



**Bichanga v Mount Kenya University (Cause E073 of 2022)
[2024] KEELRC 985 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 985 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E073 OF 2022
BOM MANANI, J
APRIL 11, 2024**

BETWEEN

DR JULIUS BICHANGA CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

RULING

1. The Claimant filed the instant suit in a bid to recover alleged salary arrears of Ksh. 2,505,000.00 from the Respondent. The Claimant's case is that he has rendered services to the Respondent from the year 2010 to the date of institution of the instant suit. However, the Respondent has withheld part of his remuneration which accrued over the years totaling Ksh. 2,505,000.00 as at the time of instituting these proceedings.
2. The Respondent has filed a defense to the action. In addition, it has filed a Notice of Preliminary Objection dated July 8, 2023 in which it pleads that the suit is time barred. The Respondent relies on section 90 of the Employment Act to anchor its objection.

Analysis

3. At the outset, I should point out that I have studied the decision by my brother Justice Nderitu in Ogola V Mount Kenya University (Miscellaneous Civil Application E046 of 2022) [2023] KEELRC [2281] (KLR) (28 September 2023) (Ruling) which the Respondent relies on in support of its position. In that case, the Applicant moved the court in November 2022 for leave to extend time to institute proceedings to recover arrears which had accrued from a service that was rendered in August 2018. However, there was no indication that the parties had sustained their employment relation after August 2018. Evidently, the application for leave to file suit out of time was lodged more than three (3) years after the debt in question had been incurred and the employment relation between the parties had presumably terminated.



4. Unlike in the *Ogola v Mount Kenya University case* (*supra*), there is no suggestion that the employment relation between the parties in the instant suit had terminated at the time of filing suit. As a matter of fact, the Claimant indicates that the amount in dispute relates to services which he has rendered to the Respondent from 2010 to the date of filing suit suggesting that at the time suit was filed, the parties were still in the employment relation.
5. Further, it is not the Claimant's case that the amount claimed all accrued in 2010. Rather, it is his case that it (the amount) has continued to accumulate from the year 2010 to the date of filing suit.
6. The two cases are therefore clearly distinguishable. Whilst the debt in the case of *Ogola v Mount Kenya University* (*supra*) appears to have crystalized in August 2018 when it was incurred, the claim by the Claimant in the instant suit relates to amounts which have allegedly continued to accumulate from 2010 to the time of institution of the suit.
7. The Claimant's contention is that the amount claimed has been accumulating over time since 2010 to date. This raises the question whether the instant suit can be said to be time barred within the meaning of section 90 of the *Employment Act*.
8. The Court of Appeal has attempted to provide an answer to this question in its recent decision of *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment). One of the questions in that case was whether a claim for benefits that were more than three years old at the date of institution of the claim were time barred in terms of section 90 of the *Employment Act*. In its decision, the Court of Appeal held that the outstanding benefits constituted a continuing injury since the parties remained in the employment relation as they (the benefits) accumulated.
9. The court expressed itself on the matter as follows:-

" Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90."
10. In the past, I have expressed a contrary view from the one postulated by the Court of Appeal on the subject (see *Siro v Muyundo & 2 others* (All being sued in their capacity as Chairperson, Secretary and Treasurer of Ray of Hope Clinic & Community Centre) (Cause 1108 of 2018) [2022] KEELRC 13256 (KLR) (16 November 2022) (Judgment). However, I am bound by the Court of Appeal's latest position on the the matter (*The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment).

Determination

11. The upshot is that the instant claim is not time barred. As such, the preliminary objection by the Respondent is not well founded.



12. As a consequence, it is dismissed with costs.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF APRIL, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

