



**Njoroge v NCBA Bank Kenya PLC Formerly NIC Bank Ltd (Miscellaneous Case E285 of 2023) [2024] KEELRC 794 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 794 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CASE E285 OF 2023**

**JK GAKERI, J**

**APRIL 17, 2024**

**BETWEEN**

**ROBERT GEORGE KAMAU NJOROGE ..... APPLICANT**

**AND**

**NCBA BANK KENYA PLC FORMERLY NIC BANK LTD ..... RESPONDENT**

**RULING**

1. Before the court for determination is the respondent's notice of preliminary objection dated December 28, 2023 that the court is denied jurisdiction by section 90 of the *Employment Act*, 2007 to extend time as sought or at all.
2. The preliminary objection was precipitated by the claimant/applicant's application dated December 8, 2023 filed under certificate of urgency seeking *inter alia* leave to file a suit out of time.
3. The brief facts according to the applicant's supporting affidavit is that he was employed by the respondent bank on September 26, 1997 until May 9, 2008 when his employment was terminated by a letter of even date which the claimant received on May 12, 2008.
4. It is the claimant's case that since then, he has failed to secure alternative employment and attempts to settle the issue of liability with the respondent have fallen through.
5. The claimant makes reference to a letter by his counsel dated September 11, 2023 and an email to the respondent's deputy director of human resources dated November 18, 2023.
6. It is the applicant's case that he could not institute legal proceedings for unfair or unlawful termination of employment earlier as he was pursuing an out of court settlement but the respondent has been adamant.
7. The respondent challenges the applicant's notice of motion on the premise that the court has no jurisdiction to entertain the suit let alone grant the leave prayed for.



### **Applicant's submissions**

8. Counsel submitted on the court's jurisdiction to extend time and prejudice to the respondent.
9. On the court's discretion, counsel submitted that the applicant was misguided on the law and time lapsed as he was negotiating with representatives of the respondent company and sought the advise of Ahmed Mberere & Co. Advocates in September 2023 regarding termination of his employment.
10. Reliance was made on the decisions in *YH Wholesalers Ltd v Kenya Revenue Authority* (2021) eKLR and *Gatune v The Headmaster, Nairobi Technical High School & another* (1986) eKLR, where, in the latter case the Court of Appeal allowed extension of time on account that the applicant had a disability under the exceptions provided by the *Limitation of Actions Act*, cap 22, laws of Kenya.
11. As regards prejudice to the Respondent, counsel submitted that it stood to suffer no prejudice as both parties will be heard.
12. Reliance was also made on the sentiments of the court in *Branco Arabe Espanol v Bank of Uganda* (1999) 2 EA 22 quoted with approval in *Omulele & Tolo Advocates v Mount Holdings Ltd* (2018) eKLR to underscore the essence of doing justice in all matters.

### **Respondent's submissions**

13. Counsel submitted on a singular issue, that the court lacked jurisdiction to grant the leave sought by the applicant and cited the sentiments of the court in *Beatrice Kahai Adagala v Postal Corporation of Kenya* (2015) eKLR on the effect of section 90 of the *Employment Act*, 2007.
14. Concerning the time spent negotiating a settlement out of court, counsel relied on the sentiments of the Court of Appeal in *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another* (2016) eKLR as well as those in *David Ngugi Waweru v Attorney General & another* (2017) eKLR on the need to give cases a human face to urge that the court had no jurisdiction to grant the leave sought by the applicant.

### **Determination**

15. The singular issue for determination is whether the respondent's notice of preliminary objection dated December 28, 2023 is merited.
16. In determining whether the respondent's notice of preliminary objection meets the threshold of a preliminary objection, the court is guided by the often cited words of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where Law JA stated as follows;

“... 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, 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.”
17. According to Sir Charles Newbold, V.P;

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. It requires no gainsaying that guided by the foregoing sentiments, the court is satisfied that the respondent’s notice of preliminary objection is a competent preliminary objection as it raises the essential and critical issue of jurisdiction of the court to hear and determine the Claimant’s Notice of Motion.
19. As held by Nyarangi JA in *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) KLR 1;  
“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
20. Relatedly, the issue of limitation of time implicates the jurisdiction of the court to hear and determine the suit before it.
21. As to whether the preliminary objection is merited, counsels for the parties adopted opposing positions with the applicant’s counsel contending that the applicant and the respondent were negotiating and he thus could not pursue court action and cited the Court of Appeal decision in *David Stephen Gatune v Headmaster, Nairobi Technical High School & another* (*supra*) to reinforce the submission.
22. In that case, the Court of Appeal, by a majority, was satisfied that as the applicant was negotiating with the Attorney General and had a disability, the 10 months delay was accounted for in the court’s view.
23. Similarly, the court was persuaded that the Attorney General ought to have informed the appellant about filing an action within 6 years and that doing so would not have prejudiced the on-going negotiations.
24. Nyarangi JA stated as follows;  
“Having not done so and therefore having caused the appellant to continue the negotiations, it is only fair that the appellant should not be penalized for attempting to settle the dispute out of court. I fear that a contrary view will operate harshly on the appellant who has been guilty of no lashes and has negotiated in good faith.”
25. The two cases are distinguishable as the applicant’s employment in the instant case was terminated on May 9, 2008 and the instant Application was received by the court on December 11, 2023, more than 15 years and 7 months later and the applicant has not pleaded any disability.
26. Significantly, although the notice of preliminary objection relies on section 90 of the *Employment Act*, 2007, the statute is inapplicable to the instant suit as the applicant’s employment was terminated on May 9, 2008. The termination pre-thus pre-dates the *Employment Act*, 2007 which came into operation on June 2, 2008.
27. It therefore follows that the operative law was the *Limitation of Actions Act*, 1969 (Revised in 2022).



28. Section 4(1) of the Act provides that;
- “The following actions may not be brought after the end of six years from the date on which the cause of action accrued –
- a. actions founded on contract; . . .”
29. However, unlike the *Employment Act*, whose section 90 is couched in mandatory terms, the provisions of the *Limitation of Actions Act*, 1969 provide for extension of the period of limitation under part III of the Act on the grounds of disability, acknowledgment and payment as well as fraud, mistake and ignorance of material facts.
30. The applicant has not relied on any of the grounds enumerated under part III of the *Limitation of Actions Act*, 1968 but relies on the fact that the parties were negotiating, an issues counsel urged in his submissions and cited the Court of Appeal decision cited above.
31. In an endeavour to buttress his case on negotiations, the applicant attached copies of his advocate’s letter to the respondent dated September 11, 2023 and received on September 14, 2023.
32. Also attached are copies of email communication between the applicant and senior officials of the Respondent.
33. While the 1<sup>st</sup> email to one Venessa Kamatia was sent on July 28, 2023, the last was sent on November 20, 2023 by which the respondent’s deputy director, Human Resource, Mr. Apollo invited the applicant for a face to face conversation at his office along Mara Ragati Road – Upperhill, Nairobi.
34. The applicant provided no evidence of what transpired at the meeting or if it took place at all.
35. Even assuming that applicant and the Respondent were negotiating for one (1) year before the suit was filed on December 11, 2023, such negotiations would not obviate the need to demonstrate the undoubtedly inordinate delay in following up the matter with the Respondent since May 2008.
36. The applicant, is in the court’s view guilty of laches and has not provided any credible explanation or justification for the delay.
37. Needless to emphasize, judicial authority is unambiguous that engaging in other forms of dispute resolution including negotiations does not postpone the running of time.
38. As regards prejudice to the respondent if the application herein is granted, the sentiments of the Court of Appeal in *David Ngugi Waweru v Attorney General & another* (*supra*) cited by the Respondent’s counsel are instructive as follows;
- “As to the issue that courts must have human face, it is our view that the sword of justice cuts both ways. It applies to the appellant as well as to the Respondent. Being courts of justice, we cannot look at only one side and shut our eyes to the other side as there are always competing interests.”
39. The fact that the respondent did not allege that it would suffer any prejudice if the instant application was granted cannot be construed as a suggestion that it would happily embrace a suit filed 8 years after the duration prescribed by the law had lapsed.
40. The *Limitation of Actions Act*, 1968 accorded the applicant 6 years from the date the cause of action accrued on May 9, 2008 and time stopped running on May 10, 2014.



41. Arguably, the applicant was indolent for over 8 years.
42. Having failed to allege and evidentiary demonstrate that any of the provisions of part III of the Limitation of Actions Act, 1969 are applicable to his application, the court is satisfied that the respondent's preliminary objection merited that it has no jurisdiction to hear and determine the application as the applicant's suit in question is statute barred and hereby downs its tools.
43. Parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF APRIL 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

