



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Clay Products Ltd v Irungu (Employment and Labour Relations
Appeal E061 of 2022) [2023] KEELRC 621 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 621 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E061 OF 2022**

AN MWAURE, J

MARCH 2, 2023

BETWEEN

KENYA CLAY PRODUCTS LTD APPLICANT

AND

STANLEY IRUNGU RESPONDENT

RULING

1. The Applicant has filed a notice of motion application dated May 23, 2022. He makes the following prayers:
 1. Spent.
 2. That there be a stay of proceedings in Ruiru Magistrate's Court MCELRC 31 of 2019 Stanley Irungu vs Kenya clay products limited pending the hearing and determination of the appeal.
 3. Costs of the application be provided for.
2. The Applicant is supported by the grounds in the annexed affidavit of Gilbert Kisian and the grounds are that:
 1. That trial court has found that it has jurisdiction to hear and determine Ruiru's magistrate's Court MCELRC 31 of 2019 Stanley Irungu vs Kenya Clay products Limited notwithstanding that the respondent was dismissed from employment on April 22, 2014 and filed the claim in the trial court on November 9, 2019 outside the mandatory three years period fixed by section 90 of the *Employment Act*.



2. That a stay of proceedings in the trial court is merited as the trial court is proceeding to hear and determine the claim without jurisdiction as the trial court is handling the dispute without jurisdiction as the claim was time barred as at the date of filing the claim in the magistrate's court.
 3. That the respondent acknowledges that his employment was terminated on August 22, 2014 and the claim lapsed on August 21, 2017 but the suit being Ruiru's magistrate's court MC.ELRC 31 of 2019 Stanley Irungu vs Kenya clay Products Limited was filed on November 12, 2019 well after expiry of limitation of time stipulated under section 90 of the [Employment Act](#).
 4. That the Application has been filed without delay.
 5. That the appeal raises a prima facie arguable appeal where the trial court has jurisdiction to handle a claim that is time barred.
 6. That it is in the interest of justice to grant the orders sought as the court lacks jurisdiction to hear the claim.
3. The deponent avers that the respondent acknowledges his employment was terminated on August 22, 2014 and yet the claim should have been filed on August 21, 2017. The same was filed in 2019.
 4. He says that the Applicant and the trial court stands to suffer irreparable loss and precious time in handling a claim that is time barred by law and jurisdiction ousted by court.
 5. He prays for this application to be allowed.

Appellant's submissions

6. The Appellant in their submissions says the respondent was dismissed from employment on August 22, 2014. He submits that the trial court in attempting to hear a matter which was filed outside the statutory period has expressly ousted jurisdiction following expiry of the period within which the suit ought to have been filed.
7. He further submits that the appeal is challenging the jurisdiction of trial court and it may have serious effects on the entire case pending before the trial court. He therefore prays that in the interest of justice the court grants stay of proceedings in the trial court to enable court determine the appeal which seeks to settle the question on whether the trial court has jurisdiction to hear the claim that is statute barred.

Respondent's submissions

8. The respondent in their submissions says that in order stay orders to be granted pending appeal the Applicant must demonstrate sufficient cause to warrant grant of the said orders. He says that section 90 of [Employment Act](#) As well as Limitations of Actions Act does not in any way extinguish the claim as the latter would amount to denying the claimant access to justice which is constitutionally granted under article 48 and 50(1) of the [Constitution](#). He says that time in this case began to run when the respondent was notified of the termination and that there is no evidence that the dismissal letter of August 22, 2014 was communicated to the respondent.
9. He says claimant could not have known about the dismissal when he was in police custody for 4 years in criminal case No 2942 of 2014. He says his right to justice should not be deterred by the Applicant's right to appeal. He therefore urges the court to find the Applicant has failed to demonstrate any cause to warrant grant of the orders of stay of proceedings in Ruiru Magistrates Court.



10. He urges the court to find the time started to run from January 30, 2018. He further says that section 39 of Limitations of Actions Act limitation does not run if the person attempting to plead limitation is estopped from doing so. He says that the Appellant conduct causing the claimant to be charged with a criminal offence where he spent 4 years in remand made it impossible for him to file the suit. He says that Applicant is therefore estopped from pleading limitation.
11. The respondent also asks the court to consider section 59 of *Interpretation and General provision Act* which states: 'where in a written law time is prescribed for doing an act or taking proceeding, and a power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until the expiration of the time prescribed.'
12. He urges the court to be guided by maxim that equity will not see a wrong without a cure and the principles of natural justice.

Determination

13. The court has considered the pleadings and the case law as well as the submissions of the rival parties. The Applicant is praying for stay of proceedings of a suit in the lower court in Ruiru pending the hearing of their appeal to determine if the lower court has jurisdiction to hear a case that was filed after the 3 years statutory provision under section 90 of the *Employment Act*.
14. The trial magistrate in Ruiru was presented with the similar application on time bar but he ruled that he had jurisdiction to hear the case. He reasoned out that time began to run from when the respondent was released from prison remand as that is the time he got to know about his termination. He therefore held that the claim which was filed in December 2019 was within time and he therefore ruled that he had jurisdiction to proceed with the suit.
15. The Applicant however submitted that the respondent was terminated on August 22, 2014 and therefore the suit should have been filed on or by August 21, 2017. His submission is that section 90 of *Employment act* has no grounds for extension of time. Section 90 of *Employment Act* provides as follows.

' 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.'

16. The court agrees with the Applicant that section 90 of *Employment Act* does not give discretion to the court to extend time once the suit is time barred.
17. Furthermore the Court of Appeal in the case of *Beatrice Adagala vs Postal Corporation Civil Appeal No 28 of 2014* denied this court the discretion completely to extend time under section 90 of the *Employment Act* 2007.
18. The Beatrice Adagala case the Court of Appeal held:

' As we have stated much as we sympathise with the Appellant allowing this application will not only be an exercise in futility but will instead cause her to incur more costs.'



19. They further said 'much as we sympathise with the Appellant if that is true we cannot help her as the law ties our hands'. Section 90 of the [Employment Act](#) 2007 which we have quoted verbatim herein is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this court stated in the case of *Divecon Limited vs samani (1995-1998) EA* a decision relied on by Radido J in the case of *Josephat Ndirangu vs Henkel Chemicals EA Limited 2013* the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the Applicant satisfies the requirements of section 27 and 28 of the [Limitation of Actions act](#).
20. Having said as much and much as this court just as in the Beatrice Adagala case sympathise with the respondent is persuaded to stay the proceedings in Ruiru Magistrates Court MCELRC 31 of 2019 pending the hearing and determination of the Appeal.
21. The court directs in view of this ruling that the appeal should be fixed to be heard before another Judge.
22. Costs will be in the intended appeal
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF MARCH 2023.

ANNA NGIBUINI MWAURE

JUDGE

