



**Okwirry v Honda Motorcycle Kenya Limited (Cause E026 of 2022)  
[2023] KEELRC 368 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 368 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E026 OF 2022  
CN BAARI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**EDWIN ODHIAMBO OKWIRRY ..... CLAIMANT**

**AND**

**HONDA MOTORCYCLE KENYA LIMITED ..... RESPONDENT**

**RULING**

1. The ruling herein relates to a notice of motion application dated August 4, 2022, brought pursuant to order 51 of the [Civil Procedure Rules](#) and section 15 of the [Civil Procedure Act](#), and a notice of preliminary objection of even date. In the notice of motion, the applicant seeks orders that:
  - i. Spent
  - ii. The honourable court be pleased to order the transfer of ELRC cause No E026 of Edwin Odhiambo Okwirry v Honda Motorcycle Kenya Limited from the Employment and Labour Relations Court at Kisumu to the Employment and Labour Relations Court at Nairobi for hearing and final determination.
  - iii. The honourable court be pleased to make any other orders within its inherent jurisdiction.
  - iv. The costs of the application be in the cause.
2. On the preliminary objection, the respondent/applicant seeks the striking out of the claimant's prayers b and c listed in his statement of claim on the basis that the claims are time barred and offends section 90 of the [Employment Act](#) and section 37 of the [Civil Procedure Act](#).
3. The application is supported by grounds on the face of the motion and the affidavit of Eric Ngugi. The crux being that the cause of action in the matter arose in the city of Nairobi within Nairobi county, and within the jurisdiction of the Employment and Labour Relations Court at Nairobi and not the Employment and Labour Relations Court at Kisumu.



4. The applicant avers that the respondent operates their business in Nairobi city where its offices and headquarters are located, and that they stand to suffer prejudice if the application herein is not allowed, as they will incur unnecessary additional expenses defending the suit in Kisumu.
5. The applicant further states that the instant application has come at a preliminary stage, hence the respondent/claimant will not be prejudiced.
6. The applicant in support of its preliminary objection, avers that the claimant's claims for payment of salary for days worked from 2<sup>nd</sup> -March 6, 2020, and leave allowance for 28.5 days, have come two years after the accrual of the cause of action contrary to the limitation in section 90 of the [Employment Act](#), that provides a limit of one year for such prayers.
7. The claimant/respondent opposed the preliminary objection *vide* a replying affidavit sworn by him on September 12, 2022, and a further affidavit of January 18, 2023.
8. The claimant/respondent avers that the cause of action herein, arose at Kisumu where he was working for gain at the respondent/applicant's branch offices. The claimant further avers that he knows of his own knowledge that the ELRC at Kisumu has jurisdiction to determine this suit.
9. The claimant/respondent further avers that the instant suit has been properly instituted in a court of competent jurisdiction pursuant to section 15 of the [Civil Procedure Act](#).
10. The claimant/respondent states that the suit/claim was filed within the time limits prescribed under section 90 of the [Employment Act](#), and that the objection raised in this respect is a mere delaying tactic employed by the applicant/respondent.
11. Parties canvassed the motion by way of written submissions, and submissions were filed for both parties.

#### **The Respondent/Applicant Submissions.**

12. It is submitted for the applicant that section 15 of the [Civil Procedure Act](#), requires that suits be filed at the place where the respondent has its principal office. The applicant had reliance in [EKM v PKM \(2021\) eKLR](#), to buttress this position.
13. The applicant further submits that per the court's decision in [Abid Hashim v Anthony Kibonge Mubia \(2008\) eKLR](#), section 15 of the [Civil Procedure Act](#), limits the court's territorial jurisdiction in regard to where civil suits can be filed by plaintiffs against defendants.
14. The applicant further submits that its principal office is in Nairobi and that the claimant/respondent is well aware of this fact, and it will be forced to incur expenses in defending this suit, and hence the application to transfer.
15. The applicant submits that the claimant/respondent's claim for unpaid salary and house allowance that accrued between 2<sup>nd</sup> – March 6, 2020, cannot be granted for reason that they are time barred and the court has no jurisdiction to entertain the claims. The applicant placed reliance in the holding in [David Ngala Ochieng v Hatari Security Guards Ltd \(2022\) eKLR](#), where the court stated thus:

“The reasoning of the Court of Appeal appears to be that a contractual benefit which occurs at the end of each month amounts to continuing injury for purposes of the law of limitation.”



## The Claimant/Respondent's Submissions

16. It is the claimant/respondent's submission that this court has unlimited original jurisdiction to hear and determine this case since the cause of action arose at Kisumu, where the respondent/applicant has branch offices, and where the claimant was attached at the material time to this suit. It is the claimant/respondent's submission that the suit herein is properly filed in accordance with section 15 of the *Civil Procedure Act*. The claimant sought to rely in the holding in the case of *Mohamed Abu Ali v Kenya Power & Lighting Co Ltd* (2000) eKLR to support this position.
17. It is the claimant/respondent's further submission that the case should not be transferred to Nairobi on the premise that he was stationed in Kisumu. The claimant/respondent further avers that transfer of this suit will occasion him injustice being that he is currently unemployed.
18. The claimant/respondent submits that he was dismissed on March 6, 2020, and that section 90 provides a three (3) year limitation on matters arising out of employment contracts. He submits that this claim is properly within time. The claimant placed reliance in the case of *Hilarion Mwabalo v Kenya Commercial Bank* (2013) eKLR, where the court stated that accrual of the cause of action in a claim emanating from employment contract takes effect from the date of termination.
19. It is further submitted for the claimant/respondent that the part in section 90 that concerns continuing injury, does not apply to his claim for reason that his claim arises from his termination and the reliefs sought under his claim cannot be termed as continuing injury. The claimant sought to rely in *Mary Kitsao Ngowa & 36 others v Krystalline Limited* (2015) eKLR, where the Court of Appeal guided on what constitutes a continuing injury.
20. The claimant/respondent submits that this court finds his claim properly filed in accordance with the set time lines of the *Employment Act*, 2007.

## Analysis and Determination

21. I have considered the motion, the notice of preliminary objection, the replying and further affidavit and the parties' submissions, the issues that arise for determination are:
  - i. Whether the applicant has demonstrated reasons to warrant transfer of this suit to ELRC at Nairobi
  - ii. Whether the claimant's prayers b and c are statute barred.

## Whether the applicant has demonstrated reasons to warrant transfer of this suit to ELRC at Nairobi

22. Section 15 of the *Civil Procedure Act* states: -

“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- (a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
- (b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally



work for gain, as aforesaid acquiesce in such institution; or (c) the cause of action, wholly or in part, arises.”

23. The applicant bases his application for transfer of the suit on it having their principal offices in Nairobi county. The claimant/respondent on his part, argues that he was stationed at the applicant/respondent’s branch offices at Kisumu and that the cause of action arose at Kisumu.
24. The applicant has not disputed that the claimant/respondent was stationed at their branch offices at Kisumu and that the cause of action subject herein, arose in Kisumu.
25. Section 15 of the *Civil Procedure Act* proceeds to explain where suits should be instituted by/against corporations with multiple offices as follows: -

“explanation. (2)—

A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.”
26. In *Red Anchor Freight Forwarders Ltd v David Nthiwa Wambua* (2005) eKLR, also cited by the claimant/respondent, the court had this to say on transfer of a suit where the appellant had a principal office: -

“.....I have to conclude that more harm is done to a suitor if the suit is filed in Nairobi than if it is filed in Mombasa; and the one who is most vulnerable in all circumstances is the plaintiff. It is the plaintiff, therefore, who is favoured by the balance of convenience...”
27. Contrary to the applicant/respondent’s submissions, section 15 does not oust this courts jurisdiction from hearing and determining this matter on the basis only that the applicant’s principal office is situated in Nairobi. The cause of action herein, arose in Kisumu and at the applicant’s branch offices in Kisumu.
28. The claimant has also told the court that he is currently unemployed and transferring this suit to Nairobi, will occasion him injustice.
29. In light of the foregoing, the balance of convenience tilts in favour of the claimant/respondent. Further, it is both expeditious and economical to continue this suit before this court as opposed to transferring it to Nairobi, where parties will have to queue again to list the matter for hearing. Moreover, hearing of suits is currently on-line and the respondent/applicant needs not travel to Kisumu physically for hearing, and thus the issue of unnecessary expenses does not arise.
30. In this regard, I find the applicant/respondent application to transfer the suit to ELRC Nairobi unmerited and is dismissed.

**Whether the claimant’s prayers b and c are statute barred.**

31. Section 90 of the *Employment Act* states thus: -

“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.”

32. The applicant/respondent’s contention is that the claimant’s prayer for unpaid salary and house allowances for the period from 2<sup>nd</sup> – March 6, 2020, is a continuing injury and which claim should have been filed within 12 months of the cessation of the injury.
33. The claimant/respondent asserts that the cause of action herein arose at his dismissal on March 6, 2020, and that the time of limitation begun running on the date of dismissal, where after, he had three years to lodge his claim in accordance with section 90 of the Act.
34. The question for this court is what constitutes a continuing injury. In *Mary Kitsao Ngowa & 36 others v Krystalline Limited* (2015) eKLR, the Court of Appeal borrowing from the *Blacks Law Dictionary*, explained a continuing injury as follows: -

“ This definition connotes an injury that continues to happen at the time the claim is lodged and/or ongoing. In the context of an employment relationship, it presumes that the parties are still on a continuous engagement at the time of claim. “..... However, in this case, it is not disputed that at the time the claim was lodged, the employment relationship had already been severed. It is the termination that gave rise to the cause of action. Any claims arising therefrom could no longer be termed as continuing injury....”
35. The claimant/respondent was dismissed on March 6, 2020. The suit herein was lodged on May 30, 2022, following the dismissal. This is about two years and one month after the accrual of the cause of action.
36. The filing of the claim was occasioned by the dismissal. The claim for prayers b and c, which are the subject of the suit herein, was filed upon dismissal of the claimant.
37. Guided by the Court of Appeal’s definition of a continuing injury, the claim herein does not amount to a continuing injury. The employment relationship between the parties had already been severed.
38. I find both the notice of motion and the preliminary objection incompetent and are for dismissal.
39. The application dated August 4, 2022, and the preliminary objection of similar date, is dismissed with costs.

Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

N/A for the Claimant/Respondent

N/A for the Respondent/Applicant

Ms. Christine Omollo-C/A

