



**Kitonyi v National Cereals Produce Board (Cause E202 of 2022)
[2024] KEELRC 968 (KLR) (8 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 968 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E202 OF 2022
K OCHARO, J
APRIL 8, 2024**

BETWEEN

ROSEMARY KITONYI CLAIMANT

AND

NATIONAL CEREALS PRODUCE BOARD RESPONDENT

RULING

Introduction

1. The Claimant commenced this suit vide Memorandum of Claim dated March 23, 2022 sued the Respondent seeking various orders against it thus; an order compelling it to reinstate her into employment; compensation in the sum of Kshs. 6,157,425/- costs and interest.
 1. The Respondent filed a Notice of Preliminary Objection dated March 27, 2023, challenging the jurisdiction of this Court. The Respondent asserts that the Claimant's claim herein is time-barred by dint of the provisions of Section 90 of the *Employment Act*, and Section 4[1] of the *Limitation of Actions Act*, as the cause of action in respect of the matter arose in 2019.
 2. In line with the directions of this Court issued on April 27, 2023 that parties canvass the preliminary objection by way of written submissions, the Respondent filed submissions dated May 29, 2023, and the Claimant filed submissions dated July 25, 2023.

Issues for Determination

3. I have carefully and holistically considered the suit herein; the Notice of Preliminary Objection dated March 27, 2023; the parties' respective submissions and the authorities that they place reliance on, and return that only a single issue emerged for determination, thus; whether the Claimant's suit herein is time-barred by dint of the provisions to Section 90 of the *Employment Act* 2007.



4. Section 90 of the *Employment Act* 2007 provides thus: -

“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.”

5. Imperative to state that Section 90 of the *Employment Act*, set in with a twofold effect on the matter, limitation of time as regards the causes of action regarding contracts of employment which were hitherto dealt with under the space of contracts generally. The section limited the time of filing actions regarding contracts of service or matters arising from the contract, to three years. Thus, lessening the same from the six years provided for under Section 4[1] of the *Limitation of Actions Act*. Further, it ousted the applicability of Section 4 [1] of the *Limitation of Actions Act* to such actions.

6. In the Context of the *Employment Act*, to determine whether the suit herein is time-barred or not, this Court must determine when the cause of action arose or when the act, neglect or default complained in arose. In the case of *David Wekesa Nambafu v Bob Morgan Services Ltd* [2020] eKLR, which bore similar facts to the present suit, the Court held as follows on when the cause of action arose: -

“30. The respondent contended that the suit is time barred by didn’t of section 90 of the *Employment Act* because the claimant did not challenge the lawfulness of the suspension within 3 years from 31.1.2006 when it was communicated, or within 12 months from 25.1.2012 when the continued suspension ended with his acquittal. Section 90 of the *Employment Act* on the other hand states 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 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.”

31. Applying the foregoing provision to the facts of this case I am of the view that the suit is not time barred because as at the time when the RW1 testified, the claimant’s services had not been terminated nor had the suspension been lifted by the employer. Although RW1 disputed that the claimant reported back to work and gave a copy of the judgment to the two HR officers, he admitted that the claimant did in fact serve the letter dated 4.3.2012 to report about his acquittal and the suspension was not lifted and instead he was served with another letter requesting for copy of the judgment and proceedings. Instead, it continued until the suit was filed on 27.11.2014 to claim accrued benefits under the contract of service. I, therefore, return that the claimant had the right to bring suit to challenge the lawfulness of the suspension at any time from the day it was communicated up to 12 months from the day when it ceased or sue for any benefit accruing during the suspension period within 3 years next after the date when the criminal case ended. In this, the suit was filed before



the suspension was lifted and within 3 years after the acquittal and therefore it is not statute barred.”

7. No doubt, the Claimant in the present case, was suspended from her employment pending investigations against her on some alleged malpractices on her part. Subsequent, to suspension and investigations, the Respondent caused the Claimant to be arrested by the police, arraigned in court and charged with a criminal offence. Prior to the Claimant’s arraignment and charging in court or thereafter in the course of the proceedings, the Respondent didn’t deem it necessary to lift the suspension or terminate the Claimant’s employment with a cause in one of those manners recognized under the law. Consequently, I find no difficulty in concluding that the Claimant’s employment was and has not been terminated. Couching her claim the way she has, and I think rightfully so, has been informed by this fact.
8. The date of the suspension cannot be the basis for ascertaining whether or not the claim has become time-barred by operation of the provisions of Section 90 of the *Employment Act*. The Claimant is not challenging the legality of the suspension, her Claim flows from the events post the suspension for instance non-payment of salary and failure on the part of the Respondent to reinstate her after the acquittal, not from the suspension.
9. In my view, as regards her claim for reinstatement, the cause of action arose when she brought her acquittal of the criminal charge to the attention of the Respondent, and the Respondent refused and or neglected to reinstate her. I make this conclusion based on the fact that from the totality of the circumstances of the matter, it appears that the Respondent had made the fate of the Claimant’s employment subject to the outcome of the criminal case. Therefore, September 17, 2021.
10. As regards the payment of accrued but unpaid salary during the time she was under suspension, I hold the view that the Respondent’s failure to pay the salary if unjustified amounted to a continuing injury, and the same would rightfully be sought as did the Claimant. See the Court of Appeal decision in the case of *The German School Society vs- Helga Ohany* as consolidated with *Helga Ohany vs The German School Society* [2023] KECA 894 [KLR].
11. For the above reasons, I return that the Claimant’s claim is not time-barred.
12. In the upshot, the Respondent’s objection is dismissed.
13. It is so ordered.

READ, DELIVERED AND SIGNED THIS 8TH DAY OF APRIL, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Mr. Webale for Claimant

No appearance for Respondent

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 March 15, 2020 and subsequent directions of April 21, 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 [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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

