



**Makhoha v Multiple Ice Kenya Limited (Miscellaneous Application
E015 of 2023) [2023] KEELRC 1726 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1726 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E015 OF 2023**

M MBARŪ, J

JUNE 29, 2023

BETWEEN

HILLARY ODWORI MAKHOHA PETITIONER

AND

MULTIPLE ICE KENYA LIMITED RESPONDENT

RULING

1. The petitioner filed application dated 10 March 2023 seeking to file his petition for free on the grounds that his employment was unlawfully terminated by the respondent after he was accused of defilement and as a consequence he was detained in prison and while in remand, his employment contract was terminated illegally. He has no financially ability to pay the amount required for the court for filing his petition and hence is seeking leave to file it for free.
2. The petitioner supported the application through his affidavit and aver that he was dismissed from employment on 10 January 2021 after arrest and incarceration in prison from where he sent his colleague, Austin Odhiambo to inform the respondent. he was charged with a criminal offence and later acquitted on 15 April 2021 and when he followed up with the respondent he was denied the opportunity to a hearing.
3. The respondent was served and does not oppose the application.
4. The court directed parties to address the matter with regard to the provisions of Section 90 of the *Employment Act*, 2007 (the Act).
5. Only the respondent filed written submissions on the basis that under Section 90 of the Act, an employee is allowed 3 years to file suit upon termination of employment as held in *John Kiiru Njiiri v University of Nairobi* [2021] eKLR that under Section 90 of the Act, a claim under employment and labour relations must be filed within 3 years from the date the cause of action arose. Also see *James Mugeria Igati v Public Service commission* [2014] eKLR.



6. The petitioner was issued with letter of summary dismissal on 10 January 2019 when the cause of action arose and therefore had until 10 January 2022 to commence action in respect to termination of employment. such claim has since been extinguished and time barred as held in [Peter Ndegwa Nderitu v Teachers Service Commission](#) [2019] eKLR.
7. Being able to urge once claim in court is a matter of access to justice secured under Article 48 of [the Constitution](#). such right is sacred and should be protected by the court save, even where a litigant is unable to file suit due to indigence, the filing of such suit must be within the confines of the law so as to claim in law.
8. Whether the applicant has moved the court through a petition or not, the leave sought to file his petition herein must be within the law. the petition sought to be filed must have a basis in law and proper in the first instance. The leave the applicant is seeking must be allowed in context as to allow him to file suit for free where the petition is technically not allowable would be to urge him on without good cause and result in improper use of judicial time.
9. The applicant's explanation as to why he was unable to file suit in time is because of being arrested and incarceration in prison. Within that time, the respondent on 10 January 2019 summarily dismissed the applicant.
10. The petition is not yet filed since the applicant is unable to file it due to financial inability.
11. Upon the cause of action arising on 10 January 2019 the applicant ought to have filed his petition on or before 9 January 2022. Time to file suit within the meaning of Section 90 of the Act has since lapsed as held in [Elias Kibathi & another v Attorney General](#) [2021] eKLR.
12. Time under Section 90 of the Act does not stop running due to ongoing criminal proceedings. in [Francis Atonya Ayeka v Kenya Police Service & another](#) [2017] eKLR the court held that;

... time in employment and labour relations claims cannot be extended by virtue of criminal proceedings or any other device of the parties. In employment and labour relations claims, section 90 of the [Employment Act](#), 2007 is clear to the extent that all such claims ought to be filed with the court within 3 years from the time the cause of action complained of arose. ...
13. The filing of a petition instead of a Memorandum of Claim is not sufficient to extend time. the provisions of Section 90 of the [Act](#) are mandatory that a cause of action arising out of an employment relationship must be addressed within 3 years from the date the cause of action arose.
14. At this stage, even though the issue is not the merit of the applicant's petition, to allow him to file the petition would not aid him, time to do so has since lapsed. It will not aid justice to urge him on in a matter that is already time barred by operation of the law, Section 90 of the Act.
15. The Court of Appeal in [Regent Management Limited v Wilberforce Ojiambo Oundo](#) [2018] eKLR held that;

It is also settled that the institution of criminal proceedings is not a bar to civil proceedings on similar facts. See this Court's decision in [Geoffrey Kiragu Njogu vs. Public Service Commission & 2 others](#) [2015] eKLR. With the foregoing in mind we concur with the majority decision of this Court in [Attorney General & another vs. Andrew Maina Githinji & another](#) [2016] eKLR that a dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal before challenging such a dismissal.



Consequently, we find that the learned Judge did not err in entertaining and determining the respondent's suit during the pendency of the criminal proceedings.

16. Accordingly, to grant the leave sought to file the petition for free will not achieve the intended purpose. Accordingly, application dated 10 March 2023 is hereby declined. The respondent was not opposed to the application and has filed written submissions but in the circumstances, each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

