



**County Government of Nyamira v Aruasa (Appeal E002 of 2024)
[2024] KEELRC 1594 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1594 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E002 OF 2024
S RADIDO, J
JUNE 26, 2024**

BETWEEN

COUNTY GOVERNMENT OF NYAMIRA APPELLANT

AND

GRACE NYAKERARIO ARUASA RESPONDENT

*(Being an Appeal from the Ruling and Orders of the Honourable C.I. Agutu (SRM)
delivered on 03.01.2024 in Nyamira MCELRC Misc Application No. E001 of 2023)*

JUDGMENT

1. Grace Nyakerario Aruasa (the Respondent) moved the Senior Resident Magistrates Court seeking orders:
 - (a) ...
 - (b) That the applicant be granted leave to file suit against the Respondent out of time.
 - (c) That the intended application and suit annexed herein be deemed to have been filed within the time specified.
 - (d) That the costs of this application be provided for.
2. On 3 January 2024, the Senior Resident Magistrate granted the Respondent leave to file suit out of time and also deemed the draft Complaint annexed to the Motion as duly filed.
3. The County Government of Nyamira (the Appellant) which had been named as the Respondent in the Complaint was dissatisfied, and it lodged a Memorandum of Appeal with this Court on 12 February 2024, contending:



- (1) That the Learned Trial Magistrate’s decision to grant the Respondent leave to file an employment claim outside the statutory set timelines is per incuriam and defective in principle as:
 - 1.1 It is trite that the provisions of section 89 (sic) of the *Employment Act* (Cap 226 – Laws of Kenya) are couched in mandatory terms.
 - 1.2 It is well settled in law that Courts have no jurisdiction to extend statutory set timelines for institution of actions arising out of contract – including employment claims;
- (2) That the Learned Trial Magistrate’s decision to consider the Respondent’s application and issue orders of 03.01.2023 ex parte, in total disregard to the Appellant’s Preliminary Objection, vide notice dated 15.01.2024 is contrary to the principles of natural justice.
4. The Record of Appeal was filed on 15 May 2024, and the Court gave directions on 16 May 2024.
5. The Appellant filed its submissions on 26 May 2024 and the Respondent on 14 June 2024.
6. The Court has considered the Record of Appeal and the submissions.

Role of the Court on a First Appeal

7. The role of a first appellate Court on appeal was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

this being a first appeal, it was the duty of the Court... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
8. This Court will bear in mind the interdict on its role.

Breach of contract: Can the Court grant leave to file suit out of time?
9. The Respondent was an employee of the Town Council of Nyamira and she resigned due to ill health sometime in 2004. The Respondent followed up with the Council for the payment of salary arrears amounting to Kshs 337,452/- to no avail.
10. With the coming into effect of the *Constitution*, 2010, the Town Council of Nyamira was succeeded by the County Government of Nyamira. The Respondent’s efforts to have the County Government assume the liability for the salary arrears and pay did not yield fruit.
11. The Respondent, therefore, moved the Senior Resident Magistrates Court seeking the grant of leave to file action out of time, and on 3 January 2024, leave was granted ex-parte.
12. Despite the grant of leave, the Appellant filed a Notice of Preliminary Objection in the Senior Resident Magistrate’s Court on 15 January 2024. Clearly, the horse had bolted and no wonder the instant Appeal.
13. Was the Senior Resident Magistrate within the law in granting leave?
14. The Respondent’s cause of action accrued around 2004 and the applicable prescriptive limitation law was section 4(1) of the *Limitation of Actions Act*. The section provided for a limitation period of 3 years in actions founded in contract.
15. The Respondent did not make a claim within the 3 years.



16. The *Employment Act*, 2007 then commenced on 2 June 2008. Section 90 thereof prescribed a limitation period of 3 years.
17. The Respondent moved the Court on or around 20 December 2023, seeking a grant of leave.
18. The Court of Appeal addressed the question of grant of leave to file a contractual action out of time in *Divecon v Samani* (1995-1998) 1 EA 48 thus:

No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract.
19. In *Beatrice Kabai Adagala v Postal Corporation of Kenya* (2015) eKLR, the Court of Appeal held 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 -vs- Samani* [1995-1998] 1 EA P.48, a decision relied upon by Radido, J. in *Josephat Ndirangu - vs - 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*.
20. The binding case law cited above leave no doubt that the Senior Resident Magistrate acted outside jurisdiction in granting leave to sue after the lapse of prescribed limitation time.
21. Not even section 27 of the *Limitation of Actions Act* can assist the Respondent's cause as it applies to actions in negligence, breach of duty, or nuisance.

Orders

22. In light of the above, the Appeal is allowed, the order granting leave is vacated and set aside and substituted with an order dismissing the Motion dated 20 December 2023.
23. Considering the undisputed ill health of the Respondent, the Court orders each party to bear own costs of the Appeal.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 26TH DAY OF JUNE 2024.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Office of the County Attorney

For Respondent Omurwa Musangalie Advocates

Court Assistant Chemwolo

