant's case that she stood to suffer grave prejudice as she would lose the right to relief.

Applicant's submissions

7. On whether this court has jurisdiction to enlarge time, counsel submitted that Section 90 of the *Employment Act*, 2007 did not expressly prohibit enlargement of time as held in *Elias Kibathi & another V Attorney General* (2021) eKLR.
8. Reliance was also made on the sentiments of the court in *Magethe Joseph Kiarie V Eco Bank Kenya Ltd* (2015) where the court held that the court had discretion under Section 12(3) of the *Employment and Labour Relations Court Act*, 2011 to make such orders as it deemed appropriate the provisions of Section 90 of the *Employment Act*, 2007 notwithstanding.
9. That prejudice to the Respondent ought to be a consideration and the Respondent indicated that it was not opposed to the application.
10. On delay in filing this application, counsel submitted that the same was not inordinate and was thus excusable as the failure was counsel's mistake and mistake of counsel ought to be visited on their client's as has been held in legions of decisions such as *Itute Ingu & another V Isumael Mwakavi Mwendwa* (1994) eKLR among others.

Respondent's submissions

11. Counsel submitted that Section 90 of the *Employment Act*, 2007 barred any party from filing an employment matter after 3 years.
12. Reliance was made on the sentiments of the court in *Josephat Moteti Motanya V Amrutt Kenya Ltd* (2017) eKLR as well as *Beatrice Kabai Adagala V Postal Corporation of Kenya* (2015) eKLR to urge that the court had no jurisdiction to extend time and Section 90 of the *Employment Act*, 2007 was mandatory.
13. Counsel left it to the court to make a determination.
14. The singular issue for determination is whether the Applicant's Notice of Motion dated 15th December, 2023 is merited.
15. The applicant seeks the court's leave to file a suit out of time or enlargement of time within which the applicant can file her suit.
16. It is not in dispute that Claimant resigned from employment sometime in April or May 2020 but did not avail a copy of the resignation letter.
17. According to the applicant, a suit filed at the Chief Magistrate's Court MCELRC No. E752 of 2021 which was dismissed by the court for want of jurisdiction pursuant to a Preliminary Objection filed by the Respondent's counsel.
18. The salient issues for the court's determination is whether the court has discretion to enlarge time under Section 90 of the *Employment Act*, 2007.



19. The Claimant relies on the provisions of Section 12(3) of the [Employment and Labour Relations Court Act](#), 2011 which provides *inter alia*;

“In exercise of its jurisdiction under this Act, the court shall have the power to make any of the following orders;

- i. . . .
- ii. . . .
- iii. . . .
- iv. . . .
- v. . . .
- vi. . . .
- vii. . . .
- viii. Any other appropriate relief as the court may deem fit to grant.”

20. Although this provision appears to give the court unfettered discretion to grant any relief as appropriate, the provisions “any other appropriate relief” must be construed ejus dem generis, the provisions of Section 12(3)(i) to (vii) of the Act.

21. The court has noted the sentiments of Mbaru J. in [Magethe Joseph Kiarie V Eco Bank Kenya Ltd](#) (*Supra*) on the scope of Section 12(3)(viii) of the Employment and Labour Relations Act, 2011 and Nduma Nderi J. in [Elias Kibathi & another V Attorney General](#) (*Supra*).

22. In the words of Nduma Nderi J.

“The provision of Section 90 does not specifically refer to Part III of the Limitation Act, Cap 22 Laws of Kenya and does not state expressly that enlargement of time, if sought on sound grounds may not be extended.”

23. In the Magethe Joseph Kiarie case (*Supra*), Mbaru J. was of the view that;

“Where there is good reason that finds justification, the court has the power to invoke this discretion and sufficiently apply the same.”

24. The foregoing sentiments notwithstanding, the applicant’s counsel cited no case where the court exercised its discretion and enlarged time under Section 90 of the [Employment Act](#), 2007.

25. Significantly, the issue of limitation of time in the filing of a suit implicates the court’s jurisdiction and “jurisdiction is everything” as aptly captured by Nyarangi JA in Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd (1989) KLR.

26. The issue is so central that it can be raised by the court suo motu even in its judgment if it is satisfied that the suit is statute barred.



27. Limitation of time in contracts of service is governed by the provisions of Section 90 of the *Employment Act*, 2007 which provides that;

“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 cessation thereof.”

28. As correctly underscored in legions of decisions, Section 90 of the *Employment Act*, 2007 is couched in mandatory terms and has no proviso on circumstances or instances in which time may be enlarged and the applicant’s suit is an employment matter which falls squarely within the provisions of the Act.

29. The applicant herein filed a suit before the Chief Magistrates Court on 5th May, 2021, one year after the resignation and the Respondent filed the Preliminary Objection dated 30th August, 2022, more than one year later.

30. In the court’s view, the applicant had sufficient time to withdraw the suit and file it in the proper court but slept on her rights and seeks the court’s discretion this late hour after her case has already been dismissed by the court for want of jurisdiction on 6th July, 2023 more than 3 years after the cause of action accrued.

31. Similarly, the instant Notice of Motion was filed in December more than 5 months after the dismissal of the suit.

32. In the premises, the court is not persuaded that the applicant has made a sustainable for the exercise of discretion in her favour.

33. Consequently, the Notice of Motion dated 15th December, 2023 is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

