



**Bosire v Telkom Kenya Limited & another (Cause E038 of 2024)  
[2024] KEELRC 2410 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2410 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E038 OF 2024  
NZIOKI WA MAKAU, J  
OCTOBER 2, 2024**

**BETWEEN**

**VINCENT KAUNDA BOSIRE ..... CLAIMANT**

**AND**

**TELKOM KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ZAMARA FANAKA RETIREMENT FUND (PROVIDENT & PENSION  
SECTIONS/ZAMARA VUNA PENSION PLAN) ALIAS ZAMARA ACTUARIES,  
ADMINSITRATORS & CONSULTANTS LIMITED/ALEXANDER FORBES  
RETIREMENT FUND ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the Court is a preliminary objection dated 4<sup>th</sup> June 2024 by the 1<sup>st</sup> Respondent to the effect that:
  - a. The suit relates to a claim arising out of a contract of service, which ought to have been filed within three (3) years from the date of termination of employment, i.e. three years from 30<sup>th</sup> June 2011, when the claimant's employment was terminated.
  - b. The court does not have jurisdiction or discretion under the Act to extend time or grant leave to a Claimant to file a case grounded on breach of employment contract where the limitation time set out in section 90 of the Act has expired.
  - c. The claim violates the principle established in the case of *Peter Nyamai & 7 others v M.J. Clarke Limited* [2013] eKLR.
  - d. In view of the above, the present suit is therefore incompetent and should be struck out with costs to the 1<sup>st</sup> Respondent.



2. The preliminary objection was canvassed before me and Ruling reserved to 18<sup>th</sup> September 2024 a day the Court was not sitting, hence the delivery of the same today. The Court apologises for the slight delay in delivery of the Ruling.
3. The gravamen of the objection is the assertion that the suit herein is time barred in terms of section 90 of the *Employment Act*. In this, the 2<sup>nd</sup> Respondent joined issue with the 1<sup>st</sup> Respondent.
4. Learned Counsel for the 1<sup>st</sup> Respondent submitted that the suit is time barred having been filed more than 12 years after the cause of action arose. It avers that since the Claimant's employment was terminated on 30<sup>th</sup> June 2011, he should have filed this suit within three years as per the provisions of section 90 of the *Employment Act*.
5. The 1<sup>st</sup> Respondent cites section 90 of the *Employment Act* and the case of *Michira & 41 others v Aegis Kenya Limited t/a Leopard Beach Hotel* [2023] eKLR where it was held that section 90 is framed in mandatory terms and that a claim based on a contract must be filed within 3 years. Additionally, the 1<sup>st</sup> Respondent relies on the case of *Kitsapha v Teachers Service Commission & another* [2023] eKLR where the court declined jurisdiction on account of the suit being filed outside the 3-year period prescribed by section 90 of the *Employment Act*.
6. Regarding extension the 1<sup>st</sup> Respondent submits that this court is not clothed with jurisdiction to extend time to file suit. It draws this court attention to the case of *Peter Nyamai & 7 others v M.I Clarke Limited* [2013] eKLR in which the court noted that the *Employment Act* does not provide for extension of time or leave to file a claim after 3 years, while the *Limitation of Actions Act* allows discretion to extend time in causes of action based on negligence, nuisance or breach of duty.
7. In further opposition to extension of time the 1<sup>st</sup> Respondent cites the case of *John Kiiru Njiiri v University of Nairobi* [2021] eKLR where the court in emphasising the mandatory nature of section 90 of the *Employment Act*, stated that the court was bereft of jurisdiction to extend time for suits not filed within 3 years. The court noted that time can only be extended in claims founded on torts so long as the applicant satisfies the requirements of section 27 and 28 of the *Limitation of Actions Act*. In conclusion the 1<sup>st</sup> Respondent urges the upholding of the preliminary objection.
8. The 2<sup>nd</sup> Respondent submits that section 90 leaves no room for extension of time to file a time barred suit. reiterating that the word "shall" in the provision is restrictive. In expounding on this point the 2<sup>nd</sup> Respondent cites the case of *JNjunge v Muasya* (Appeal E040 of 2023) [2024] KEELRC 265 (KLR) (9 February 2024) (Judgment) where the court in reproducing section 90 of the *Employment Act* stated: -

“A plain reading of the above section clearly shows that it is couched in mandatory terms. That is to say “no... action shall lie” which implies that once the three-year period lapses, no civil action shall lie on a claim based on the Act or contract of employment. Further, it is important to note that an action arising out of a contract of employment is an action based on contract. Therefore, under the *Limitation of Actions Act* which previously governed contracts generally including contracts of employment, no extension was permissible once the limitation period lapsed.

34. The Court of Appeal in the case of *Beatrice Kabai Adagala v Postal Corporation of Kenya* [2015] eKLR observed 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 v Samani* [1995-1998]1 EA P.4S,...in *Josephat Ndirangu v 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 then the applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act*.

35. From the foregoing, the Court is of the view that the first Court seized of this matter had no jurisdiction to extend time to bring action against the appellant once it was evidently clear that the claim was based on contract of employment and that the mandatory three-Year period had lapsed. Further, the trial court ought to have heard in limine the issue limitation prior to proceeding with the merits of the suit.
  36. On the above ground alone, the court finds and holds that the trial magistrate made an error of jurisdiction when he proceeded to hear a matter that was barred by virtue of section 90 of the *Employment Act*. The Appeal therefore succeeds to that extent'.
9. Additional reliance was placed on the cases of *Peter Katithi Kithome v Laboratory & Allied Limited* [2021] eKLR and *Anthony Ashitakaya Akungwi v Inspector General of Police & 2 others* [2017] eKLR where the common thread was that section 90 of the *Employment Act* prohibited extension of time for suits based on an employment contract. The Claimant did not file any submissions in the matter nor file anything in response to the preliminary objection taken.
  10. The Court has considered the tenor of the preliminary objection raised, the submissions of parties and the law in coming to this decision. Even where the Court does not recite the findings of the Courts on the issues of limitation and extension of time, the same have been factored herein. The main aspect for determination is whether there was a limitation of action on the cause of action that accrued and whether, if limitation set in, there is discretion to extend or enlarge time.
  11. Limitation of actions relative to employment and labour relations is provided for in section 90 of the *Employment Act*. The section provides as follows in parre materia  

...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...
  12. The law is clear. As held in the case of *Michira & 41 others v Aegis Kenya Limited t/a Leopard Beach Hotel (supra)* it was held that section 90 is framed in mandatory terms and that a claim based on a contract must be filed within 3 years. Put another way, a cause must be presented within the time lines provided in law and any claim filed beyond its statutory time limit is dead on arrival. It is incapable of resuscitation as the law does not provide the architecture, the surgical tools for such an exercise. Since the patient was unresponsive when presented to the hospital, we have to pronounce its time of death as 3 years from the accrual of cause of action in June 2011 i.e. June 2014. The Court agrees it is bereft of jurisdiction to extend time for suits not filed within 3 years. The case is over 13 years past due date and therefore has only one outcome. Dismissal, albeit with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF OCTOBER 2024.**

**NZIOKI WA MAKAU**



**JUDGE**

