



**Wakhuchuru v Teachers Service Commission (Cause E646 of 2023)
[2024] KEELRC 1652 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1652 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E646 OF 2023
NZIOKI WA MAKAU, J
JUNE 24, 2024**

BETWEEN

KIDALIA PETER WAKHUCHURU CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Preliminary Objection dated 13th September 2023 on the grounds that:
 - a. The instant Claim is time-barred by virtue of section 90 of the [Employment Act](#).
 - b. The Honourable Court lacks jurisdiction to determine the instant Claim.
 - c. The claim is incompetent, bad in law and the same should be struck out with costs.
2. In response and opposition to the Notice of Preliminary Objection, the Claimant/Respondent swore a Replying Affidavit on 22nd May 2024 denying that his Claim is time-barred because he has been in constant communication with the employer (Applicant herein) from the time he retired up to 2021 while using the Respondent's internal dispute resolution mechanism to try and get his dues. He asserted that he opted to initiate the instant suit after a breakdown of communication with the Respondent and that the Court should consider that the dispute between the Claimant and the Respondent arose in 2021 after lengthy negotiations failed to bear fruits. It was the Claimant/Respondent's averment that this Court has jurisdiction in the matter as provided for under Article 162 of [the Constitution](#) of Kenya.



Respondent/ Applicant's Submissions

3. The Respondent/Applicant referred to the case of John Omollo Nyakongo t/a H.R Ganijee & Sons v Kenya Power & Lighting Co. Ltd [2022] eKLR wherein the Court reiterated the decision of the Court in Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, that a preliminary objection raises a pure point of law that is argued on the assumption that all the facts pleaded by the other side are correct. It further submitted that section 90 of the [Employment Act](#), 2007 provides 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 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.

4. The Respondent/Applicant noted that a perusal of the Claimant's pleadings evidences that the instant Claim was filed on 10th August 2023 while the Respondent dismissed the Claimant from employment with effect from 31st October 2007. That in effect, this Claim was filed 16 years past the date of the alleged cause of action and it is apparent that three years lapsed a while back. The Applicant argued that the provisions of section 90 are couched under mandatory terms and do not provide any exceptions or extenuating circumstances that would allow a petitioner file a petition beyond the prescribed time. It cited the case of James Mugeru Igati v Public Service Commission of Kenya [2014] eKLR wherein the Court stated that the accrual of a cause of action in a claim emanating from an employment contract takes effect from the date of termination of employment as stated in the letter stating the same. The Applicant further argued that the inclusion of a time limit serves a fundamental purpose of ensuring that employment-related disputes are resolved in a timely, manner preventing undue delay and preserving the efficiency of the system. That this position was emphasised by the Court in Josephat Ndirangu v Henkel Chemicals (EA) Ltd [2013] eKLR that no employee has the right or power to bring, after the end of three years from the date of dismissal or termination, an action founded on a contract of service.
5. Further, it was the Respondent/Applicant's submission that the Court in the case of Bosire Ogero v Royal Media Services [2015] eKLR stated that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute-barred, the court has no jurisdiction to entertain the same. That in the case of Motor Vessel "Lillian S" v Caltex (Kenya) Ltd [1989] KLR 1, the Court stated that jurisdiction is everything and without it a court has no power to make one more step. The Applicant fronted that the preliminary objection herein is meritorious as the Claimant does not dispute the date of dismissal and admits the aforementioned date in his pleadings. It further submitted that the instant suit is an abuse of the court process and made in total disregard of section 90 of the [Employment Act](#). The Applicant urged the Court to strike out the Claim with costs and to uphold their Objection.

Claimant/Respondent's Submissions

6. The Claimant/Respondent maintained that the dispute that arose between him and the Applicant was resolved in 2007 and concluded in 2009, after which he was reinstated to work. That he took the necessary step of exhausting the Respondent's internal dispute resolution mechanism by drafting numerous correspondences in 2020 and 2021. That he decided to move this Court in 2023, which was two years after the dispute arose with the Respondent and within the stipulated timelines of section 90 of the [Employment Act](#). On this submission, the Claimant cited the case of Ezekiel Nyangoya Okemwa



v The Kenya Marine & Fisheries Research Institute [2016] eKLR in which Rika J. held that the claim was filed in time and went on to decline the preliminary objection. Regarding whether the Court has jurisdiction, the Claimant/Respondent cited the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR (Application No. 2 of 2011) in which the Supreme Court expressed itself that a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law and that without jurisdiction, the Court cannot entertain any proceedings. He posited that in so far as the jurisdiction of the Employment & Labour Relations Court is concerned, the same is derived from Article 162(2)(a) of *the Constitution* of Kenya, section 4(1) of the Industrial Court Act, 2011 and section 87(1) of the *Employment Act*, 2007. He implored the Court to therefore find that the instant suit was filed in good time and this Court has jurisdiction to handle the matter and to dismiss the preliminary objection dated 13th September 2021 with costs to the Claimant.

7. The preliminary objection raised by the Respondent is that the suit is time barred in terms of section 90 of the *Employment Act*. The Claimant was last in employment on 31st October 2007. The Respondent asserts the claim herein has been presented 16 years after the date of termination. The Claimant asserts that he has been in communication with the Respondent seeking his dues.
8. In the case of Attorney General & another v Andrew Maina Githinji & another [2016] eKLR Waki JA held as follows:

...in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word 'shall'. [emphasis supplied]

9. The claim before the Court has been filed when memories have faded, documents lost, witnesses untraceable or demised. I do not think the Claimant had any business waiting for 17 years before moving the Court. Suit is time barred and thus dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

