



**Mola v National Government Constituencies Development Fund Board
(Cause 42 of 2022) [2023] KEELRC 354 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 354 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 42 OF 2022
S RADIDO, J
FEBRUARY 15, 2023**

BETWEEN

EDWARD OMONDI MOLA CLAIMANT

AND

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND
BOARD RESPONDENT**

RULING

1. The Claimant was dismissed through a letter dated 18 December 2018.
2. Dissatisfied, the Claimant appealed against the termination, and the Respondent only notified the Claimant on or around 26 January 2022 that the appeal was unsuccessful.
3. The Claimant then sued the Respondent on 27 September 2022, alleging unfair termination of employment and breach of contract.
4. Upon service, the Respondent raised a Preliminary Objection contending that:
 - (a) The Honourable Court lacks jurisdiction to admit, hear and determine this Claim by being time-barred pursuant to section 90 of the Employment Act No. 11 of 2011.
5. The Claimant filed Grounds of Opposition to the Preliminary Objection on 19 December 2022, and the Court took oral submissions on 23 January 2023.
6. The germane question for the Court's consideration is whether time stopped running for purposes of limitation when the Claimant's appeal was pending before the Respondent.
7. The Claimant argued that he could not pursue parallel processes, before the Respondent/employer and the Court.



8. The Court of Appeal addressed its mind to the question whether time stops running while alternative processes are ongoing in *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & Ar* (2016) eKLR, where it stated:

While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in out-of-court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the *Employment Act* even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service.

9. In *Attorney General & Ar v Andrew Maina Githinji & Ar* (2016) eKLR, the Court of Appeal was confronted with a case where an employee had lodged a Claim before the Employment and Labour Relations Court outside the 3 years prescribed by section 90 of the *Employment Act*, 2007. A preliminary objection was raised and the defence was that there were pending criminal charges which made the employee wait for the conclusion of the trial.

10. The Court observed:

A dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal. If he chooses to do so, it is at his own peril should the statute bar him, as happened herein.

11. In the Court of Appeal had this to say *David Ngugi Waweru v Attorney General & Ar* (2017) eKLR:

We may ask the same question about the appellant in this case: when did he become entitled to complain or obtain a remedy in damages from his employer through the civil court? Was it at the time he received the letter of dismissal on 29th April, 2004 or at the time he received the letter converting the dismissal to termination in public interest on 13th July, 2006 or after the decision of the JR court on 17th June, 2009? The answer, we think, is the 29th April, 2004. For it bears no logic for a cause of action to accrue and then, instead of proceeding to court, the aggrieved party pursues an appellate disciplinary process that would take him outside clearly stated statutory limitation periods. The detour to the JR Court was a calculated risk since, as stated in the Boniface Inondi Otieno case (supra), time did not stop running. In any event, it seems the appellant has himself to blame since time had not run out by the time the JR Court was through with him. He had more than a year to file his claim within the statutory limit but he did not. We have considerable sympathy for him, especially considering the sentiments expressed by the JR Court, but the law must take its course.

12. This Court has said enough to show its view of the question at hand. It endorses and applies the ratio in the Court of Appeal authorities cited above.

13. The Court, therefore, upholds the Preliminary Objection and downs its pen. The Cause is struck out for want of jurisdiction.

14. Each party to bear own costs as Respondent had not filed a Response to the Memorandum of Claim.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF FEBRUARY 2023.

RADIDO STEPHEN, MCIARB

JUDGE



Appearances

For Claimant Sala & Mudany Advocates

For Respondent Sheila Tarus, Advocate

Court Assistant Chrispo Aura

