



REPUBLIC OF KENYA



**King'oo v PCEA Kikuyu Hospital & another (Cause 1150 of 2018)
[2023] KEELRC 845 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 845 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1150 OF 2018
L NDOLO, J
APRIL 13, 2023**

BETWEEN

DANIEL MBEVO KING'OO CLAIMANT

AND

PCEA KIKUYU HOSPITAL 1ST RESPONDENT

**REGISTERED TRUSTEES OF PRESBYTERIAN FOUNDATION 2ND
RESPONDENT**

JUDGMENT

Introduction

1. By his Statement of Claim dated 2nd July 2018 and amended on 10th September 2019, the Claimant sued P.C.E.A Kikuyu Hospital as the 1st Respondent and Registered Trustees of Presbyterian Foundation as the 2nd Respondent. The Respondents filed separate Responses both dated 10th August 2021.
2. At the hearing, the Claimant testified on his own behalf and the 1st Respondent's Human Resource Manager, Esther Muhindi testified for the Respondents. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondents as a Kenya Registered Community Health Nurse on a three-year contract.
4. He worked until 9th April 2015, when he fell ill and was admitted at the Respondents' facility. Upon being discharged, the Claimant was granted seven (7) days' sick off which was extended by a further five (5) days.



5. The Claimant claims that after full recovery, he resumed duty but was not allocated any duties. He avers that he had been listed in the duty rota for the month of May which was cancelled when he reported back to work.
6. The Claimant states that he kept on going to work for a period of more than a month without being allocated duties. He claims to have been informed to wait to be called back to work. He adds that he was never called to resume duty nor was he issued with a termination letter.
7. The Claimant accuses the Respondents of victimising him on account of illness.
8. The Claimant's claim against the Respondents is as follows:
 - a. One month's salary in lieu of notice.....ksh 41,980
 - b. Unpaid leave days (4,000x3).....12,000
 - c. Damages for unlawful termination.....1,343,360
 - d. General damages for discrimination on account of illness
 - e. Refund of unremitted NSSF, NHIF and PAYE dues
 - f. Certificate of service
 - g. Costs plus interest

The Respondents' Case

9. In its Response dated 10th August 2021, the 1st Respondent states that it is not a legal entity capable of being sued. Consequently, the 1st Respondent maintains that the claim against it is incompetent and ought to be struck out.
10. Without prejudice to the foregoing assertion, the 1st Respondent denies having employed the Claimant as alleged in the Statement of Claim.
11. The 1st Respondent only admits that the Claimant was admitted in its facility for treatment and that he was treated and discharged. The allegation that the Claimant resumed duty after full recovery is denied.
12. The 1st Respondent states that upon being discharged from hospital, the Claimant deserted duty.
13. The 1st Respondent further states that the Claimant was not issued with a termination letter or a certificate of service because he absconded duty and has never visited the 1st Respondent to collect a termination letter or a certificate of service.
14. The 1st Respondent denies the Claimant's allegations of victimisation, discrimination and/or wrongful dismissal.
15. The 1st Respondent claims to have remitted all statutory deductions to the respective statutory bodies.
16. In its Response also dated 10th August 2021, the 2nd Respondent pleads that the claim against it is incompetent for having been brought outside the statutory limitation of three (3) years. The 2nd Respondent therefore seeks orders to strike out the claim against it.
17. Without prejudice to the preceding pleading, the 2nd Respondent denies the allegation that it owns and/or runs the 1st Respondent medical facility as set out in the Statement of Claim.



18. The 2nd Respondent denies having employed the Claimant and asks the Court to dismiss the entire claim.

Findings and Determination

19. There are three (3) issues for determination in this case:
- a. Whether the Claimant's claim is properly before the Court;
 - b. Whether the Claimant has made out a case of unlawful termination of employment;
 - c. Whether the Claimant is entitled to the remedies sought.

Competency of the Claim

20. The Respondents challenge the Claimant's claim on three fronts; first, that the claim is statute barred by dint of Section 90 of the *Employment Act*; second, that the 1st Respondent is not a legal entity capable of being sued; and third, that there was no employment relationship between the Claimant and the 2nd Respondent.
21. Regarding the issue of limitation, the Respondents submit that the Claimant's claim, having been filed outside the three-year period set by Section 90 of the *Employment Act*, is incompetent and ought to be struck out.
22. Section 90 of the *Employment Act* provides as follows:
90. 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.
23. The law is now well settled that the Court does not have jurisdiction to extend time for claims arising out of a contract of employment. This position was affirmed by the Court of Appeal in its decision in *Beatrice Kabai Adagala v Postal Corporation of Kenya* [2015] eKLR in the following terms:
- “Much as we sympathize 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 above, 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 v Samani* [1995-1998] 1 EA P. 48, a decision relied on by Radido J in *Josephat Ndirangu v Henkel Chemicals (EA) Limited*, [2013] eKLR, 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 Sections 27 and 28 of the *Limitation of Actions Act*.”
24. According to the Claimant, he was not assigned any work and was not paid salary after April 2015. This would be the time when time began running and it follows therefore that his claim ought to have been filed by the end of April 2018. The claim filed on 6th July 2018 was therefore out of time and is therefore incompetent.
25. As a result, there is nothing more to do except to strike out the claim, which I hereby do.
26. Each party will bear their own costs.



27. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF APRIL 2023

LINNET NDOLO

JUDGE

Appearance:

Miss Shikali h/b for Mr. Kiprop for the Claimant

Mr. Amuga for the Respondents

