



**Otieno v Texas Alarms (K) Limited (Cause E821 of 2021)
[2023] KEELRC 1323 (KLR) (22 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1323 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E821 OF 2021
NZIOKI WA MAKAU, J
MAY 22, 2023**

BETWEEN

CHARLES ONDENG' OTIENO CLAIMANT

AND

TEXAS ALARMS (K) LIMITED RESPONDENT

RULING

1. Before me is a Notice of Preliminary Objection by the Respondent dated April 27, 2022 in response to the Claimant's Memorandum of Claim dated the September 30, 2021. The preliminary objection is to the effect that this Honourable court has no jurisdiction to hear and determine the Claimant's memorandum of claim as it is time barred as per section 90 of the Employment Act 2007; and that the Claimant did not seek leave of court before filing his pleadings as he claims his services were terminated in 2017.
2. The Claimant was opposed and the preliminary objection was disposed of by way of written submissions. The Respondent submits that the Claimant herein filed a Memorandum of Claim dated September 30, 2021 against the Respondent claiming that the Respondent unlawfully terminated his employment on or about January 13, 2017 and has refused to pay him his terminal benefits and other monies owed to him. The Respondent submits that section 90 of the Employment Act 2007 provides for the period within which employment matters shall be brought to court and expressly states as follows:

' 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.'



3. It submits that a preliminary objection was defined by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Company Limited v Westend Distributors Ltd* [1969] EA 696 thus: it consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit and examples are an objection to jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration per Sir Charles Newbold, P at pg 701.
4. The Respondent cites the case of *Wilson Nyabuto Areri v Postal Corporation of Kenya* [2018] eKLR where the court stated that limitation is not a procedural technicality but substantive law that affects jurisdiction and that as was stated in the cases of *James Muriithi Ngotho v Judicial Service Commission* [2012] eKLR and *Nyanamba O. Steve v Teachers Service Commission* [2016] eKLR, limitation is not a mere technicality but goes to the substance of claim. The Respondent submits that limitation is provided for by substantive legislation and affects jurisdiction of the court. This means that the court has no jurisdiction to hear a claim that is statute barred and without jurisdiction the court must down its tools as was held in the case of *Owners of Motor Vessel Lillian 'S' v Caltex Oil (K) Ltd* [1989] KLR 1.
5. The Respondent cites the case of *Gathoni v Kenya Co-Operative Creameries Ltd* [1982] KLR 104, where Potter, JA at page 107 expressed himself thus:

' The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.'
6. The Respondent further submitted that in *Iga v Makerere University* [1972] EA it was held:

' A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rules seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.'
7. Further, in the case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR the Court of Appeal defined what constitutes a continuing injury to mean that :-

'Regarding 'a continuing injury', the provision to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.'
8. The Respondent also cited the case of *Johnson Kazungu v Kenya Marine & Fisheries Research Institute* [2021] eKLR where the court held that nowhere in section 90 of the Act is it stated that in event of a continuing injury, the 12 months of limitation are an extension to a time of three years from the date the continuing injury commenced. They also cited the case of *John Kiiru Njiiri v University Of Nairobi* [2021] eKLR where the court stated that section 90 of the Act is framed in mandatory terms. It submits that a claim based on a contract of employment must be filed within 3 years and this Court



is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose. The Respondent submits that the limitation period is never extended in matters based on an employment contract and that 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 which provisions do not apply in employment and labour relations claims. The Respondent submits that in the present case, the Claimant was employed by the Respondent as a guard earning a salary of Kshs 11,700/- and alleges his services were terminated summarily on January 13, 2017. He consequently filed this suit on October 1, 2021 four (4) years nine (9) months later, well beyond the limitation period as stipulated in the Employment Act 2007 specifically section 90 thereof. The Respondent submits that the Claimant has not sought leave of this Honourable Court to file his pleadings out of time therefore should be struck out with costs to the Respondent.

9. The Claimant did not file any documents either opposing or replying to the preliminary objection. Important for the Respondent to note albeit by way of obiter, the Respondent's submissions were inelegantly drawn with comments interposed on the citations of stare decisis to the extent that it was a bother reading the citations by the Respondent. When citing a decision of the court, comments should be saved for the paragraph following the citation since commentary in the course of the citation amounts to altering a decision of the court. It is also untidy and detracts from the import of the decision. If there is need to emphasise a point, bold or italics will do. Additionally, the cases in the digest were printed in a font that is alien to the Kenya Law website. The case citation was missing at the top of the pages and there was no numbering which is indicative of modification of the decision. This is to be deprecated as one cannot be sure the content of the decision has not been altered. On the Kenya Law portal, there is an option for a portable document format (PDF) download. That is what one should use so that the decision printed for submission to court is accurate and accords with that which is on the Kenya Law portal. The Court had to read the decisions online as the ones presented to Court in an alien font seemed altered. That said, the cases cited were considered in coming to this decision despite the odd manner in which they were presented.
10. There was no record of any submissions filed by the Claimant whether on the e-portal or on the Court file. As such the objection seems unopposed. Nevertheless, it is incumbent upon a court before whom a preliminary objection is taken, to consider the same and give its decision on it. The Claimant filed his suit on October 1, 2021. The cause of action accrued on February 13, 2017 when his termination took place. In terms of section 90 of the Employment Act, the claim herein ought to have been filed within 3 years of this date which by mere calculation of time is February 13, 2020. As such, the claim filed on October 1, 2021 was filed out of time and in contravention of statute. It is a nullity ab initio only fit for dismissal. The inescapable result is that this suit is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MAY 2023

NZIOKI WA MAKAU

JUDGE

