



**Abuya v Principal Secretary, Ministry of Health (Cause  
E565 of 2020) [2024] KEELRC 1300 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1300 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E565 OF 2020**

**B ONGAYA, J**

**MAY 29, 2024**

**BETWEEN**

**CALVIN ABUYA ..... CLAIMANT**

**AND**

**PRINCIPAL SECRETARY, MINISTRY OF HEALTH ..... RESPONDENT**

**RULING**

1. The applicant filed the application dated 31<sup>st</sup> January, 2024 through Ochanda Onguru & Company Advocates invoking sections 3, 3A and 63(e) and 80 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, Order 45 rule 1 &2 of the [Civil Procedure Rules](#), 2010, Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules](#), 2016 and all other enabling laws. The application was for orders:
  - a. That the application herein be certified as urgent and service of the same be dispensed with in the 1<sup>st</sup> instance.
  - b. That the Honourable Court be pleased to review and set aside it's judgment of 7<sup>th</sup> December 2023.
  - c. That upon review and setting aside the said judgement, the Honourable Court do grant the claim.
  - d. That the costs of this application be provided for.
2. The application was based on the supporting =of the applicant sworn on 31.01.2024 and upon the following grounds:
  - a. That there is sufficient reason for review being that there is a mistake and an error apparent on the face of the record.



- b. That the said judgement was based on issues not specifically pleaded by the respondent thus offends order 2 rules 4 & 6 of the Civil Procedure rules (2010), Laws of Kenya thus amounting to an error on the face of the record.
  - c. That the respondent in its pleading did not specifically plead the statute of limitation as mandatory required by law under order 2 rule 4(1) of the Civil Procedure rules (2010).
  - d. That the respondent in the submission as captured in paragraph 18 of the said judgement raised a new issue that the suit was time barred, an issue which was never pleaded, thus being inconsistent with their pleadings in the same suit resulting into breach of the law under order 2 rule 6(1) of the Civil Procedure Rules (2010).
  - e. That the said submission has not been served upon the claimant until to date.
  - f. That the respondent did not adduce certificate of service which is prima facie evidence and an important legal instrument required by law as primary evidence proving that employer and employee relationship has ceased under section 51 of the Employment Act No. 11 of 2007, Laws of Kenya.
  - g. That the respondent gave their evidence in chief during the hearing that the disciplinary matter was still pending and until it was finalized, claimant's clearance certificate and certificate of service of last payment could not be issued thus, he is still an employee, as the relationship had not yet ceased as per section 51 of the Employment Act, his resignation notwithstanding.
  - h. That it is from the above reasons given that time has not started running in this matter.
  - i. That the claimant's right under Article 25 (c), 41 and 51 of the Constitution of Kenya (2010) were violated as the new issue raised by the respondent in their submission was not specifically pleaded by the respondent and it took the claimant by surprise as were issues not arising out of the preceding pleading.
  - j. The orders be granted and application be allowed.
3. In response to the application herein, the respondent through the Attorney General filed the replying affidavit of Leonard Ngotho Nyathira sworn on the 11.03.2024 in which he stated as follows:
- i. That he is the director human resource management and development of the respondent.
  - ii. That the application is an abuse of court process, misleading and the issues regarded as new and not pleaded are not news to the court and hence it should be dismissed.
  - iii. That a preliminary objection can be raised at any point as was raised in the instant suit and the issue of jurisdiction was the first issue raised by the respondent and submitted in their written submissions dated 07.11.2023.
  - iv. That the issue of the instant suit being time barred was also raised as is provided for in section 90 of the Employment Act, 2007.
  - v. That it is trite law where a court has no jurisdiction, it must down its tools and that equity aid the vigilant and not the indolent.
  - vi. That time does not stop running even when an employee is pursuing internal dispute resolution nor does a certificate of last payment signify existence of an employer-employee relationship.



- vii. That the orders sought are not merited and that the application should be dismissed with costs.
4. Both parties filed their written submissions. The court has considered the parties' respective cases and makes finding as follows:
- a. The Court found that the claimant per his own demonstrated case he resigned on 13.06.2016 and therefore the suit was time barred as three years of limitation under section 90 of the Employment Act had lapsed when the suit was filed in 2020.
- b. The claimant has not raised any known ground for review as envisaged in rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* of 2016 and the submissions for the respondent are upheld, in that respect. All the claimant has done is to ask the Court to change its analysis and findings to his favour. Such are matters not for review but appeal. The application will fail.

In conclusion, the application for review is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 29<sup>TH</sup> MAY 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

