



**Khanda v Maseno University (Cause E013 of 2022)
[2023] KEELRC 115 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 115 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E013 OF 2022
CN BAARI, J
JANUARY 26, 2023**

BETWEEN

JACKSON ZEDEKIAH KHANDA CLAIMANT

AND

MASENO UNIVERSITY RESPONDENT

RULING

1. Before Court is the Respondent's Notice of Preliminary Objection dated 21st October, 2022, seeking to have the Claimant's claim struck out on the basis that the court lacks jurisdiction to entertain the same for being statute barred.
2. The Respondent contends that the Claimant's statement of claim, indicates that his contract lapsed in December, 2018, and the suit herein, filed on 14th March, 2022, hence the claim as filed violates Section 90 of the *Employment Act*, 2007. It is the Respondent's further assertion that the Claimant ought to have filed his claim within three years from the date his contract lapsed, hence, not later than December, 2021.
3. It is the Respondent's contention that the Claimant's right to sue has since lapsed and the court lacks jurisdiction to entertain the claim.
4. The Claimant opposed the Objection through grounds of opposition dated 25th November, 2022, and filed on 28th November, 2022, and a replying affidavit sworn and filed on similar date.
5. The Claimant asserts that the issue of time and more so the commencement of the cause of the action is so ambiguous, that it can only be determined in a full trial or upon recording his evidence due to the fact that his contracts lacked consistency.
6. The Claimant further avers that the grounds upon which the objection is premised are neither valid nor merited and hence the objection should be struck out.



7. Parties sought to canvass the Preliminary Objection by way of written submissions. Submissions were filed for both parties.

The Respondent's Submissions

8. It is submitted for the Respondent that the suit herein is statute barred having been filed three months after the lapse of a three year period. The Respondent argue that the Preliminary Objection be upheld. They placed reliance in *Joseph Mejala Peralta v Vigelo and Gero Construction Company Limited (VGCL)*(2022) eKLR, where the court referred to the decision in *Fred Mudave Gogo v G4S Security Services Limited(K)*(2014) eKLR and observed thus:

“...a claim based on the provisions of the *Employment Act*, 2007 must comply with the mandatory provisions of Section 90 of the Act and be filed within 3 years from the date of accrual of the cause of action...”

9. The Respondent submits that in as much as this court has jurisdiction to hear and determine disputes between the Claimant and the Respondent, it lacks jurisdiction to admit, hear and determine this claim by virtue of it being time barred per Section 90 of the *Employment Act*, 2007. The Respondent had reliance in the holding in *Owners of Motor Vessel Lilian “s” v Caltex Oil(K) Limited* (1989) KLR 1 to buttress this position.

The Claimant's Submissions

10. The Claimant submits that his contracts of service with the Respondent were given on various dates, with the first contract being issued on 8th June, 2018, and a second one given vide a letter of appointment dated 28th July, 2020, and that both letters were filed together with the statement of claim.
11. The Claimant further submits that he was a part time lecturer at the employ of the Respondent and that his evidence cannot be shut out.
12. It is the Claimant's submission that the Preliminary Objection is frivolous, scandalous and an abuse of the court process. The Claimant submits that he has a legitimate claim against the Respondent and the objection is only intended to bar him from accessing justice.

Determination

13. Section 90 of the *Employment Act*, 2007, states:

“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.”

14. The Respondent's objection is that the Claimant's claim is time barred on the premise that it was filed three months after the three-year period envisaged under Section 90 of the *Employment Act*. The Respondent contends that the Claimant's contract having lapsed in December, 2018, it follows that the suit should have been filed by 31st December, 2021, but was instead filed on 14th March, 2022.
15. The Claimant on his part contends that he had various contracts with the Respondent and that he served on part time basis, hence the Respondent's assertion of lapse of time is unfounded.



16. The *Employment Act*, 2007, no doubt requires that a claim premised on an employment agreement or contract, should be instituted within three years upon the accrual of the cause of action, and no latitude is given to the court to extend this period.
17. The issue herein is whether the Claimant's claim is time barred. The statement of claim before this court indicates that the Claimant was issued an appointment letter dated 8th June, 2018, and which was to lapse in December, 2018, being the end of the first Semester. The Claimant proceeds to state that he taught in the second semester of the Respondent's 2017/2018 academic year, but was not issued an appointment letter for the second semester despite him requesting for one.
18. In *Mukisa Biscuit Manufacturing Co. Ltd –vs 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 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.”
19. The pleadings herein, are not clear on when the Claimant's contract terminated/lapsed as to ascertain the exact date of accrual of the cause of action. The date when the Claimant's appointment lapsed is thus an issue of fact that is subject to confirmation upon a hearing.
20. In the circumstances, the court is unable to determine whether or not the suit is time barred at this stage. The Preliminary Objection is found to lack merit and is dismissed.
21. The costs of the application shall bide the cause.
22. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 26TH DAY OF JANUARY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Migosi present for the Claimant

N/A for the Respondent

Christine Omollo- C/A

