



Chege & 62 others v Put Sarajevo General Engineering Company (Miscellaneous Application E256 of 2023) [2024] KEELRC 712 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 712 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E256 OF 2023**

L NDOLO, J

APRIL 4, 2024

BETWEEN

JOHN NGIGE CHEGE & 62 OTHERS APPLICANT

AND

PUT SARAJEVO GENERAL ENGINEERING COMPANY RESPONDENT

RULING

1. By a Notice of Motion dated 31st October 2023, the Applicants seek leave to file a claim against the Respondent after the limitation period.
2. The Motion is supported by an affidavit sworn by John Ngige Chege and is based on the following grounds:
 - a. That the Applicants are former employees of the Respondent, having been employed on diverse dates to serve in different capacities at the Respondent's work sites within the Republic of Kenya;
 - b. That sometime in November 2017, the Respondent unilaterally suspended the Applicants' salaries and wages, without any lawful or justifiable cause, contrary to the terms of employment;
 - c. That despite the suspension and non-payment of their salaries and wages, the Applicants continued delivering on their duties and responsibilities until sometime in September 2018, when they decided to take action against the Respondent, for recovery of their unpaid salaries;
 - d. That the Applicants did not sit on their rights but were diligent in instructing an Advocate in Migori Town to immediately institute proceedings in court, against the Respondent to recover their unpaid salaries and wages;



- e. That the said Advocate misadvised the Applicants and thereafter instituted a constitutional petition at the Employment and Labour Relations Court at Kisumu being Kisumu ELRC Petition No 70 of 2018: Francis Ndavi & 527 others v Put Sarajevo General Engineering Company;
 - f. That in the said constitutional petition, the Applicants had sought the following orders:
 - i. An order directing the Respondent to settle all salary arrears of the Petitioners and thereafter to promptly pay such salaries as they fell due;
 - ii. A declaration that the petitioners were entitled to fair labour practices and fair administration of justice.
 - g. That alongside the Petition, the Advocate filed a Notice of Motion under Certificate of Urgency, seeking an order to compel the Respondent to pay the Petitioners' outstanding salaries and a restraining order barring the Respondent from selling and/or alienating any of its assets;
 - h. That when the Respondent put in its reply to the petition, it filed a Notice of Preliminary Objection challenging the jurisdiction of the Court to determine the matter. The Respondent further stated that the matter was an ordinary cause which did not call for a constitutional petition;
 - i. That in a judgment delivered on 17th November 2021, the petition was dismissed summarily on the ground that it did not meet the constitutional threshold as it did not raise any constitutional questions;
 - j. That the Advocate for the Applicants did not inform them of the outcome;
 - k. That on 9th October 2023, the 1st Applicant, John Ngige Chege visited the Kisumu ELRC Registry and was shocked to learn that judgment in the matter had already been delivered;
 - l. That at the time of this discovery, the statutory time limitation within which the Applicants could institute a claim against the Respondent had already lapsed;
 - m. That the Applicants were not indolent in their pursuit of justice but it is their former Counsel who approached the Court through the wrong procedure and kept the Applicants in the dark about the progress and outcome of the matter;
 - n. That the mistake of Counsel should not be visited on the Applicants, who now stand to suffer miscarriage of justice if the orders sought are not granted;
 - o. That the Applicants have a good claim against the Respondent, with a high chance of success as demonstrated in the annexed draft Memorandum of Claim;
 - p. That the orders sought will not in any way prejudice the Respondent.
3. The Respondent's response to the application is contained in a replying affidavit sworn by its Executive Chairman, Usamah Timimi on 24th January 2024.
 4. Timimi depones that this Court lacks jurisdiction to entertain the Applicants' intended claim for reasons that:
 - a. The intended claim is incurably time barred;



- b. The intended claim is res judicata as there is a prevailing judgment issued by a competent court in Kisumu ELRC Petition No 70 of 2018 between Francis Ndavi & 527 others and Put Sarajevo General Engineering Company, which judgment substantively addressed and disposed of the issues raised in the intended claim.
5. Timimi asserts that the law does not permit extension of the three year limitation period set by Section 90 of the *Employment Act*.
6. The Respondent further filed a Notice of Preliminary Objection dated 9th January 2024, citing the following grounds:
 - a. The Applicants' intended claim against the Respondent as set out in the draft Memorandum of Claim is incurably time barred under Section 90 of the *Employment Act*;
 - b. Section 90 of the *Employment Act* is framed in mandatory terms. The limitation period is never extended in matters based on contracts of service and therefore, no leave can issue in the instant case for the intended claim to be filed outside the limitation period of 3 years;
 - c. The Applicants' intended claim against the Respondent is res judicata on account of the judgment delivered on 17th November 2021 in Kisumu ELRC Petition No 70 of 2018 between Francis Ndavi & 527 others and Put Sarajevo General Engineering Company;
 - d. The instant application and the Applicant's intended claim against the Respondent are an abuse of the court process.
7. In his further affidavit sworn on 12th February 2024, John Ngige Chege depones that the judgment delivered in Kisumu ELRC Petition No 70 of 2018: *Francis Ndavi and 527 others v Put Sarajevo Engineering Limited* did not substantively address the main issue in dispute, which the Applicants intend to present before this Court for determination.
8. Chege further depones that the present application has been presented under very unique circumstances and that despite the clear limitation provided under Section 90 of the *Employment Act*, this Court has power to exercise its judicial discretion when presented with peculiar circumstances.
9. The primary issue for determination in this application is whether the Court can extend time for filing of the Applicants' claim. The operative statutory provision is Section 90 of the *Employment Act*, which provides as follows:
 90. Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act*, 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. The Applicants blame their former Advocate for first, using the wrong mode to file their case in Kisumu ELRC and second, for failing to notify them of the outcome of that case in good time.
11. In civil litigation, the general principle is that cases belong to parties and not their Advocates. A party cannot therefore get away from the strictures of limitation of time by assigning the delay to their Advocate.



12. What is more, it is now firmly settled that Section 90 of the *Employment Act* does not give the Court any leeway for extension of time. This was clearly stated by the Court of Appeal in *Beatrice Kabai Adagala v Postal Corporation of Kenya* [2015] eKLR as follows:

“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 on 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*.”

13. With the foregoing decision which is binding on this Court, there is nothing more to say. The Applicants’ intended claim is statute barred and the Court has no power to extend time. With this finding, I do not need to delve into the question of res judicata.
14. In the result, the application dated 31st October 2023 is declined with an order that each party will bear their own costs.
15. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF APRIL 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Ndegwa for the Applicants

Mr. Wachira for the Respondent

