



**Waluchio v Teachers Service Commission (Cause E006 of 2023)
[2024] KEELRC 604 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 604 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE E006 OF 2023
JW KELI, J
MARCH 14, 2024**

BETWEEN

VINCENT WANYONYI WALUCHIO CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. The Claimant on 25th May 2023 filed the Memorandum of Claim dated 24th May 2023 supported by his verifying affidavit sworn on even date seeking the following reliefs:-
 - a. A Declaration that the dismissal of the Claimant from the service was unlawful and irregular and the Respondent to reinstate the Claimant.
 - b. The Respondent to pay the Claimant all his dues specified in his terms of employment right from the date of stopping to finality.
 - c. The Respondent to pay the compensation equivalent to 12 month's salary
 - d. That in the alternative, the Respondent to pay the Claimant Terminal benefits and dues.
 - e. The Respondent to pay the cost of this suit with interest.
 - f. Any other orders and/or relief that this Honourable Court may deem just and expedient to grant.
2. On the 11th December 2023 having not received the submissions by the Claimant the Court proceeded to issue a ruling dismissing the claim. The Claimant then filed an application dated 15th December 2023 seeking for the Court to review and vary its ruling delivered on the 11th December 2023.



3. The Application was based on the grounds that there was an error apparent on the face of the record as the Claimant's submissions had been filed on the 6th November 2023 and the ruling of the Court was issued on the 11th December 2023.
4. The application was opposed by the Respondent who filed grounds of opposition dated 23rd January 2024.
5. The Court having considered the application allowed the Application for Review and set aside its ruling of 11th December 2023 to take into consideration the submissions filed by the Claimant.

The Notice of Preliminary Objection

6. The Respondent entered an appearance on 25th July 2023 through Flora Manyasa Advocate and filed on even date a Notice of Preliminary Objection dated 4th July 2023 and its statement of defence. Accompanying the Statement of defence was a list of documents dated 4th July 2023 and the Respondent's bundle of documents.
7. The instant Notice of Preliminary Objection is premised on the grounds that the suit is time-barred and offends the mandatory provisions of section 90 of the [Employment Act](#), 2007, and thus the Honourable Court has no jurisdiction to hear and determine the claim.
8. The Court on July 26, 2023 directed that the Notice of Preliminary Objection be canvassed first by way of written submissions.

Written Submissions

9. The Respondent's written submissions were filed by Flora Manyasa Advocate on October 11, 2023 and were dated September 22, 2023.
10. The Claimant's written submissions drawn by Makokha Wattanga & Luyali Associates Advocates were dated 6th November 2023 and received in Court on an even date.

Determination

Issues for determination.

11. The Respondent in its submissions did not identify the issues for determination but submitted generally on the lack of jurisdiction on the part of the Court to determine the suit stating the same is statute time-barred.
12. The Claimant addressed two issues in his written submissions: -
 - a. Whether the preliminary objection raises legal issues, and;
 - b. Whether the memorandum of claim offends the provisions of section 90 of the [Employment Act](#).
13. The Court having perused the pleadings by the parties, and the submissions by the parties was of the considered opinion that the issue placed before the Court for determination was whether the Notice of Preliminary Objection was proper and merited.



Whether the preliminary objection was proper

14. The Notice of preliminary objection by the Respondent raised a point of law that the suit is statute-time barred and offends the mandatory provisions of section 90 of the [Employment Act](#) and thus the Court has no jurisdiction to hear and determine the claim.
15. Section 90 of the [Employment Act](#) which states: - “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.”
16. The Claimant submits that relying on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA696 a preliminary objection must confine itself to a point of law and that this was not the case herein. The Claimant further relied on the decision in *Oraro v Mbaja* (2005) e KLR where the Court stated that “ anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.” The Claimant submits that the preliminary objection does not meet the threshold in the Mukisa Biscuit case and should be dismissed
17. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs, D-F Law JA, as he then was, had this to say:-

‘...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. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.’

At page701 paragraph B-C, Sir Charles Newbold, P., added the following:-

‘A Preliminary Objection is in the nature of what used to be a demurrer. 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 the exercise of judicial discretion....’

18. Applying the foregoing authority of the *Mukisa Biscuits Case*, the Court holds that the Notice of Preliminary Objection dated 4th July 2023 by the Respondent was on a point of law that the suit was time-barred and offends the mandatory provisions of section 90 of the [Employment Act](#). The issue of a claim being time-barred is a point of law proper to be raised by way of preliminary objection as per the Mukisa Biscuits authority. The Court will then proceed to consider the preliminary objection on merit.

Whether the Notice of preliminary objection is merited.

19. The Notice of preliminary objection by the Respondent raised a point of law that the suit is statute time barred and offends the mandatory provisions of section 90 of the [Employment Act](#) and thus the Court has no jurisdiction to hear and determine the claim. Section 90 of the [Employment Act](#) states:- “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.”

20. The Respondent submits that the Claimant was issued with letter of dismissal dated 23rd March 2019 and ought to have filed claim within 3 years to wit 21st March 2023. The Respondent stated it dispatched the dismissal letter to address provided by the Claimant by registered post on the 24th May 2019.
21. The Claimant in its statement of claim denied ever receiving the dismissal letter alleged to be of 21st March 2019. The Claimant however states in paragraph 16 of the statement of claim that on 15th July 2019, he applied for reinstatement and the same was refused on the basis he applied out of time. In his letter of appeal against the dismissal dated 6th November 2019 the Claimant stated he had not received the dismissal letter.
22. A Preliminary Objection, raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the Court is called upon to exercise judicial discretion (See *Mukisa Biscuit supra*).
23. The Claimant submits that to delve into the issue of limitation of time they address the issue at two levels namely; - a limitation of three years and another of continuing injury of 12 months.
24. The Claimant submits that he was employed on 7th May 2017 by the Respondent and interdicted on November 2018. That he filed a defense to the interdiction vide letter dated 19th November 2018 while the hearing of the case was scheduled for 11th February 2019. That he was removed from the panel of teachers after the hearing and he sought for review vide a letter dated 6th November 2019. The review committee convened on the 6th August 2021 and upheld its decision which he was informed of vide letter dated 10th August 2021. The Claimant contends that since 6th August 2021, he has pursued redress of his dismissal through review, and three years had not lapsed. That the time limit of three years would have started on the 6th of August 2023.
25. The Claimant submits that he was not served with the dismissal letter for him to respond in 90 days. That there was a delay in communication of the review date by the Respondent leading to the three-year delay. There was also a related criminal case against the Claimant which was finalized on the 6th of April 2022. The Claimant urged the Court to find he was within time and that time should have started counting on the conclusion of the criminal case on the 6th of April 2022.
26. On the limb for continuing injury, the Claimant submits that the Respondent had not proven through any document that it has paid the Claimant his dues and monies in that regard, the Claimant continues to suffer up to this point in time as the said issues of payment and unfair dismissal continue to remain unsettled and has not ceased. That the issue of limitation of 12 months from cessation of continuing injury under section 90 of the *Employment Act* does not even begin to arise in the instant case.
27. The Claimant relied on the decision in *Samuel Otiende Lukoko v Shiners Girls High School* (2015)e KLR. I looked into the cited case and did not find the quotation cited in the submissions. The ruling in that case was on continuing injury of underpayment.
28. The Claimant submits that the criminal charges and disciplinary process had one goal to establish whether he was guilty of committing an act. He relied on the decision in Nyeri Cause No. 73 of 2014 of which he did not state the parties to the extent that the time limit after acquittal was 12 years. It was the Claimant’s submission that the counting of time limit should have started on the 6th of August 2023, the Respondent’s review committee having delayed hearing his review since filing in 2019 and only convened on the 6th of August 2021.



29. There is no dispute that the Claimant had been dismissed at the time of his appeal in 2019.
30. The Claimant relied on the decision of Justice Ongaya in *Andrew Maina Githinji and another v The Hon. Attorney General* where in a similar scenario, the Court held that time did not run until the date of acquittal. That Court further held that the suit was properly filed as based on the acquittal order in a criminal case. The time limit was within 12 years for suits based on judgment or Court decision under section 4 of the *Limitations Act*. The Court in that decision upheld its earlier decision in *Kenya Petroleum Workers Union v Kenya Pipeline Company Limited* (2014)e KLR to that effect.
31. On the other hand the Respondent in support of their preliminary objection relied on the decision of Justice Hellen Wasilwa in *Bramwel Okunda Mayienga v Teachers Service Commission* (2018) e KLR who held that time started to run upon dismissal and that subsequent administrative procedure of appeal or review did not hold in abeyance time for filing. The Respondent further relied on the decision of the Court of Appeal in *G4S Security Services(K) Limited v Joseph Kamau & 468 others* (2018)e KLR where the Court held that time does not stop running on the commencement of conciliation or other alternative dispute resolution mechanism provided for under the *Constitution* or any other law. In the decision, the Court of Appeal stated that the claims ought to have been filed within three years of termination of the contract of service.

Decision

32. The notice of preliminary objection by the Respondent is premised on the provisions of section 90 of the *Employment Act* to wit:-“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.”
33. The issue of timelines for filing a suit goes to the root of the court’s jurisdiction. The Court on establishing a claim is time-barred it must down its tools.
34. It was not in dispute that the Claimant was dismissed from the employment of the Respondent before 15th July 2019 when he applied for reinstatement upon acquittal of criminal charges related to the reasons for dismissal at the first instance(he was later charged afresh). The claim was filed on 25th May 2023. The Claimant stated he was not served with a dismissal letter. His case was that the time started to run after acquittal or upon the decision on the review. The decision on review upholding his dismissal was communicated by the Respondent vide a letter dated 10th August 2021. His other case was this was a continuing injury and time was yet to start to run.
35. In the instant case the parties cited 2 contradictory decisions of the court. The decisions of the Court are only persuasive. The Court of Appeal is binding on this Court. In *G4S Security Services(K) Limited v Joseph Kamau & 468 others* (2018)e KLR on appeal from this court, it was held that time started to run after the termination of the contract of service. The Court held that time does not stop running on the commencement of conciliation or other alternative dispute resolution mechanisms provided for under the *Constitution* or any other law.
36. This Court states that the act of termination of the employment contract is the cause of action in employment claims for reinstatement and the basis for all the remedies prescribed under section 49 of the *Employment Act*.
37. On the continuing injury limb of the Claimant’s position, the Court of Appeal in the *G4S case* (*supra*) held in paragraph 20 that the learned trial judge erred in concluding that the claims for unpaid terminal



dues had no limitation of time. The Court of Appeal stated, “further upon the Claimant’s dismissal , any claim on a continuing injury ought to have been filed within one year failing which it was time barred”.

38. In conclusion, It is settled law that the Court has no jurisdiction to extend time under the provisions of section 90 of the *Employment Act*. The claim was filed long after the expiry of 3 years after the dismissal of the Claimant from service by the Respondent. Consequently, I find the point of law raised in the Notice of Preliminary Objection by the Respondent and dated 4th July 2023 is merited.
39. The claim dated May 24, 2023 and filed in Court on the May 25, 2023 is held to be statute time-barred under section 90 of the *Employment Act* and is dismissed as the Court has no jurisdiction. To temper justice with mercy I make no order as to costs.
40. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 14TH MARCH 2024.

J.W. KELI

JUDGE

In The Presence Of:-

Court Assistant: Lucy Macheso

Claimant:- Wekesa h/b Makokha

Respondent : Manyasa

