



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogola v Egerton University (Miscellaneous Application  
E055 of 2022) [2023] KEELRC 714 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 714 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
MISCELLANEOUS APPLICATION E055 OF 2022**

**HS WASILWA, J  
MARCH 23, 2023**

**BETWEEN**

**FREDRICK OGOLA ..... APPLICANT**

**AND**

**EGERTON UNIVERSITY ..... RESPONDENT**

**RULING**

1. Before me for determination is the Applicant's Notice of motion dated December 9, 2022, filed pursuant to Section 3 and 3A, Section 95 of the Civil Procedure Act, Article 41 of the constitution of Kenya 2010 and Section 4(1) of the Limitations of Actions Act as read together with the provisions of Section 12 of the Employment and Labour Relations Court Act No 20 of 2011, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016 and any other enabling Laws of Kenya, seeking the following orders; -
  1. Spent.
  2. That the Applicant be granted leave to file this suit against the Respondent out of the stipulated time.
  3. That the intended application and suit annexed herein be deemed to have been filed within the time specified.
  4. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the affidavit sworn on December 8, 2022 by Professor Fredrick Ogola, the Applicant and based on the following grounds: -
  - a. That the application has been filed without undue delay.
  - b. That the intended application and suit has arguable grounds and case.



- c. That the Honourable Court has proven to exercise its discretion conferred to it and extend time for the intended application and suit.
  - d. That the Applicant is aware of the three (3) years limitation period to file the memorandum of claim and that the same has lapsed.
  - e. That the Applicant was unable to file the current suit within the statutory and mandatory time lines as the Respondent kept on promising to pay him for the work he did but the Respondent did not put their promise into action to pay.
  - f. That the delay in filing this memorandum of claim was not inordinate or deliberate as the Applicant felt that this university being an institution of higher learning is a respectable institution which the management could have not defaulted in paying him for the work he did without any justifiable cause at all as is the case now.
  - g. That in accordance with the attached memorandum of claims, the suit has both substantial legal issues and evidential facts that could render the claim successful as the Honourable Court has jurisdiction to entertain this matter.
  - h. That the Respondent will not be prejudiced if the extension of time to file this memorandum of claims out of time is allowed.
  - i. In the supporting affidavit, the affiant stated that he was contracted by the Respondent on August 14, 2018 till December, 2018 to teach its 250 students philosophy of Education and community studies, which he lectured, administered examinations and submitted for the university to be paid, which pay has never been made to date.
  - j. That he followed up on his pay and every time, the Respondent kept promising him that they will pay only to realize time within which a claim can be filed had lapsed, prompting the filling of this application.
3. The Application was served on the Respondent through its legal officer Janet Bii on the February 27, 2023, as per the affidavit of service sworn by Bonface Owuoche, a Court process server and filed on February 28, 2023.
  4. Despite service of the said application, the Respondent has not filed any response to the Application. Nevertheless, directions were taken for the application to be disposed of by written submissions, which Applicant filed on the January 31, 2023.

#### **Applicant's Submissions.**

5. The Applicant submitted that this Court has been granted inherent powers under section 3 of the [Employment and Labour Relations Court Act](#) to facilitate just, expedient, efficient and proportionate resolution of disputes governed by the Act. He added that these provisions coupled up with Provisions of section 3A of the [Civil Procedure Act](#) as read with Article 159(d) of the [Constitution](#) removes all barriers from the Court and allows this Court to do all that is necessary for the ends of justice to meet.
6. From the foregoing, the Applicant urged this Court to be persuaded by the overriding principles under the [Civil Procedure Act](#) and allow its application for him to file the suit and agitate for the payment of his withheld dues. To support this argument, the Applicant relied on the case of [Abdirahman Andi V Safi Petroleum Products Limited and 6 others](#) [2011] eKLR, where the Court face with an application seeking to strike out a notice of appeal served out of time without leave, the Court emphasized the



need to do substantive justice and relied on the overriding objectives of the Court and disallowed the invitation and instead allowed the Notice of Appeal to stand. The Court of Appeal held as follows;

“An issue was raised regarding the competence of the application before us, in view of the fact that it was brought outside the stipulated period without leave. The same principles as stated earlier apply. Ordinarily, the motion should have been struck out, but in view of the overriding objective in civil litigation we overlooked the delay and instead considered the application on its merits. In view of the conclusion we came to regarding the delay in serving the notice of appeal, it follows that the failure on the part of the 1<sup>st</sup> Respondent to copy the letters bespeaking copies of proceedings and judgment to counsel for the other parties need not be considered as doing so will not serve any useful purpose.”

7. The Applicant submitted further that the delay in filing the suit was occasioned by inadvertence and excusable mistake because the Respondent kept promising him that it would pay the said dues till time ran out. In this he relied on the case of *Stephen Gatune V The headmaster; Nairobi Technical High School & Another* [1998] Eklr where the Court was of the view that the delay in filling the suit was no deliberate but occasioned on protracted negotiation between the Applicant and the Attorney general's office that promised to pay damages for the lost eye.
8. Based on the case law, above, the Applicant submitted that the delay in filling the suit herein was occasioned by negotiations and promises made by the Respondent which have never materialized to date, forcing him to file this Application seeking for extension of time to file the claim out of time.
9. On whether the claim is arguable, the Applicant submitted that the issues in the draft claim are worth this Court's consideration and that unless, leave is granted, justice will not have been served on him as is required under the Constitution and the law, in this he relied on the case of *Rawa V Rawa* [1990] KLR 275.
10. I have considered the averments of the Applicants herein. Section 90 of the Employment Act states as follows;  
“90.  
Limitations  
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”.
11. Under this section it appears that the Court's discretion to allow filing of a claim out of time is fettered.
12. As much as the Applicant may have good reasons for not filing the claim within time, the Court has no jurisdiction to extend time to file the same out of time.
13. I therefore find the application has no merit and is dismissed accordingly.

**RULING DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**



Awuor for Claimant Applicant – present

Respondent – Absent

Court Assistant – Fred

