



**Mohammed v African Banking Corporation (Cause 43 of 2020)
[2024] KEELRC 2299 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2299 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 43 OF 2020
AK NZEI, J
SEPTEMBER 26, 2024**

BETWEEN

MAHMOOD ADAM MOHAMMED CLAIMANT

AND

AFRICAN BANKING CORPORATION RESPONDENT

RULING

1. Vide its Ruling delivered on 26th October 2023, this Court gave the following orders:-
 - a. The Claimant's suit herein is hereby reinstated.
 - b. The suit shall be prosecuted within six (6) months from the date of this Ruling, failing which it shall stand dismissed.
 - c. Costs of the application shall be in the cause.
2. When the suit came up for hearing on 16th November 2023, a date fixed by the Court in the presence of Counsel for both parties on 16th October 2023, Counsel for the Respondent applied for an adjournment on ground that she had been instructed by the Respondent to file an application to amend the Respondent's pleadings. The Court made the following orders:-
 - a. The period of 6 months given in this Court's Ruling delivered on 26th October, 2023 for the Claimant to prosecute his case is hereby extended by a further period of 6 months as from the date of the said initial six (6) months' lapse.
 - b. The Respondent is hereby granted 7 days to file and to serve an application for leave to amend its pleadings.
 - c. The Claimant shall respond to the said application within 7 days of service.
 - d. Mention on 7th March 2024 for further directions and/or orders.



- e. The hearing scheduled for today is adjourned. There will be no further adjournments in future.
 - f. Today's costs, assessed at Kshs. 10,000, are awarded to the Claimant, and shall be paid within 7 days of today.
3. About three months from the date of the said orders, the Respondent filed a Notice of Motion dated 28th February 2024 seeking the following orders:-
- a. That leave be granted to the Respondent to amend its Reply to [the] Memorandum of Claim dated 25th September 2020 in terms of the draft Amended Reply to [the] Claimant's Memorandum of Claim and counter-claim filed therewith.
 - b. That the draft Amended Reply to the Claimant's Memorandum of Claim and counter-claim be deemed to be filed and served upon payment of the applicable Court fees thereon.
 - c. That costs in the motion be in the cause.
4. The foregoing is the application before me for determination, and is predicated on the supporting affidavit of Kajuju Marete sworn on 28th February 2024. The application is opposed by the Claimant vide his replying affidavit sworn on 13th May 2024.
5. I have noted from the Respondent's draft Amended Reply to Memorandum of Claim, and draft Counter-Claim that the Respondent intends to counter-claim Kshs. 1,091,736.93, made up of an alleged balance of a personal loan facility advanced by the Respondent to the Claimant during the subsistence of the latter's employment with the Respondent bank. I have also noted from the Respondent's said draft pleading that its alleged cause of action against the Claimant arose upon the Claimant's failure to pay the said alleged outstanding personal loan balance upon termination of his employment on or about 25th June 2018 in accordance with the terms of the loan agreement. The Respondent thus seeks to raise its alleged claim against the Claimant, by way of a counter-claim, some six (6) years from the date the alleged cause of action arose.
6. Section 89 of the *Employment Act* (formerly Section 90) provides as follows:-
- “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.”
7. The foregoing statutory provision, which is couched in mandatory terms, is unambiguously clear. The cause of action on the part of both parties is, according to pleadings and intended pleadings on record herein, shown to have stemmed from and/or originated from termination of the Claimant's employment on or about 25th June 2018. The Claimant filed his suit on 13th August 2020, within the prescribed three years' limitation period, while the Respondent now seeks to raise a counter-claim against him.
8. It is to be noted that a counter-claim is a counter-suit, and must always be raised within the time limited by the statute. It was stated as follows in the persuasive case of *John Ogutu Rogoma v Elimu Co-operative Savings & Credit Limited* [2013] eKLR:-
- “A counter-claim is a fresh suit where a claimant should be given a chance to reply. It is an independent action by the respondent as against the claimant. It is a cross-claim and the



principles of pleadings which govern a counter-claim are substantially the same as those which would apply to a statement of claim in a cross-action brought by the Respondent against the claimant”

9. In yet another persuasive case, *Christone Charo Matesho v Charles Richard Newton* [2022] eKLR, the Court stated as follows:

“12. In law, a counter-claim is considered a stand alone suit. Therefore, the law on limitation applies to it in much the same way as an ordinary claim. An application to amend a defence to introduce a counter-claim is considered on the same principles as a request to amend any other pleading.

13. In *Kenya Wine Agencies -v- Yobesh Amoro* [2018] eKLR

“A counter claim is by definition a suit that can be filed independently and therefore subject to the law of limitation.”

10. The Court of Appeal stated as follows in the case of *Beatrice Kaliai Adagala v Postal Corporation Of Kenya* [2015] eKLR:-

“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* 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] EA P. 48, a decision relied upon by Radido, J in *Josephat Ndirangu -v- Henkel Chemicals [E.A] Limited* [2014] 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 Action Act.”

11. Allowing the Respondent’s present application to introduce a counter-claim would be tantamount to granting leave to the Respondent to institute an employment claim outside the statutory limitation period of three years. Looking at the Draft Amended Reply to the Claimant’s Memorandum of Claim and Counter-Claim filed with the application, no amendment is shown to be intended on the Respondent’s Reply to the Claimant’s Memorandum of Claim dated 25th September 2020 and filed herein on 1st October 2020, save for deletion of paragraph 13 thereof. The rest of the intended “amendment” is introduction of a counter-claim, running from paragraph 16 of the said filed draft upto paragraph 25, thereof and ending with prayers:-

- a. That the Claimant’s claim be dismissed.
- b. That the Bank’s Counter-Claim be upheld, and Judgment be entered in favour of the Bank against the Claimant in the sum of Kshs. 1,091,736.93 due as at 25th September 2023 together with further accrued interest at the rate of 20.5% per annum, and further accrued default interest at the rate of 24% per annum.
- c. Interest on (b) above at court rates.
- d. Costs of the proceedings.

12. Such an amendment cannot be looked at through the liberal and gracious principles governing amendment of pleadings, which the Respondent/Applicant’s Counsel have invoked in their filed



written submissions. The introduction of a counter-suit through amendment of pleadings must always pass the statutory limitation test, if it is to be allowed by a Court of law. It is over six years since the Claimant's employment was terminated. The 3 years limitation period spelt out in Section 89 of the *Employment Act* is absolute, and once it lapses on any cause of action, the door to seeking redress regarding that particular cause of action is forever shut.

13. The situation would not be different even if it were to be argued that the Respondent's cause of action arose from the Claimant's default on a loan agreement entered into by both parties herein on 16th May 2016 (during the subsistence of the Claimant's employment with the Respondent) as stated in the affidavit of Kajuju Marete, as six years have lapsed since the date of the alleged default. Section 4(1)(a) of the *Limitation of Actions Act* (Cap. 22 Laws of Kenya) is called in aid.
14. In view of all the foregoing, and having considered written submissions filed by Counsel for both parties, the Notice of Motion dated 28/2/2024 is allowed in the following terms:-
 - a. The Respondent shall amend its Reply to the Claimant's claim dated 26/9/2020 and filed in Court on 1/10/2020 only by deleting paragraph 13 thereof as indicated on the draft filed with the application, and an amended Reply to the claimant's claim shall be filed within 14 days of this Ruling.
 - b. The intended introduction of a Counter-Claim as indicated in the said filed draft is disallowed.
 - c. Each party shall bear its own costs of the application.
15. Having noted the continued delay in prosecuting the suit herein, which delay is attributable to both parties herein, I order that the suit shall be prosecuted within seven (7) months from the date of this Ruling.
16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH SEPTEMBER 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

