



REPUBLIC OF KENYA



**Thuita v Dedan Kimathi University of Technology (Cause
193 of 2019) [2024] KEELRC 208 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 208 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 193 OF 2019
SC RUTTO, J
FEBRUARY 9, 2024**

BETWEEN

GLADYS WANJIKU THUITA CLAIMANT

AND

DEDAN KIMATHI UNIVERSITY OF TECHNOLOGY RESPONDENT

RULING

1. What comes up for Ruling is the Respondent's Preliminary Objection dated 11th October 2023 seeking to strike out the Claim on the basis that the same is time barred.
2. On 18th October 2023, the Court directed that the Objection be canvassed by way of written submissions.
3. Both parties complied and I have considered their respective submissions. The Respondent maintains that the suit is time barred. Citing the cases of *James Murithii Ngotho v Judicial Service Commission* (2012) eKLR and *Nyanamba O. Steve v Teachers Service Commission* (2016) eKLR, the Respondent submits that limitation is not a procedural technicality but substantive law that affects jurisdiction. In support of its submissions, the Respondent has further placed reliance on the cases of *John Kiiru Njiiri v University of Nairobi* (2021) KLR and *Peter Nyamai & 7 others v M.J Carke Limited* (2013) eKLR.
4. On her part, the Claimant submits that the assertions the Respondent intends to rely on are factual matters that she has pleaded and which the Court can determine at the hearing of the main suit. The Claimant has further submitted that the cause of action arose in 2017 when the employment was terminated and not when the employment commenced.
5. According to the Claimant, the cause of action commenced on 24th March 2017 whereas the suit was filed in 2019 which was well within the prescribed time and within the law. In support of the Claimant's argument, the Court was invited to consider the determination in the case of *Mark Gori Adoo v Pan African Trucks Equipment (K) Ltd* (2020) eKLR.



Analysis and Determination

6. The singular issue for determination at this juncture is whether the Claim herein is time barred.
7. From the record, the crux of the dispute herein is payment of the Claimant's dues which she avers were unpaid from May 2014 to August 2015. It is therefore evident that the Claimant's claim is in the nature of a continuing injury.
8. A continuing injury is a wrong that is committed continuously over a period of time and does not occur by a single event or breach. An example of a continuing injury in an employment context is withholding part of an employee's pay, an unlawful deduction from an employee's salary, an underpayment etc. Consequently, in this case, for every period, the Claimant was not paid her dues as contractually agreed, a breach was committed.
9. Turning to the *Employment Act*, Section 90 addresses the limitation period in respect of a continuing injury as follows:

[90] 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. Underlined for emphasis
10. Essentially, the *Employment Act* has placed a time bar of 12 months in the case of a continuing injury, from the date of cessation of the said injury. What this means is that cessation of the injury occurs when the breach is halted for instance, upon full payment of salary in the event the injury constituted an underpayment or where the employer starts paying the salary regularly where the claim is for unpaid salary. Cessation can also occur where the employment relationship is terminated amid the continuing injury.
11. Fundamentally, a claim for continuing injury should be made within 12 months upon cessation of the alleged continuing injury.
12. In the case of *G4S Security Services (K) Limited s Joseph Kamau & 468 others* [2018] eKLR, the Court of Appeal considered the import of the aforesaid Section 90 with regards to a continuing injury and had this to say:

“Regarding ‘a continuing injury’, the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.”
13. Thus, the logical question to ask is when did the continuing injury in this case cease? Revisiting the record, the Claimant's last appointment as a part-time lecturer of the Respondent University was to run from June to September 2015. Ideally, the last date of her employment contract signifies the date when the injury ceased as that would be the last date she was engaged by the Respondent. Therefore, in terms of Section 90 of the *Employment Act*, the Claimant had up to September 2016 to lodge her claim for any unpaid dues from the Respondent.
14. At the time the Claimant's engagement with the Respondent came to an end, she had all the necessary facts with regards to her claim for unpaid salary. Therefore, by dint of Section 90 of the *Employment Act*, she had up to the end of September 2016, to move the court.



15. Be that as it may, the Claimant lodged her claim on 28th March 2019. Clearly, this was outside the stipulated time for a claim for continuing injury and as such, the Claim was statute barred by the time it was filed.
16. Submitting against the Preliminary Objection, the Claimant has averred that the cause of action arose on 24th March 2017 when her email seeking payment of the unpaid dues was acknowledged by the Respondent's Chairman Department of Accounting and Administration.
17. With due respect, I disagree with that position noting that this is a claim for a continuing injury hence it was only valid for twelve months upon cessation of the injury.
18. Therefore, acknowledgment and receipt of the Claimant's letter on 24th March 2017, by the Respondent's Chairman of the Department of Accounting and Finance could not in any way revive the Claim seeing that the same was time barred by then.
19. The total sum of my consideration is that the instant Claim is time barred having been brought one year past the date the continuing injury ceased. Accordingly, the Court lacks jurisdiction to hear and determine the matter.
20. In the circumstances, the Preliminary Objection is upheld and the Claim dated and filed on 28th March 2019, is hereby struck out for being time barred.
21. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Maina instructed by Ms. Akello

For the Respondent Ms. Muthoni

Court Assistant Abdimalik Hussein

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 had 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.

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STELLA RUTTO

JUDGE

