



**Ojiambo v Kibos Sugar & Allied Industries Ltd (Cause E027 of 2024)  
[2024] KEELRC 2482 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2482 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E027 OF 2024  
CN BAARI, J  
OCTOBER 11, 2024**

**BETWEEN**

**WILFRED OUMA OJIAMBO ..... CLAIMANT**

**AND**

**KIBOS SUGAR & ALLIED INDUSTRIES LTD ..... RESPONDENT**

**RULING**

1. This ruling relates to a Notice of Preliminary Objection by the Respondent dated 14<sup>th</sup> May, 2024. The Objection is that the suit herein is statute barred contrary to Section 90 of the *Employment Act*, on premise that the Claimant's last working day was 23<sup>rd</sup> February, 2021 and the cause of action herein filed in April 2024. It asserts that the 3-year limit has been surpassed.
2. The Claimant in response to the objection stated that the witness statement filed with the claim is evidence that the Claimant signed a P9 form and a discharge voucher on 10<sup>th</sup> May, 2021, which date signaled his separation from the Respondent, hence his claim would only be deemed time barred if filed after 10<sup>th</sup> May, 2024.
3. The Claimant further argues that the time he left the service of the Respondent is a matter of evidence and not law, and hence the objection does not meet the requirement in *Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors 696*.
4. Parties canvassed the objection through written submissions.

**The Respondent's Submission**

5. The Respondent submits that Section 90 of the *Employment Act*, 2007, has a statutory bar with regard to filing of claims within 3 years from the date the cause of action arises and that any claim filed after 3 years denies the Court jurisdiction and should be struck out.



6. The Respondent had reliance in the case of *David Ngugi Waweru v Attorney General & another* (2017) eKLR where the court held that time starts running at the point employment is terminated and not the date internal disciplinary process concluded.
7. The Respondent further submits that to file an employment cause on 9<sup>th</sup> April, 2024 following a cause of action which was determined on 2<sup>nd</sup> March, 2021 is outside the limitation period, both for claims under continuing injury and a claim arising out of an employment contract.
8. The Respondent prays that the Claimant's claim be struck out for being statute barred.

### **The Claimant's Submissions**

9. The Claimant submits that the Objection is hopelessly misconceived, frivolous, devoid of merit, bad in law and calculated to waste this Honourable Court's precious time. He states that the objection is a misinterpretation of Section 90 of the *Employment Act*.
10. It is the Claimant's submission that the objection is a matter of fact and not law, and that evidence has to be led to prove the issues, hence not a matter that can be determined by preliminary objection.
11. The Claimant submits that the preliminary objection as raised by the Respondent is vexatious and unwarranted. That it fails to raise a pure point of law, but rather seeks the court to determine a triable issue at the preliminary stage of the suit, much to the disadvantage of the Claimant. He placed reliance in the case of *Attorney General of Tanzania v African Network for Animal Welfare (ANAW)* EACT Aegeal No 3 of 2011 for the holding that:-

“a Preliminary Objection could only be properly taken where what was involved was a pure point of law, but that where there was any issue involving the clash of facts, the production of evidence and assessment of testimony it ' should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigations on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross-examined, and a finding of fact then made by the Court.”

12. The Claimant prays that the objection be dismissed with costs.

### **Determination**

13. I have considered the Preliminary Objection, the response by the Claimant and the rival submissions. The issue for determination is whether the Claimant's suit is time barred.
14. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, the court had this to say on preliminary objections:-

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”



15. Further, the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* Civil Application No 36 of 2014 [2015] eKLR held that a preliminary objection should be founded upon a settled and crisp point of law.
16. The Preliminary Objection in this suit, is a plea of limitation premised on Section 90 of the *Employment Act*, 2007. The court returns that this is a pure point of law and which if proven, has the potential to dispose of the suit without the need for a further hearing.
17. Section 90 of the *Employment Act* 2007, provides as follows on filing of employment related claims;

“Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act*, 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.”
18. The Claimant’s Memorandum of Claim is dated April 3, 2024 and filed on April 8, 2024. Paragraph 12 of the claim states thus: -

“The Human Resource Manager proceeded to issue the Claimant with a termination letter dated 2<sup>nd</sup> March, 2021 to which he responded by writing a letter of even date requesting a review of his termination”
19. The question then is when the cause of action herein accrued. The *Black’s Law Dictionary* (10th Edition) defines “accrue” to mean “to come into existence as an enforceable claim or right.”
20. In the case of *Hilarion Mwabolo v Kenya Commercial Bank* (2013) eKLR the court extensively dealt with this issue thus: -

“.. the cause of action under Section 90 of the *Employment Act*, 2007 accrues from the date of termination as stated in the termination letter....”.
21. Further, the Court of Appeal in *David Ngugi Waweru v Attorney General & another* (2017) eKLR, while addressing the question of when time starts running, stated that the time of dismissal or termination is the time contained in the letter of termination/dismissal and not the time of conclusion of internal disciplinary mechanisms.
22. It is therefore true that the cause of action in cases arising out of employment contracts, accrue on the date of termination/dismissal. The Claimant having been terminated on 2<sup>nd</sup> March, 2021, ought to have lodged his claim on or before 2<sup>nd</sup> March, 2024.
23. It therefore follows that the Claimant’s Memorandum of Claim dated 3<sup>rd</sup> April, 2024, and filed on 8<sup>th</sup> April, 2024, is by simple arithmetic statute barred, and is for striking out.
24. The Respondent’s preliminary objection thus succeeds and the Claimant’s claim dated 3<sup>rd</sup> April, 2024 is struck out with costs to the Respondent.
25. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**

**CHRISTINE N. BAARI**



## **JUDGE**

Appearance:

Mr. Wakasa h/b for Mr. Wachakana for the Claimant

N/A for the Respondent

Mr. Kirui-C/A

