



**Oliveira v Resort Kenya Limited (Cause e237 of 2024)  
[2024] KEELRC 2368 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2368 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E237 OF 2024  
JK GAKERI, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**SAVIO XAVIER OLIVEIRA ..... CLAIMANT**

**AND**

**RESORT KENYA LIMITED ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the Respondent’s Notice of Preliminary Objection dated 15<sup>th</sup> July, 2024 objecting to the Claimant’s suit on the premise that it is statute barred in light of the provisions of Section 90 of the *Employment Act* and should be struck out.

**Response**

2. In his Replying Affidavit, the Claimant admits that his suit was instituted after 3 years and is thus statute barred.
3. The affiant deposes that the suit was initially filed on 31<sup>st</sup> May, 2023 before the Magistrate’s Court but the Court had no jurisdiction to hear and determine the suit and was withdrawn on 27<sup>th</sup> March, 2024 and immediately filed in this Court after the 3 years had lapsed.
4. The affiant deposes that the delay is excusable.

**Applicant’s submissions**

5. According to the Claimant’s counsel, the issue for determination is whether the Court can exercise discretion and allow the Claimant’s case be heard on merits.
6. Counsel urges that the word “shall” in Section 90 of the *Employment Act* is not mandatory but directive and ought to be construed in a fair and liberal manner to give effect to the intention of the legislature.



7. Reliance was made on the Court of Appeal decision in David Njenga Ngugi V Attorney General (2016) eKLR as well as in Re Estate of George Barua (2019) eKLR to urge that the word “shall” in Section 90 of the [Employment Act](#) does not take away the Court’s discretion to hear and determine the instant suit as the delay has been explained.
8. Counsel urges the Court to dismiss the Preliminary Objection.

### **Respondent’s submissions**

9. Counsel urges that since the Claimant resigned on 9<sup>th</sup> July, 2020 and filed the suit on 28<sup>th</sup> March, 2024, the cause of action arose on 9<sup>th</sup> July, 2020 and the suit is statute barred by dint of Section 90 of the [Employment Act](#).
10. Reliance was made on the decision in Josephat Ndirangu V Henkel Chemicals (EA) Ltd (2013) eKLR.
11. That the Claimant could have applied to have the suit transferred to the proper Court but opted to withdraw it and cannot use the withdrawal as a defence.
12. Counsel submits that the suit is statute barred and ought to be struck out.
13. The only issue for determination is whether the Respondent’s Notice of Preliminary Objection is merited.
14. As to whether the Respondent’s Preliminary Objection meets the threshold, the same is uncontested and thus meets the test in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696.
15. The sentiments of Law JA in the Mukisa Biscuits case (Supra) are unambiguous that an objection to the jurisdiction of the court or a plea of limitation are examples of a Preliminary Objection.
16. Needless to belabour, an objection grounded on limitation implicates the Court’s jurisdiction, which was held in Owners of the Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd (1989), where Nyarangi JA stated that;

“Jurisdiction is everything. Without it, a court has no power to make one more step . . .”
17. It follows that if a suit is statute barred, the court lacks jurisdiction to hear and determine it.
18. The Respondent contends that the Claimant’s suit before the Court is unsustainable as it was filed after the prescribed statutory period had lapsed.
19. The Respondent grounds the Preliminary Objection on the provisions of Section 90 of the [Employment Act](#) which provides;

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 cessation thereof.
20. The foregoing provision is clear that time starts running from the date the cause of action arises and in the instance case, the Claimant avers that she resigned from employment on 9<sup>th</sup> July, 2020 and filed the instant suit on 28<sup>th</sup> March, 2024, more than 3 years and eight months later.



21. From the foregoing, it is indisputable that the Claimant's suit against the Respondent is statute barred, a fact the Claimant admits in his Replying Affidavit sworn on 10<sup>th</sup> September, 2024.
22. In the Court's view, the intention of the legislature under Section 90 of the Employment Act is unambiguous.
23. Finally, the Claimant's deposition that the delay in filing the suit is excusable and the suit has high chances of success cannot avail the Claimant as this is not an application for extension of time but an objection by the Respondent that the Court has no jurisdiction to hear and determine the suit as it is statute barred.
24. Flowing from the foregoing, it is discernible that the Claimant's suit against the Respondent is unsustainable and the Respondent's Notice of Preliminary Objection dated 15<sup>th</sup> July, 2024 is merited.
25. Accordingly, the Claimant's suit is dismissed on account of being statute barred.
26. Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**DR. JACOB GAKERI**

**JUDGE**

