



REPUBLIC OF KENYA



KENYA LAW
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**Nzau v Attorney General (Cause 925B of 2014)
[2023] KEELRC 919 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 919 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 925B OF 2014**

**L NDOLO, J
APRIL 20, 2023**

BETWEEN

GABRIEL MULINGA NZAU CLAIMANT

AND

THE HON ATTORNEY GENERAL RESPONDENT

RULING

1. On April 1, 2019, O.N Makau J issued the following ex tempore ruling:

“Suit was filed out of time. The Claimant is not here to prosecute his case. Suit dismissed for the 2 reasons. No costs.”
2. Subsequent to this, the Claimant filed a Notice of Motion dated August 5, 2021 seeking an order to set aside the order issued on April 1, 2019, dismissing his claim, on the grounds of it having been filed out of time and the Claimant being absent to prosecute his case.
3. The Motion is supported by an affidavit sworn by the Claimant’s Counsel, Gitobu Imanyara and is based on the following grounds:
 - a) The Court was deliberately misled by Counsel for the Respondent that the claim had been filed out of time;
 - b) There was no application before the Court for dismissal of the claim on the ground of limitation of time;
 - c) The Claimant’s suit was dismissed while the Claimant was in court;
 - d) No opportunity was provided to the Claimant to address the Court or seek alternative representation;



- e) It is in the interest of justice and fair play that the orders sought are granted;
 - f) No prejudice will be suffered by the Respondent if the orders are granted;
 - g) The delay in making this application was caused by the Claimant's absence from the country after proceedings were obtained by the Claimant's Advocates on record;
 - h) The Claimant's employment is based out of the country and he only comes to the country when on leave;
 - i) Due to the corona virus pandemic and the attendant travel restrictions, the Claimant was not able to come back to the country until June 16, 2021.
4. In his affidavit in support of the Motion, Counsel for the Claimant, Gitobu Imanyara depones that he walked into the court room on April 1, 2019 at 9.25 am, soon after the Claimant's claim had been dismissed.
 5. Counsel further depones that according to the court record, what was coming up was a mention to fix a date for highlighting of submissions or taking a judgment date.
 6. On October 5, 2022, I directed the parties to file written submissions on the issue of limitation of action.
 7. The gravamen of the Claimant's case is that time did not begin to run against him until conclusion of a criminal case he was facing, on the same set of facts that led to the termination of his employment. The Claimant also claims to have been waiting for exhaustion of internal administrative mechanisms.
 8. The law on the relationship between criminal proceedings and internal disciplinary processes at the work place has been settled through decisions of this Court and the Court of Appeal.
 9. In *James Mugeria Igati v Public Service Commission of Kenya* [2014] eKLR Rika J held that there is nothing in the law to suggest that a disciplinary process is in any way tied to a criminal process that may arise from the same facts. This position was affirmed by the Court of Appeal in its decision in *Attorney General v Andrew Maina Githinji* [2016] eKLR.
 10. Regarding the Claimant's submission that he was waiting for conclusion of internal administrative mechanisms before filing his case, the only thing to say is that this too cannot provide an escape from the strictures of limitation of action.
 11. In its decisions in *Hilarion Mwabolo v Kenya Commercial Bank* [2013] eKLR and *Benjamin Wachira Ndiithi v Public Service Commission* [2014] eKLR this Court held that availability of the option for a review or an appeal does not mean that accrual of the cause of action is held in abeyance, until a final verdict on the review or appeal is made. Time does not therefore stop running against a claimant just because they are pursuing an internal review or appeal process.
 12. In the present case, the Claimant's claim was filed out of time and there is no reason for me to interfere with the order issued by my brother Judge on April 1, 2019.
 13. The result is that the Claimant's claim stands dismissed and the file is closed.
 14. I make no order for costs.
 15. Orders accordingly.



DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF APRIL 2023

LINNET NDOLO

JUDGE

Appearance:

Miss Nkonge h/b for Mr. Agwata for the Claimant

Mr. Mungata for the Respondent

