



Mutuku v Multichoice Kenya Limited & another (Cause E1039 of 2023) [2024] KEELRC 1028 (KLR) (17 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 1028 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1039 OF 2023
NZIOKI WA MAKAU, J
APRIL 17, 2024**

BETWEEN

PETER MUOKI MUTUKU CLAIMANT

AND

MULTICHOICE KENYA LIMITED 1ST RESPONDENT

NANCY MATIMU 2ND RESPONDENT

RULING

1. The 1st and 2nd Respondents/Applicants filed a Notice of Preliminary Objection dated 27th February 2024 on the grounds that the Court lacks jurisdiction to hear and determine the present Claim as the cause of action is statutorily time barred by virtue of the provisions of section 90 of the [Employment Act](#). Secondly, that the present Claim is fatally defective, incompetent and an abuse of the Court process and should be dismissed with costs to the Respondents.
2. In response, the Claimant/Respondent swore a Replying Affidavit on 8th March 2024 averring that after the Respondents summarily dismissed him on 27th November 2020, he appealed against the dismissal on 7th December 2020. He then received the outcome of the appeal on 18th December 2020 via a letter dated the same date from the Respondents/Applicants. He further averred that his advocates on record have advised him that time begins to run for a cause of action to be lodged before the Court when all internal processes have been exhausted. That he lodged the present Claim on 18th December 2023 and paid all the requisite fees on the said date, which is within the time provided and therefore the allegation that the Claim is time barred is unattainable.

Respondents/Applicants' Submissions

3. The Respondents/Applicants submitted that the single issue for determination is whether the present claim is time barred, which then determines the question of whether the Court has jurisdiction



to consider and determine the present claim. They cited section 90 of the *Employment Act*, which provides that:

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.

4. It was the Respondents/Applicants' submission that it is trite law that issues of limitation of time goes to the jurisdiction of the Court as was affirmed by the Court in the case of *Nyakundi Okerio & another v Elijah Sokobe Obot & 2 others* [2021] eKLR. That this position is in line with the pronouncement by the Court of Appeal in the celebrated *Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* [1989] KLR 1 that jurisdiction is everything and without it, a Court of law would be required to down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. The Respondents/Applicants fronted that since the present Claim is based on an employment contract, it is subject to the three-year limitation period under section 89 of the *Employment Act*, which is the applicable law. That since the cause of action arose on 27th November 2020 on the date of termination of the Claimant's employment, the Claimant should have filed the Claim on or before 27th November 2023. It was the Applicants' submission that the present Claim is thus time barred as it was filed on 18th December 2023 and which further means that this Honourable Court does not have jurisdiction to entertain, hear and determine the suit.
5. The Applicants further submitted that an internal process such as an appeal process after termination of employment does not stop time from running. In this regard, they relied on the reasoning of this Court in *John Kiiru Njiiri v University of Nairobi* [2021] eKLR that the fact that an employee whose employment has been terminated seeks a review or an appeal or makes demand thereof does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal or a response on the demand is made. The Applicants argued that delineated from the holding of Mbaru J. in the *John Kiiru Njiiri case (supra)*, the Claimant's contention that his cause of action accrues at the termination of an internal review process is flawed at best. That moreover, it is trite law that this Honourable Court cannot extend time of filing of a claim arising out of an employment contract even where an extension of time is sought.

Claimant/Respondent's Submissions

6. According to the Claimant/Respondent, the issues for determination are whether the Respondents' Preliminary Objection dated 27th February 2024 has been raised on a pure point of law; and when does time start running for employment disputes. The Claimant/Respondent submitted that the Respondent's preliminary objection herein lacks merit on the face of it because it raises no pure points of law but matters of facts that need to be tested by evidence. He argued that it is trite law that a valid preliminary objection must be on a pure point of law. That in the case of *Daqare Transporters Limited v Zainab Hashi* [2021] eKLR, the High Court at Nairobi referred to the case of *Abmed Noorani & another v Rajendra Ratilal Sanghani* [2020] eKLR where the Court of Appeal set out the following tests to be satisfied before a preliminary objection can succeed: firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. According to the Claimant/Respondent, the matter of fact raised in the Applicants' preliminary objection is the time when the cause of action commenced. That the question as to when his employment was terminated, whether he appealed, what date the appeal was determined, and when



he filed this suit, are all questions of fact that will behove this Court to delve into matters of fact. That since there is a dispute as to when the cause of action arose, the Court cannot entertain the preliminary objection herein. He maintained that the cause of action arose on 18th December 2020 and the suit was filed on 18th December 2023, which is the last day of the period within which a claim should be instituted according to section 89 of the *Employment Act*.

7. As to when time starts running for employment disputes to be instituted in Court, the Claimant/Respondent submitted that courts have held that in employment cases where there is an ongoing alternative dispute resolution, time stops to run at such a time when those mechanisms have been exhausted. He cited the case of *Desidery Tyson Otieno Onyango v Rift Valley Railways [Kenya] Limited* [2014] eKLR in which the Court stated that time stands still while other dispute resolution mechanisms are engaged, and it re-starts when the negotiation or other mechanisms break down. He further noted that in another case, *Hawkins Wagonza Musonye v Rift Valley Railways Kenya Limited* [2014] eKLR, the Court found that the claim was not time barred after considering the period of negotiations between the claimant's advocates and the employer. The Claimant/Respondent asserted that going by the foregoing two authorities, in his case time began to run on 18th December 2020 when the outcome of internal dispute resolution was exhausted and communicated to him. He thus urged the Court to hear the matter in the interest of justice and noted that if he had filed the suit any time after 27th November 2020 and before 18th December 2020, the suit would have been barred for failing to exhaust internal remedy processes.
8. Further, the Claimant/Respondent submitted that the law cannot countenance two concurrent dispute resolution processes regarding the same matter and cause of action. That such a position is alien to our law and would defeat the intentions of the *Employment Act* to exhaust all appeal avenues. He argued that the doctrine of exhaustion is a cardinal legal doctrine in our law recognized under Article 159 of *the Constitution* of Kenya and aimed at preserving precious judicial time. He cited the case of *Republic v Joe Muecheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Katiba Institute & another (Ex parte); Immaculate Kasait, Data Commissioner (Interested Party)* (Judicial Review Application E1138 of 2020) [2021] KEHC 122 (KLR) in which the Court held that:

“Where there was an alternative remedy and Parliament had prescribed a particular form of procedure for resolution of a complaint, that procedure ought to be followed. Section 9(2) of the *Fair Administrative Action Act* implied that where there existed internal mechanisms for resolution of the dispute which, inevitably, would yield an alternative remedy, it was no longer a matter of the court's discretion to entertain, let alone grant, an application for judicial review. In that event, the court would not review the administrative action until the internal mechanism had been exhausted.”

The Claimant thus urged the dismissal of the preliminary objection by the Respondents/Applicants with costs.

9. The matter of jurisdiction is critical since without it, a court cannot take one more step. The Respondents assert in their preliminary objection that the claim herein is time barred. The Claimant on his part asserts that time did not begin to run until the internal process was concluded. The Claimant asserts the appeal he lodged on 7th December 2020 and its eventual outcome on 18th December 2020 gave him the leeway to file the claim on 18th December 2023.



10. Limitation on matters labour is set by section 90 of the *Employment Act* provides as follows in *parre materia:-*

...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 [emphasis supplied]

11. The limitation in respect to the Claimant's claim ran from the date of dismissal which was on 27th November 2020. As such, the claim he filed on 18th December 2023 was late by almost a month. One wonders why he waited until 18th December 2023 to file a claim. Such brinkmanship is what has led the Claimant to this unnecessary conundrum. He willingly waited for time to run. He failed to note as Kenyans are wont to say *mapema ndio best* in as far as his claim goes. Limitation is not in the books for show. It is meant to protect a party so as not to meet a case when witnesses are gone, memories faded and documents misplaced eternally. Granted the preliminary objection by the Respondents is merited, the suit herein is struck out as it is time barred. The Claimant is to pay costs for the successful preliminary objection raised.

It is so ordered.

Dated and delivered at Nairobi this 17th day of April 2024

Nzioki wa Makau

JUDGE

