



Mufuma v British Army Training Unit Kenya (Employment and Labour Relations Cause E980 of 2023) [2024] KEELRC 734 (KLR) (5 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 734 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E980 OF 2023**

SC RUTTO, J

APRIL 5, 2024

BETWEEN

DOMINIC AMBISAI MUFUMA APPLICANT

AND

BRITISH ARMY TRAINING UNIT KENYA RESPONDENT

RULING

1. What comes up for determination is the Applicant's Notice of Motion Application dated 24th November 2023, through which he seeks the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to grant the Claimant/Applicant leave to institute out of time against the Respondent being (the British Army Training Unit in Kenya) following the Claimant's unlawful termination on 28th April 2010.
 - c. That costs of this Application be provided for.
2. The Application is supported by the grounds appearing on its face and the Affidavit of Mr. Dominic Ambisai Mufuma, the Applicant herein. Grounds on the face of the Application are that the requisite period for filing proceedings has expired due to circumstances beyond the Applicant's control. That further, the Applicant was charged in Nairobi Criminal Case No. 2117/09 alongside 3 others for being in possession of ammunition contrary to Section 4(2) (a) as read together with Section 4(3) (b) of the *Firearms Act*. He was discharged in 2020 of the said offences. That the basis for the termination of the Applicant's employment was the said criminal charge of which he was acquitted by the criminal court in January 2020.
3. In his Affidavit, Mr. Ambisai avers that on 11th February 2010, he received a letter from the Respondent suspending him without pay until the criminal case was concluded. On 28th April 2010,



his employment was terminated because of the delay in concluding the criminal trial. He contends that it is only fair and just that he be granted leave to file the claim herein out of time as the delay was occasioned by the criminal proceedings.

4. Upon being served with the Application, the Respondent filed a Notice of Preliminary Objection dated 18th December 2023, premised on the following grounds:
 1. Section 90 of the *Employment Act* is framed in mandatory terms and a claim based on a contract of employment must be filed within 3 years from the date the cause of action arose.
 2. The Claimant's employment contract was terminated on 28th April 2010 and the period for instituting a claim alleging unlawful termination lapsed on 28th April 2013.
 3. This suit and the Application were filed on 24th November 2023 which is more than ten years after the limitation period has lapsed.
 4. The Claimant's claim as set out in the Statement of Claim dated 24th November 2023 is time barred.

Submissions

5. Pursuant to the Court's directions of 19th December 2023, the Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.
6. Placing reliance on the provisions of Articles 41, 47 and 50 of the *Constitution*, the Applicant has submitted that the Respondent violated his labour rights by withholding his salary before unfairly dismissing him. He further submits that his right to a fair hearing can only be upheld by the Court as the Respondent disregarded due process. In support of his argument, the Applicant has cited the case of *Johnson Kazungu v Kenya Marine & Fisheries Research Institute* [2021] eKLR.
7. On its part, the Respondent submits that the claim does not allege any continuing injury and it follows that it should have been filed within 3 years of the Applicant's termination from employment. It was the Respondent's further submission that the claim is therefore time-barred and there is no jurisdiction to extend the time for filing the suit. To buttress the Respondent's submissions, reliance was placed on the cases of *Michira & 41 others v Aegis Kenya Ltd t/s Leopard Beach Hotel* [2023] KEELRC 2551(KLR) and *Martin Imbusi v Nyayo Tea Zones Development Corporation* [2017] eKLR.

Analysis and Determination

8. To my mind, the singular issue falling for determination is whether the Court should allow the instant Application thereby granting the Applicant leave to institute his claim out of time.
9. Section 90 of the *Employment Act*, which provides for the period within which a claim arising out of a contract of service may be lodged, is couched in the following manner:

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.
10. A clear reading of the above statutory provision reveals that it is couched in mandatory terms. As such, any claim based on a contract of service ought to be brought within a period of three years from the date the cause of action arises. Further, it is apparent that the aforesaid Section 90 is cast in stone and the limitation period is not subject to extension. On this issue, I gather support from the determination



by the Court of Appeal in the case of Beatrice Kabai Adagala v Postal Corporation of Kenya [2015] eKLR, thus:

“Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of Divecon Limited v Samani [1995-1998] 1 EA P.48, a decision relied upon by Radido, J. in Josephat Ndirangu v Henkel Chemicals (EA) Limited, [2013] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act.”

11. To this end, it is evident that pursuant to Section 90 of the Employment Act, this Court has no jurisdiction to extend the time to file a suit beyond the prescribed statutory period.
12. If I may add, it is instructive to note that criminal proceedings are governed under a different legal regime hence has no bearing on a claim for unfair termination. Indeed, the two processes are mutually exclusive. Accordingly, the fact that the Applicant was going through a criminal trial did not impede him from bringing forth a claim for unfair termination. That was a different cause of action altogether with a life of its own.
13. As a matter of fact, the standard of proof in a criminal case is quite different from that in a civil suit. My position is fortified by the determination of the Court of Appeal in the case of Attorney General & another v Andrew Maina Gitbinji & another [2016] eKLR, where it was held that:

“In other cases where a plea was made that there was an intervening criminal process, it has been held that the institution of criminal proceedings is not a bar to civil proceedings based on similar facts.”

14. Therefore, whether or not there were pending criminal proceedings against the Applicant, nothing stopped him from moving the Court as he seeks to do now. In any event, he had all the facts and evidence at his disposal. What stopped him?
15. In total sum, the Application dated November 24, 2023 is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF APRIL 2024.

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STELLA RUTTO

JUDGE

In the presence of:

No appearance for the Applicant

Ms. Mwangi instructed by Ms. Ondieki for the Respondent

Millicent Kibet Court Assistant

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

