



**Gongera v Mount Kenya University (Cause E958 of 2021)
[2023] KEELRC 2084 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2084 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E958 OF 2021**

**K OCHARO, J
JULY 27, 2023**

BETWEEN

PROF GEORGE GONGERA CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a statement of claim dated November 19, 2021 which was later amended on July 24, 2022
2. Upon being served with summons to enter appearance, the Respondent did enter appearance but failed to file a response to the statement of the claim. contemporaneously with the memorandum of appearance, it filed a notice of preliminary objection dated January 21, 2022 contending that the claimant's claim is time-barred by operation of the provisions of section 90 of the *Employment Act*.
3. On the 11th of October 2022, when the matter came up before this court, counsel for the respondent indicated that the respondent was keen to file a response to the claim herein and implored it to grant leave of 14 days for that purpose. Leave which this court granted. The order for leave had a default clause, a default in filing the response within the 14 days could lead to the matter proceeding as an undefended claim. As at the time the matter came up for hearing on the November 2, 2022, the respondent hadn't filed its response, consequently, the court ordered the matter to proceed for formal proof.
4. Imperative to state that notwithstanding the fact that the hearing date was taken in the presence of Counsel for the respondent, neither he nor the respondent attended court on the above-stated date. The matter proceeded in their absence, therefore. After the hearing, the court directed the filing of written submissions within specific timelines. At the time of retiring to write this judgment, only the claimant had filed his submissions.



The Claimant's Case

5. At the hearing, the claimant adopted the contents of his witness statement dated November 19, 2021 as part of his evidence in chief. He urged court to admit the documents that he had filed herein as his documentary. Further to the evidence contained in the statement, he orally but briefly testified in court.
6. It was his case that he is a professor in Human Resource Management. At all material times, he was an employee of the respondent, engaged to offer tuition and or supervisory services for students undertaking undergraduate and post-graduate studies. Other than regular salaries, by express agreement or by implication, he was entitled to such sums as agreed or reasonable for engagement as a supervisor of undergraduate and postgraduate students. The time of settlement of emoluments in regard to these services was never expressly agreed upon between him and the Respondent, but by usage and custom, they would be paid within a reasonable time. He continues to offer supervisory services to the respondent.
7. He further stated that for a long time, the respondent did not pay him his dues for the supervisory services. The non-payment of the dues dates back to the year 2010. He contended that the respondent owes him Kshs.1,400,000, an amount it has at all material times acknowledged as owing him. The latest such acknowledgment was through a memo dated January 14, 2022.

Claimant's submissions

8. The claimant filed written submissions dated June 16, 2023. The submissions largely reiterate the facts of the case. The submissions have been considered.

Determination

9. Considering the material placed before me, the following issues emerge for determination, thus; whether the Claimant's claim herein is time-barred; and whether the Claimant is owed Kshs.1,400,000.
10. Notwithstanding the fact that the respondent didn't file any response to the claimant's claim, the issue raised of limitation of time under section 90 of the *Employment Act* is a point of law, a jurisdictional issue that must be dealt with nonetheless.
11. Section 90 of the *Employment Act*, 2007 provides that;

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.
12. One looking at the claimant's amended statement of claim, will gather a quick impression that the claimant's claim is time-barred and I think that is what the respondent did, hence the preliminary objection. With great respect, the impression would be justified since the claimant's pleadings are poorly crafted. However, the impression is only possible if one were to look at the pleadings only without venturing into considering the documentary and oral evidence presented by the claimant.
13. It was claimant's case that the debt was at all material times acknowledged by the Respondent as owing to him and that through an internal memo by the Vice-Chancellor dated January 14, 2022, the respondent University acknowledged owing its lecturers, him inclusive, for services they rendered at various times. This evidence remained uncontroverted. In my view, the acknowledgment gave the claim



a new lease of life, consequently, time for purposes of section 90 of the *Employment Act* started running afresh from the stated date. By reason of this, I hold that the claimant's claim is not timed barred.

14. The claimant's claim against the respondent was a specific claim. The respondent didn't file any response to the statement of claim denying the same. This coupled with the premises foregoing [acknowledgment of the debt], impels this court to conclude that the claimant has proved his case to the requisite standards.
15. By reason of the foregoing premises, judgment is hereby entered against the Respondent in favour of the claimant in the following terms;
 - a. Kshs.1,400,000/-.
 - b. Interest at court rates from the date of this judgment till full payment.
 - c. Costs of the suit.

READ, SIGNED, AND DELIVERED THIS 27TH DAY OF JULY, 2023.

OCHARO KEBIRA

JUDGE

In the Presence of;

Mr. Nyakundi for the Claimant

Mr. Omondi for the Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

