



Njau & 44 others v University of Nairobi & another (Cause 616 of 2017) [2023] KEELRC 104 (KLR) (20 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 104 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 616 OF 2017
SC RUTTO, J
JANUARY 20, 2023**

BETWEEN

GEORGE KAMAU NJAU & 44 OTHERS CLAIMANT

AND

UNIVERSITY OF NAIROBI 1ST RESPONDENT

**UNIVERSITY OF NAIROBI ENTERPRISES AND SERVICES
LTD 2ND RESPONDENT**

JUDGMENT

1. The claimants are all employees of the 1st respondent. They aver that they are members of the department of bio chemistry of the 1st respondent. That the 1st respondent is a public collegiate research university while the 2nd respondent is its commercial arm. The claimants aver that at all material time to this suit, they were working at the 1st respondent's department of bio chemistry which falls within the College of Health Sciences as professors, lecturers, technologists, technicians, drivers and cleaners.
2. They aver that the 1st respondent engaged them as direct service providers for module II in the years 2004-2011 but refused, neglected, denied and or declined to pay for the services rendered.
3. That they wrote severally and persistently seeking payment of their monies but the respondents only opted to pay for the period beginning July, 2008 upto April 12, 2011. It is on this account that the claimants now seek against the respondents the sum of Kshs 8,632,115.63 being the unpaid balances of the payments they claim for the period between 2004 to 2008.
4. The respondent opposed the claim and denied withholding the claimants' monies as alleged. It averred that the terms of engagement for those employed under module II programme are remunerated for their services in strict conformity with the university policy on Module II fees distribution. That further, the payment for direct service providers changed over time and is not on contractual arrangement between staff, rather a motivational pay to staff from parallel degree programmes. The



respondents have further termed the suit as statute barred and stated that the same was filed more than three years after the claim arose. Consequently, the respondents have asked the Court to dismiss the claim with costs.

5. The matter proceeded for part hearing on May 5, 2022 when the claimant's side presented oral evidence and closed its case. Further hearing was slated for July 18, 2022 when the respondent's side had the opportunity to call oral evidence and thereafter, trial closed.

Claimants' case

6. Mr Philip Kamangu Gatiu testified on behalf of all the claimants. To start with, he adopted his witness statement together with the bundle of documents filed with the claim as well as the claimants' supplementary list and bundle of documents, to constitute his evidence in chief. He also produced the said documents as the claimants' exhibits before Court.
7. Mr Gatiu told Court that the 2nd respondent being the financial arm of the 1st respondent, was tasked with handling revenue from the 1st respondent's income generating activities. That their claim is in respect of tuition fees collected from the 1st respondent's parallel programme. That in 2004, the tuition fees collected was Kshs 16,475,810.00 and the department of biochemistry was to get 30% of the same being Kshs 5,766,533.50. That the money in question covers the period 2004-2008 and cumulatively, is Kshs 8, 632,115.63.
8. He further testified that the claimants demanded payment and sought audience with the respondents but they never responded. That despite the respondents withholding the sum claimed, they honoured the other payments. Closing his testimony, Mr Gatiu asked the Court to allow the claim as prayed.

Respondent's case

9. The respondents tendered oral evidence through Mr Harrison Akala who testified as RW1. He identified himself as the Senior Assistant Registrar- Administration of the 1st respondent. He also adopted his witness statement and the respondents' bundle of documents filed together with the response and supplementary list and bundle of documents to constitute his evidence in chief. He also produced the said documents as the respondents' exhibits before Court.
10. Mr Akala told Court that the claim by the claimants is not part of their terms of service. That since the inception of the self-sponsored programme, payments to direct service providers are guided by the respondents' council approved policy on distribution of revenue from income generating activities (Kibera IV) as approved from time to time. That the policy guidelines on payment of direct service providers states that rates applicable on payments should be dependent on availability of funds. That upon submitting claims in conformity with the respondents' policies on Module II fees distribution, all the claimants were paid for the services rendered for the period July, 2004 to June, 2008 and July, 2004 to April, 2011.
11. Mr Akala concluded his testimony by asking the Court to dismiss the claim with costs.

Submissions

12. Both parties filed written submissions upon close of the hearing, with the claimants submitting that since they are still employees of the respondents, they have a cause of action within the purview of continuing injury. That the continuing injury has never ceased hence the issue of limitation does not arise. To buttress this argument the claimants placed reliance on the case of *James Mugeria Igati v*



Public Service Commission (2014) eKLR and G4S Security Services (K) Limited v Joseph Kamau & 468 others (2018) eKLR.

13. That there is no evidence that the payments in question were made to the claimants.
14. On its part, the respondents submitted that the claim is statute barred. It was further submitted by the respondent that the claimants had failed to prove that there was an existing contract between the parties that led to the amount of Kshs 8,632,115.60. That the appointment letters issued to the claimants formed the basis of their employment and did not include Kshs 8,632,115.60. In support of this position, the respondents cited the cases of Martin Wanderi & 19 others v Engineers Registration Board of Kenya & 4 others (2020) eKLR.

Analysis and Determination

15. From the record before me, the issues falling for determination are:
 - i. Is the claim statute barred?
 - ii. If the answer to (i) is in the negative, whether the claimants are entitled to payment of Kshs 8,632,115.60 as sought in the claim.

Is the claim statute barred?

16. The claimants claim is for payment of monies they allege arose out of the services they rendered as direct service providers in respect of the 1st respondent's Module II programme. The period in question is July 2004 to June, 2008 while the claim herein was filed on March 30, 2017.
17. The respondents contend that the claim is statute barred having been filed more than three years after the cause of action arose, whereas the claimants state that the same is a continuing injury hence the issue of limitation of time does not arise.
18. Section 90 of the Employment Act places a time bar on claims instituted three years past the date the cause of action arose. With regards to continuing injuries, the same are to be brought within 12 months from the date of cessation of the such injury. The section is couched 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.”
19. It was not contested that the parties are in an employment relationship. The question is whether the cause of action has accrued, and if so, when? Further, is there a claim for continuing injury?
20. In defining what constitutes a cause of action, the Court of Appeal in the case Attorney General & another v Andrew Maina Githinji & another [2016] eKLR, cited with approval the case of Letang v Cooper [1964] 2 All ER 929 at 934 where the term was defined as follows:

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”
21. To my mind, in the instant case, the cause of action would ordinarily arise at the time the claimants had a cause to complain and this would be when the respondents made a definite decision not to pay the payments claimed and informed them as much.



22. On record is a letter dated July 1, 2011, from Prof Madara Ogot, the Managing Director of the 1st respondent to the Chairman, Department of Biochemistry, advising him that the 1st respondent's Vice Chancellor had not approved the request for the payment based on the University's policy.
23. In another letter dated July 20, 2011, to the Vice Chancellor, the claimants acknowledged receiving the communication to the effect that the payment was not approved and the reasons thereof. The letter reads in part:
- “Further to our earlier letter dated May 26, 2011 on the above subject, we are in receipt of a letter dated July 1, 2011 from the managing director UNES (copy attached) informing us that the above payment was not approved by the vice chancellor. The reason given in the letter was that payment of such balances would be against university policy.”
24. Therefore, it is evident that as at July 1, 2011, the claimants were aware that the payments in question would not be honoured. At that point in time they knew the respondents' position with regards to the payment being that it was not ready to settle the payments. Indeed, that is when the claim crystallized and the cause of action arose. The respondents had made their position known. It is no wonder that further correspondence from the claimants elicited no response from the respondents.
25. Therefore, from July 1, 2011, the claimants had three years to move the Court to seek the payments they now claim. However, they waited until March 30, 2017 to file the instant suit. This was close to six years after the claimants had been notified that the 1st respondent's Vice Chancellor had refused to approve payment of their claim due to policy requirements. By then, the suit was time barred and had been caught by limitation of time and no action based on the issue could be sustained.
26. In the same breath, I adopt and reiterate the decision of the Court of Appeal in the case of *Attorney General & another v Andrew Maina Gitbinji & another* (supra), thus:
- “The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October, 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not...having found that the cause of action arose on 2nd February, 2010 and that the claim was filed on 16th June, 2014 it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was barred as at 1st February, 2013, and I so hold.”
27. Against this background, I cannot help but find that the instant Claim is time barred having been brought three years past the date the cause of action arose.
28. To this end, and as per the determination in the case of *Thuranira Karauri v Agnes Ncheche* [1997] eKLR, the Court lacks jurisdiction to determine the matter as the issue of limitation goes to the jurisdiction of the court. This follows that the second issue cannot be determined by the Court.
29. The total sum of my consideration is that the Claim dated March 21, 2017 and filed on March 30, 2017, is hereby struck out for being time barred.
30. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2023.

STELLA RUTTO

JUDGE



Appearance:

For the Claimants Mr Nyabena

For the Respondents Ms. Achieng'

Court Assistant Abdimalik Hussein

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

