



**Mwaniki & 10 others v Kenya Institute of Management (Cause
14 of 2019) [2023] KEELRC 314 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 314 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 14 OF 2019
HS WASILWA, J
JANUARY 31, 2023**

BETWEEN

**JOHN MWANIKI 1ST CLAIMANT
JAMES WAWERU 2ND CLAIMANT
EVANS OMBONGI 3RD CLAIMANT
MOSES BIWOTT 4TH CLAIMANT
PETER KANEGENI 5TH CLAIMANT
JOSEPH DENNIS WAMOTO 6TH CLAIMANT
EMILY WAMOTO 7TH CLAIMANT
LUCY ANN KARANI 8TH CLAIMANT
MARGARET SIELE 9TH CLAIMANT
WILFRED NYAGAKA MBECHÉ 10TH CLAIMANT
JOYCE MUMBI KAMAU 11TH CLAIMANT**

AND

KENYA INSTITUTE OF MANAGEMENT RESPONDENT

RULING

Introduction

1. This case had been concluded on the July 13, 2021, where the claimants were awarded a cumulative sum of Kshs 5,020,348 being accrued salary arrears. The respondent having failed to participate in the hearing of the claim filed an application seeking to change his advocate, stay taxation of the bill of costs which had been filed by the claimant, set aside the judgement of July 13, 2021 and to be allowed to



- file a defence and prosecute this case. After consideration of the application, the court allowed that application in its ruling of January 18, 2022 on conditions that the respondent pays throw away costs of Kshs 110,000 within 15 days.
2. When the matter came up for hearing, the respondent only cross examined the claimant but did not call any witness or tender any evidence. The advocate proceeded to close the respondent's case on the May 30, 2022. In view of that the court entered judgement for the claimants and directed parties to consolidate the figures on the salary arrears payable within 3 weeks.
 3. Negotiations ensued therefrom and on July 28, 2022, Wachira advocate for the claimants informed the court that they had received some payments but they were yet to reconcile their account as instructed by court. The negotiation proceeded further and on October 11, 2022, the court directed the parties to submit on the pending issues together with the preliminary objection dated September 14, 2022 which had been raised by the respondent.
 4. The preliminary objection raised by the respondent is based on the following grounds;
 - a. That the statement of claim dated February 9, 2019 offends provisions of section 90 of the Employment Act to the extent that the claimants' claim relates to non-payment of sums of monies for the period of the year 2017.
 - b. That the above mentioned law provide 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.
 - c. That the claimant had until anytime within the year 2018 to lodge any claim for the sum of money allegedly owed and accrued within the year 2017.
 - d. That therefore the claimants' statement of claim dated February 21, 2019 and filed on the same date is time barred and by operation of the Employment Act, to the extent that it relates to the claim for the year 2017 and such claims do not lie in law against the respondent.
 5. In addition to the preliminary objection, the respondent filed an application notice of motion dated October 28, 2022 brought pursuant to section 20(1) of the Employment and Labour Relations Court Act, rule 26(2) of the Employment and Labour Relations (Procedure) Court rules, sections 1A, 1B & 3A of the Civil Procedure Act and article 159(2)(a) &(d) of the Constitution of Kenya and all other provision of law seeking the following orders; -
 - a. Spent.
 - b. That the honourable court be and is hereby pleased to re-open the respondent's case.
 - c. That the honourable court be and is herein pleased to grant leave to the respondent to call an officer of the respondent as a witness with the singular purpose of producing additional evidence being bank account statements of the respondent evidencing payments made by the respondents to the claimants.
 - d. That the costs of the application to be provided for.
 6. The grounds upon which the application is made is as follows; -



- i. That the claim herein relates to alleged salary arrears amounting to Kshs 5,020,348, which the court entered interlocutory judgment on liability for the claimant as against the respondent but reserved the issue of quantum and directed parties to negotiate and reconcile the sum payable.
 - ii. It is stated that the parties negotiated on quantum but could not agree, therefore that the application herein is seeking to produce evidence that some part payments that the claimants are seeking has already been paid.
 - iii. That the bank statement to be relied upon were sought from the bank and received on July 13, 2022 which were served upon the respondent's advocates for consideration while the negotiations were going on.
 - iv. It is the respondent's case that the issue pending before court is on quantum which can only be settled conclusively if the said bank statements are allowed to be placed on record and relied upon by the parties and court in ascertaining the quantum payable.
7. The application is also supported by an affidavit sworn by Raymond Mwangi, the head of shared services at the respondent's employ, which reiterated the grounds of the application.
 8. The application and the preliminary objection is opposed by the claimant who filed a replying affidavit sworn on November 23, 2022 by Evans Ombogi Nyakango, the 3rd claimant herein. In the said affidavit the deponent avers that the matter herein was filed on February 21, 2019 and the respondent's advocate filed a notice of appointment on March 27, 2019, but failed to file any defence thereafter.
 9. That the matter was scheduled for hearing and mentioned severally where the parties attended court and eventually the matter was heard in absence of the respondent who was served but failed to attend the court session. After the decree was issued and served, the respondent filed another application seeking to set aside the court's judgement which was allowed by the court. The respondent was directed to file its defence and prosecute it however that he only re-called the claimant's witness, cross –examined him and closed its case without calling any witness or tendering any evidence.
 10. The court in light of the foregoing, ruled in favour of the claimant and directed parties to reconcile their books and agree on the sums of money owing to the claimants. He added that the respondent was represented throughout these proceedings and given several opportunities to defend its case between January 18, 2022 and March 16, 2022 and therefore cannot cry foul.
 11. The affiant urged this court to dismiss the application herein seeking to re-open the defence case because it is aimed at delaying the final disposal of this matter.
 12. It is also stated that the respondent refused to produce the documents that could have aided the negotiation process despite filling a request to produce in this court which was later withdraw because it was further delaying the matter.
 13. The affiant also stated that the respondent issued it's advocates with a cheques for the throw away costs of Kshs 110,000, which cheque bounced due to insufficient funds, thus that they do not deserve any audience in this subsequent application for failing to honour court orders.
 14. In conclusion, the deponent avers that in the event the court allows the application herein, the respondent be ordered to deposit the entire decretal sum in an interest earning account in the joint names of the advocates to avoid a scenario where the court will be making orders in vain.
 15. The issues raised herein were dispensed by written submission, with the respondent filling on the December 15, 2022 and the claimants on the December 19, 2022.



Respondent's Submissions.

16. The respondent submitted from the onset in support of its preliminary objection and argued that the claim herein with regard to alleged salary arrears for the year 2017 is time barred pursuant to provisions of section 90 of the [Employment Act](#). It was argued that the claimants were issue with one-year contracts which was separate and distinct and lapse at the close of each year. Therefore, that any claim for salary arrears for the year 2017 ought to have been filed within 12 months in line with section 90 of the [Employment Act](#), which in this case should not be later than 2018 .
17. To support this case, the respondent relied on the case of [George Hiram Ndirangu v Equity Bank Limited](#) [2015] eKLR where the court defined continuing injury that;
- “The logical meaning of the phrase 'continuing injury or damage' would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues. A typical memorandum of claim would normally contain a claim for compensation and payment of accrued dues. In my view, 'continuing injury or damage' would connote such accrued dues.”
18. It was argued that since the court has not been empowered under the law to extend time to allow for determination of any issue that has been caught up by limitation of action, this court lack jurisdiction to deal with any claim that arose in 2017. In this they relied on the case of [Ephraim Gachigua Mwangi v Teachers Service Commission & Board of management Thogoto Teachers College](#) [2018] eKLR and the case of [Justice S Sunyai v Judicial Service Commission and another](#) [2017] eKLR.
19. On the notice of motion dated October 28, 2022 seeking to re-open the defence case, the respondent submitted that the issue left for determination in this suit is on quantum payable to the claimants, which issue is contested because the respondent paid some amount of money to the claimant which can only be ascertained when the bank statements are admitted on record and relied upon in calculating the quantum payable to each claimant. It was argued that the respondent despite frantically asking for the said bank statement did not receive them till July 7, 2022 after the hearing had been concluded. To support its case, the respondent cited the case of [Joseph Ndungu Kamau v John Njibia](#) [2017] eKLR where the court faced with a similar application held that;
- “The principles governing an application such as that before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. Reopening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a similar application in [Samuel Kiti Lewa v Housing Finance Co of Kenya Ltd & another](#) [2015] eKLR Kasango J stated; in Uganda High Court, commercial division in the case [Simba Telecom v Karuhanga & Anor](#) (2014) UGH 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case [SMith v New South Wales](#) [1992] HCA 36; (1992) 176 CLR 256 where it was held: “If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered.



In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

20. Similarly, that the respondent failure to file the said documents was not deliberate but owing to the fact that the same was in the bank custody. Further that the said statement will demonstrate to this court that the respondent had paid the claimant a total sum of Kshs 1, 169, 223 which should be subtracted from the decretal sum as to allow it to remain as it is, will be unfairly enriching the claimants.
21. In conclusion, the respondent urged this court to consider two issues before making its final orders, that is to declare the arrears sought for the year 2017 of Kshs 1,925,298 to be time barred by dint of section 90 of the Employment Act and also subtract the money already paid of Kshs 1,169,223.

Claimants' Submissions.

22. The claimants on the other submitted that the allegation that the claim for salary arrear in time barred is unfounded. It was argued that the claim for salary arrears which is the cause of action and the injury in the claim herein ceased in December, 2018 then the claim was filed on February 21, 2019 about two months from the date the injury ceased, which was within the 12 months stipulated under the Employment Act.
23. It was submitted that the case cited by the respondent in Ephraim Gachigua Mwangi v Teachers Service Commission & Board of management Thogoto Teachers College [2018] eKLR, was in relation to a claim filed in court on application of section 90 with regard to 3 years' limitation period. It was argued that the time runs from the time the injury ceased as was held in the case of Ephraim Gachigua Mwangi v Teachers Service Commission & Board of management Thogoto Teachers College(supra) where the court held that;

“The law is clear. If there is a continuing injury or damage, limitation is capped at 12 months from the cessation thereof. The demotion that took place was an incident. The fact that the effects reverberate to date do not affect the incident contained in the letter of re-deployment. By parity of reasoning, after dismissal a person may suffer economic hardship and his social standing irreparably altered or damaged. That does not however entitle the dismissed employee to claim 4 or 5 years later on account of the dismissal being a continuing wrong since the effect of the dismissal may be continuing. This is an incorrect reading of the law.”
24. On the application to re-open the defence case and file additional documents, the claimants submitted that the respondent had ample time to file such documents but slept on its right only to be awakened by the interlocutory judgment made in favour of the claimants. It was argued that the statements the respondent seeks to file and place on record relate to the period before August, 2017 which was payment of dues for the month July, 2017 which is not in contention in this matter as the salary arrears pending are for the period between August, 2017 and December, 2018.
25. The claimant in conclusion prayed for the dismissal of both the application and the preliminary objection with costs to them.
26. I have examined the averments and submissions of the parties herein. The applicant seeks orders from this court to the effect that the claim is time barred – a fact coming after the hearing and conclusion of the claim and judgment rendered.
27. This in my view is a matter which should have been raised before or within the hearing of the claim which matter was never raised and therefore remain a matter appealable and cannot be handled by this court at this point in time.



28. On issue of whether this court can at this time reopen the case and allow fresh evidence, my position from the record of this case is that on May 30, 2022, parties appeared before me and the respondents intimated that they were closing their case without calling any evidence.
29. Interlocutory judgment was entered against the respondents and parties were asked to reconcile the figures payable and submit them before court.
30. The processes of reconciling the figures has been pending and now the respondents want the case re-opened.
31. In my view the issue of submissions before court will aid the court in reaching a determination of the exact figures payable.
32. A preliminary objection cannot be raised at such a time and it is my view that the preliminary objection has no merit whatsoever and what the respondent wishes to present before court can be handled in their submissions.
33. The application is therefore found without merit and is dismissed accordingly.

RULING DELIVERED VIRTUALLY THIS 31ST DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mr. Wachira for Claimants – present

Ochoe for respondent – present

Court Assistant – Fred

