



**Odeny v Kenya Breweries Limited (Cause E033 of 2022)
[2023] KEELRC 776 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 776 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E033 OF 2022
CN BAARI, J
MARCH 28, 2023**

BETWEEN

PAUL ODENY CLAIMANT

AND

KENYA BREWERIES LIMITED RESPONDENT

RULING

1. This ruling relates to the Respondent's Preliminary Objection (P.O) dated September 28, 2022, and filed on October 11, 2022. The Respondent seeks the striking out of the Claimant's suit for being time barred and hence contravening Section 90 of the *Employment Act*, and for reason that the Court lacks jurisdiction to entertain the suit.
2. Parties urged the Preliminary Objection orally on February 15, 2023. The Respondent's argument is that the objection is raised on pure points of law, and hence it meets the threshold set in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696.
3. It is the Respondent's further argument that the Claimant's suit is one day late and hence filed outside the three-year statutory period provided for under Section 90 of the *Employment Act*. The Respondent further argues that the Claimant admitted having been terminated on July 24, 2019, and it thus follows that his time to file suit lapsed on July 24, 2022, while the suit herein was filed on July 25, 2022.
4. The Respondent argues that time cannot be enlarged in claims based on employment contracts, and that extension of time in such suits is not in the court's discretion. It is the Respondent's further assertion that it is entitled to equal protection of the law and will be outrightly discriminated if this suit is allowed to proceed.
5. It is the Respondent's position that this Court does not have the jurisdiction to entertain this suit. The Respondent had reliance in the case of *Bosire Ogero v. Royal Media Services Limited* (2015) eKLR, for



- the holding that the law of limitation of actions is intended to bar the Plaintiffs from instituting claims that are stale, and protecting defendants against unreasonable delay in bringing suits against them.
6. The respondent argues that an issue of limitation goes to the jurisdiction of the court to entertain the claim and that for reason that the claim is statute barred, the court lacks jurisdiction to entertain it.
 7. The Respondent further argue that the Court lacks territorial jurisdiction on the matter, the cause of action having arisen in Nairobi and that the Respondent resides in Nairobi.
 8. It is the Respondent's prayer that the suit be dismissed with costs.
 9. The Claimant opposed the Objection on the basis that July 24, 2022, fell on a Sunday, hence the next available date to file the suit was Monday, July 25, 2022. It is the Claimant's argument that the claim was filed within the statutory time limit.
 10. The Claimant asserts that per Section 5 of the *Interpretation and General Provisions Act*, the last date for filing suit having been a Sunday, the next available date was the next Monday, and which is the date the instant suit was filed.
 11. The Claimant states that his memorandum of claim clearly states that at the time of his termination, he was working within the Lake Region, hence the cause of action arose within the jurisdiction of this Court.
 12. The Claimant prays that the Objection be dismissed with costs.

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. By dint of Section 90 of the *Employment Act*, it is not in doubt that claims premised on employment contracts have a three (3) live span. This time has been settled not to be capable of extension, and therefore claims based on employment agreements must be filed within the statutory three-year limitation period.
15. The Court in *John Kiiru Njiiri v University of Nairobi* [2021] eKLR, also cited by the Respondent, held that a claim based on a contract of employment must be filed within 3 years.
16. The Claimant was terminated on July 24, 2019, and the instant suit filed on July 25, 2022. It is the Respondent's contention that the suit is time barred by one (1) day. The Claimant's position is that July 24, 2022, was a Sunday, and therefore the earliest available date for him to file suit was Monday, July 25, 2022, hence the suit is not time barred.
17. Order 50 Rule 3 of the *Civil Procedure Rules* states thus: -

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing



or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

18. According to the 2022 annual calendar, July 24, 2022, fell on a Sunday. It then follows that in accordance with the foregoing provisions of the Civil Procedure Rules, the Claimant’s suit was duly filed on the July 25, 2022, being the next available date when offices were open.
19. Further the Respondent’s assertion that the Civil Procedure Rules do not apply to the Employment and Labour Relations Court is unfounded. Although the Court has its own Procedure Rules, where the rules do not provide for the specific situation, the Court applies the Civil Procedure Rules. This is one such instance, where the Court’s fall back is the Civil Procedure Rules.
20. The cause of action herein no doubt arose on the July 24, 2019, being the date when the Claimant was terminated and the last day for filing suit should ordinarily have been July 24, 2022. For reason that July 24, 2022, was a Sunday, and offices are not open on Sundays, the claimant’s suit is not statute barred having been filed on the next day when offices were open.
21. I find and hold that the Claimant’s suit is not statute barred.
22. On the issue of territorial jurisdiction, the Respondent states that it resides in Nairobi and that at the time of termination, the Claimant resided in Nairobi.
23. The Claimant has indicated in his memorandum of claim that he is a resident of Kisumu County. In Red Anchor Freight Forwarders Ltd v David Nthiwa Wambua [2005] eKLR, the Court had this to say on transfer of suits: -

“.....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...”
24. In my considered view, the Claimant having been terminated and being a resident of Kisumu County, transferring this suit to Nairobi, will occasion him injustice. The balance of convenience therefore, 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.
25. In whole, the Respondent’s Preliminary Objection is devoid of merit and is dismissed with costs.
26. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Khisa present for the Claimant

Mr. Andole present for the Respondent

MS. Christine Omolo - Court Assistant.

