



**Muthui v Kitui Flour Mills Limited (Cause E019 of 2024)
[2024] KEELRC 2808 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2808 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E019 OF 2024
M MBARÚ, J
NOVEMBER 14, 2024**

BETWEEN

JAMES GACHORA MUTHUI CLAIMANT

AND

KITUI FLOUR MILLS LIMITED RESPONDENT

RULING

1. The claimant filed the Memorandum of Claim on 14 March 2024. In reply, the respondent filed a Response on 16 May 2024 together with a Counter-claim.
2. The claimant has raised objections to the Counter-Claim on the basis;

The Counterclaim dated 9 May 2024 is time-barred by Section 89 of the *Employment Act* having been commenced more than 3 years after the occurrence of the act complained of because,

- a. As pleaded in paragraphs 5, 7(a) of the Reply to the Memorandum of Claim and paragraph 2 of the Counterclaim, the cause of action arose on 25 February 2021.
- b. The counterclaim was filed on 16 May 2024, 3 years and 3 months from 25 February 2021.

The claimant prays that the Counterclaim dated 9 May 2024 be struck out with costs.

3. Both parties attended and agreed to file skeleton written submissions and attend court for brief highlights.
4. The claimant submitted that the threshold for a preliminary objection is in the case of Mikisa Biscuits Manufacturing Ltd v West End Distributors [1969] EA based on the pleadings, a party may raise a



point of law. In this case, the counterclaim dated 9 May 2024 is time-barred by Section 98 of the [Employment Act](#) having been filed 3 years after the cause of action arose.

5. In the case of *Hart v Schenker Limited* Cause No.4 of 2019, the court held that a counterclaim is a counter-suit and must be raised within the time limited by statute. This position is reiterated in the case of *Mwaniki v Kenya Wildlife Service* Cause No.729 of 2017. The counterclaim must be of a nature that the court would have jurisdiction to entertain it as a separate action. Statutory limitation of actions acts as a jurisdictional deprivation factor.
6. In the Reply to the Memorandum of Claim, the respondent pleads that on 25 February 2021, the claimant was involved in the misappropriation and theft of Ksh.706, 600 at the respondent's Thika depot. The respondent prays for judgment for this amount.
7. The claimant submitted that there is no dispute that there was theft and misappropriation on 25 February 2021 but time to address such a matter has since lapsed by operation of Section 89 of the [Employment Act](#). The provisions thereof are framed in mandatory terms and a suit must be filed within 3 years from the date the cause of action arose as held in the case of *Ddaiddo v Bank of India (K) Ltd* Civil Appeal E082 of 2021. The Objections should be allowed and the counterclaim struck out with costs.
8. The respondent submitted that the respondent was not aware of the fraud until the claimant resigned. To determine the claim, the court would have to call evidence on when the employer became aware of the fraud which is a question of fact and not law. To determine the counterclaim calls for a hearing on the full claim on merit. Section 89 of the [Employment Act](#) is not absolute. A party is given a chance to explain the circumstances of the case. The objections raised are not purely matters of law and should be dismissed with costs.

Determination

9. A counterclaim is defined under the Employment and Labour Relations Court (Procedure) Rules, 2024 (Court Rules) as part of the pleading that a party is allowed to file with the court.
10. Under Rule 29(g) of the Court Rules, in filing a response, a respondent is allowed to include a counterclaim. Under Rule 31(2) of the Court Rules, a counterclaim is a new suit regulated as a claim on its merit. It is therefore regulated within the provisions of Section 89 of the [Employment Act](#) where the foundation of the counterclaim is the employment relationship.
11. Under Section 89 of the [Employment Act](#), a party is allowed 3 years to file a claim seeking employment injury or damage.
12. In this case, the claimant filed suit claiming unfair, unlawful and wrongful summary dismissal and non-payment of his terminal dues. In response, the respondent filed a counterclaim on the basis that upon the resignation of the claimant, it emerged that he had in collusion with other depot employees engaged in fraudulent conduct and forgery of bank slips and perpetuated a scheme of stealing from the respondent. On 25 February 2021, the claimant admitted to the misappropriation and theft of Ksh.706, 600 at the Thika depot and agreed to repay through monthly instalments of Ksh.50, 000.
13. Upon the Admission, the respondent conducted an audit to ascertain whether there were any other discrepancies but the claimant issued a resignation notice on 10 May 2021. On 15 July 2021, the respondent learned that the claimant had issued fake LPOs worth Ksh.704, 000 to a client and the matter was reported to Makupa Police Station where the claimant was arrested and charged with the offence of attempted stealing contrary to Section 389 of the Penal Code in Criminal Case No.E2218 of 2021 – Republic V James Gachora Muthui.



This is the basis of the counterclaim.

14. Whereas employment and labour relations claims are regulated under the provisions of Section 89 of the *Employment Act*, any claims arising from the employment relationship should be contextualized. An employee is allowed to urge his case within the provisions of Section 35(4) of the *Employment Act*.
15. The employer is also required to pay the employee all terminal dues at the end of employment save to make deductions as provided for under Sections 17 and 19 of the *Employment Act*. These may include amounts regulated under Section 19(1) (b), (d) and (h);
 - (b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;
 - (d) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with the receipt, custody and payment of money;
 - (h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty per cent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section;
16. Whether there is a counterclaim or not, where the provisions of Sections 17 and 19 of the *Employment Act* are invoked, whatever the employee owes to the employer is recoverable. Whatever damage accrues from the conduct of the employee, the employer is allowed to make the necessary deductions.
17. This calls for evidence. The claims made and the basis of what the claimant as the employee owes the employer. Under paragraph 7(a) of the Response to the Claim, the respondent's case is that;

On 25 February 2021, the claimant admitted to the misappropriation and theft of funds Ksh.706, 600 at the Thika depot and agreed to repay the respondent through monthly instalments of Ksh.50, 000.
18. These matters must be interrogated in evidence to allow the court to arrive at a fair judgment of the facts and make a conclusion. Whether at the time of resignation on 10 May 2021 the claimant had repaid the admitted amounts is a matter of evidence. Whether there were balances unpaid at the end of employment, these are facts which should be ascertained whether there is a counterclaim or not.
19. On the objections, the court requires a call of evidence to make a determination. Objections declined. Costs to abide by the outcome of the claim.

DELIVERED VIA TEAMS VIRTUAL PLATFORM THIS 14TH DAY OF NOVEMBER 2024.

M. MBARŪ

JUDGE

