



**Riungu v Attorney General & another (Cause 1415 of 2017)
[2023] KEELRC 60 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 60 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1415 OF 2017
K OCHARO, J
JANUARY 20, 2023**

BETWEEN

HUMPHREY GITONGA RIUNGU CLAIMANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT

RULING

1. Before me for determination is the respondents' preliminary objection dated July 28, 2017 based on the grounds that:
 - a. That the suit is time barred and offends the provision of section 4(1) of the *Limitations of Actions Act*
 - b. That the suit is an abuse of court process
 - c. That the suit is incompetent and ought to be struck out with costs

When the matter came up for hearing of the preliminary objection on March 15, 2022, the court directed that the same be canvassed by way of written submissions. The parties obliged and filed their respective submissions for and against the objection.

1st Respondent's submissions

2. The 1st respondent identified three issues for determination
 - a. Whether the suit is statute barred
 - b. Whether the suit is an abuse of the court process



- c. Whether the suit is incompetent and ought to be struck out with costs.
3. The 1st respondent submits that the claimant was dismissed from work on the 16th August 2006 which is the date the cause of action arose. He filed the present case on July 19, 2017 a period of 10 years 11 months and 27 days after accrual of the cause of action. Pursuant to the provision of section 4(1) of the Limitation of Actions Act the limitation period of 6 years had already lapsed.
4. The 1st respondent relies in the holding in the Industrial Court Cause no 1201 of 2012, *Banking Insurance and Finance Union (K) -v- Bank of India* where this court while dealing with the issue of limitation stated:
- “The fact of the matter is that employment contracts like other commercial contracts were subject to the provisions of the Limitations of Actions Act Cap 22 of the Laws of Kenya at the time with regard to limitations but presently the limitation period is governed by Section 90 of the Employment Act 2007 which has reduced the limitation period in employment matters to three (3) years.”
5. It is further submitted that the lapse of time is not a mere technicality but a jurisdictional issue. Where a matter is statute barred as is the case here, the court lacks jurisdiction to entertain it. The matter should be dismissed.

2nd Respondents submissions

6. The 2nd respondent identified one issue for determination whether the suit is time barred.
7. The 2nd respondent submits that the applicable law in this suit is the Limitation of Actions Act and Public Authorities Limitation of Actions Act. To buttress this point, reliance was placed on the holding in in Daniel Kago Gachanja v Inspector General & 2 others [2020] eKLR thus:
- “The relevant law is section 3(2) the Public Authorities Limitation of Actions Act which provides that:
- “No proceedings founded on contract shall be brought against the government or local authority after the end of three years from the date on which the cause of action accrued”
- Section 2 of the Public Authorities Limitation of Actions Act}} defines proceedings against the government to include: -
- proceedings against the Attorney General or any Government department or any public officer as such.”
8. The 2nd respondent further asserts that there is firm jurisprudence that in employment matters time starts running from the date of the termination, regardless of whether there is existing an internal disciplinary mechanism available for the aggrieved former employer to exhaust.
9. It submits that in the present case the cause of action arose on August 16, 2006 when the claimant was dismissed from the force, a dispute as to the legality of the dismissal should have been filed within three years as prescribed in section 2 of the Public Authorities Limitation of Actions Act.



10. The suit herein was filed on July 19, 2017, that is 10 years 11 months and 3 days after the cause of action arose. It submits that jurisdiction ceases to exist the moment a suit is time barred as held in *Bosire Ongero v Royal Media services* [2015] eKLR, thus:

“The question of limitation touches on the jurisdiction of the court, which means that if a matter is statute barred, the court would lack jurisdiction to entertain it.”

11. The 2nd respondent further submits that the claimant pleaded that he was charged at Embu Law courts on August 14, 2006 and subsequently acquitted under section 215 of the *penal code* on October 18, 2011. Existence of proceedings in a criminal matter does not in any way stop time from running. In support of this submission, reliance has been placed on the decision in *Nyabuto Arambe Abusa v Kenya Power & Lighting Co Ltd* [2015] eKLR

“A criminal process is a matter that requires evidence that has to be addressed by a different court other than this one. Criminal proceedings are therefore not a bar in themselves to proceeding before this court. Employment and labour relations proceeding before this court are filed as of right and criminal proceedings proceed before different courts based on various laws, and such proceedings have a life of their own different from proceeding before this court. To therefore file an employment and labour case before this Court should not be based on criminal proceedings taking place elsewhere.”

12. The 2nd respondent urges the court to dismiss the statement of claim with costs.

Claimant’s submissions

13. The claimant in opposition to the preliminary objection submits that he was dismissed in 2006 but had been pursuing his employer through courts and internal mechanisms. He stated that his last communication with the employer was on March 16, 2013 and he filed the suit in 2017, four years after his employer was not responsive to his grievances.
14. The claimant urges the court to disallow the preliminary objection and consider his case on its merit citing article 159(2)(d) of the *Constitution* of Kenya that provides that courts should administer Justice without undue regard to procedural technicalities.
15. The claimant submits that the respondents have not demonstrated to the court what prejudice would be occasioned to them if the court allowed the matter to proceed and be determined on merit.
16. The claimant further submits that he has attached in his list of documents several correspondences trying to pursue the matter internally, he states that he was not indolent but has been vigilant and pursued this matter with vigour and urges the court to rely on the famous maxim ‘equity aids the vigilant and not the indolent’ and disallow the Respondents’ preliminary objection.

Analysis and determination

17. I have considered the preliminary objection before me and the submissions by the parties. The issue for determination is whether the claim is statute barred.
18. The threshold for a valid preliminary objection in civil proceedings is set out in the celebrated case of *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited* [1969] EA 696. There cannot be any doubt that what the respondents have raised is a pure point of law which if allowed shall determine this matter fully.



19. From the pleadings before this court, there is no doubt that the claimant was at all material times in the employment of the 2nd respondent up until August 16, 2006, when his said employment was terminated.
20. It's also not disputed that he was arrested on October 14, 2006 and charged at Embu law courts on allegations of corruption contrary to section 39(3)(b) as read with section 48 of the [Anti-Corruption and Economic Crimes Act](#) No 3 of 2003 but was acquitted of the charge on October 18, 2011.
21. In opposition to the preliminary objection, the claimant argued that after the termination of his employment, he engaged the 2nd respondent on an appeal through the latter's internal mechanisms. The engagement did not bear any fruits as the 2nd respondent was nonresponsive. He got constrained to commence the proceedings herein four years after his last correspondence to the said respondent on the matter. I find considerable difficulty in understanding how reasonably a person can correspond for a period of more than 6 years with a nonresponsive other, without prudence dictating him to act in a manner that will aid him not to be locked out of the seat of justice. The claimant's conduct meets not any other description other than that it was one by an indolent person. As the claimant himself acknowledges, equity helps not the indolent but the vigilant.
22. I have no doubt that at all material times the claimant had a legal mechanism[s] available to him to jolt the respondent out of its unresponsiveness into action, judicial review proceedings for an order of *mandamus*.
23. The long and short of this being that the claimant didn't have any justification for his inaction for the entire period of more than 10 years, or even beyond the statutory period for filing his claim.
24. The summary dismissal the claimant from employment, the subject matter herein, happened prior to the operationalization of the [Employment Act](#). For purposes of this matter therefore, the applicable law is the section 3[2] of the Public Authorities Limitation of Actions Act considering the claimant was a member of the National police. The section stipulates, "No proceedings founded on contract shall be brought against the Government or local authority after the end of three years from the date on which the cause of action accrued"
25. The claimant submits that this court should invoke the provisions of article 159[2][d] of the [Constitution](#), which encourages resolution of matters without due regard to technicalities. My straight answer to this is that the provisions of the said Article are not a panacea to every ill, every deficiency. Matters limitation of actions do not fall under the realm of those that can be considered technicalities. They are, substantive in nature, and jurisdictional.
26. In this court's view, existence of criminal proceedings cannot in any way stop time from running in respect of a cause of action for a civil matter founded on same facts as those in the criminal matter. There has never been a bar on concurrent criminal and civil proceedings. The processes are different with different rules of engagement.
27. In the upshot, I find that the suit herein was filed out of time contrary to the stipulations section 3(2) of the Public Authorities Limitations of Actions Act. Lack of vigilance has locked the claimant out of the seat of justice. The preliminary objection is hereby upheld, the suit is struck out. Each party to bear its own costs.

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

OCHARO KEBIRA

JUDGE



In the presence of

Ms Chebet for Ms Opiyo for the 2nd respondent.

No appearance for the claimant.

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

Ocharo Kebira

Judge

