



**Kimonge v Standard Chartered Bank Kenya Ltd (Cause  
E032 of 2022) [2023] KEELRC 1844 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1844 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E032 OF 2022  
BOM MANANI, J  
JULY 27, 2023**

**BETWEEN**

**GIFT DZOMBO KIMONGE ..... CLAIMANT**

**AND**

**STANDARD CHARTERED BANK KENYA LTD ..... RESPONDENT**

**RULING**

1. The Claimant has filed this suit to challenge the Respondent's decision to terminate the employment contract between the parties. His case is that the Respondent's decision in this respect was unlawful and unwarranted.
2. The reason for termination of the contract between the parties was redundancy at the workplace. The documents on record show that on December 21, 2018, the Respondent issued the Claimant with a notice intimating the intention to declare his position redundant. The Claimant was advised that if the Respondent was unable to avoid the process, the Claimant's employment will be deemed to have come to a close with effect from January 20, 2019.
3. The record further shows that on January 20, 2019, the Respondent wrote to the Claimant confirming that his contract of service had been terminated on account of redundancy with effect from the date of the letter. It would appear that the Claimant acknowledged receipt of the letter on January 28, 2019.
4. The clearance from work schedule appearing at pages 26 to 27 of the Claimant's bundle of documents shows that the Claimant signed for the form on January 21, 2019, a day after his contract had been terminated. It would appear that the clearing process took some while. From the entries on the form, there is indication that the Claimant cleared from various departments of the Respondent between January 22, 2019 and January 28, 2019. At page 25 of the Claimant's bundle, there is a form showing that the Claimant's line manager signed him out on January 28, 2019.



## The preliminary objection

5. The Claimant filed this action on January 21, 2022. The Respondent filed a response to the Claim dated November 8, 2022.
6. In the response, the Respondent pleads that the suit is time barred. It is alleged that in terms of section 90 of the *Employment Act*, the Claimant ought to have moved the court within three (3) years from the date his contract of service was terminated on account of redundancy.
7. In response, the Claimant argues that the date of closure of his contract was January 28, 2019 when his line manager signed him out. Alternately, the Claimant argues that in computing the limitation period, the court ought to factor in the provisions of law discounting the December vacation of every year.

## **\*\*Analysis\*\***

8. It is clear to me that a preliminary objection ought to be based on a pure point of law. A preliminary objection is a matter which if successfully canvassed, should dispose of the entire case with finality. Further, such objection ought to be raised where there is no contest on the facts informing the objection.
9. These principles are set out in the celebrated decision of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969]EA. In the aforesaid case, objections relating to limitation of actions and jurisdiction of the court to entertain a dispute are given as examples of what comprises a point of law.
10. In the case before me, the objection raised relates to limitation of actions and therefore jurisdiction of the court to entertain a case outside the set timeframes. In my view, the objection meets the prerequisites for a preliminary objection as envisaged in the Mukisa Biscuit case.
11. When determining whether a case is time barred, the court only needs to examine the pleadings as presented by the parties to discern when the cause of action is expressed to have accrued. The court need not go outside the pleadings to determine this fact.
12. In the case before me, the Memorandum of Claim by the Claimant states, in no uncertain terms, that his contract of employment was terminated on January 20, 2019. In the defense, the Respondent concedes the fact that the parties separated on January 20, 2019 although it denies that the separation was unlawful.
13. Therefore, there is no contest, at least from the pleadings, that the cause of action accrued on January 20, 2019 when the Claimant's employment was terminated. Thus, the attempt by the Claimant to now assert, in response to the preliminary objection, that his contract came to a close on January 28, 2019 is unhelpful.
14. But even if the suggestion that the contract closed on January 28, 2019 was to be considered, I do not think that it can fly. As indicated in the earlier parts of this ruling, the period between January 21, 2019 and January 28, 2019 has been shown, by the Claimant's own documents, to have been the time when he processed his clearance from the workplace. The fact that the Claimant reported at the workplace after January 20, 2019 to process his clearance cannot be construed as having extended the contract of service beyond January 20, 2019, the appointed date for its closure and which date, the Claimant had notice of.
15. The Claimant has suggested that in determining the limitation period, regard should be had for Order 50 rule 4 of the *Civil Procedure Rules*. The rule provides as follows:-



“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

16. It is true that the rule requires the court to discount the period between 21<sup>st</sup> December of a year and 13<sup>th</sup> January of the year next following when computing time. However, this exemption is in relation to actions sanctioned by and under the Civil Procedure Rules or an order of a court. Therefore, it is doubtful that the Claimant can legitimately invoke this provision to defeat the express edict of section 90 of the *Employment Act*.
17. Indeed, in *Maersk Kenya Limited v Murabu Chaka Tsuma* [2017] eKLR, the Court of Appeal underscores this position when it indicates that the provisions of Order 50 rule 4 of the *Civil Procedure Rules* cannot be invoked to defeat the express provisions of limitation of actions under the *Limitation of Actions Act*. It is noteworthy that the trial court’s decision in *Murabu Chaka Tsuma v Maersk Kenya Limited* [2015] eKLR which the Claimant seeks to rely on to assert that his action was filed in time was overturned by the Court of Appeal.
18. The Claimant has asserted that because the action partly seeks constitutional reliefs, it cannot be defeated by the limitation of actions law. It is true that constitutional claims cannot be defeated by a plea of limitation of actions based on a provision of statute. However, these claims may fail on account of the equitable doctrine of laches if they are presented after an unduly extended period of time without a suitable explanation for the delay (*Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR).
19. That said, in the case before me, there was no delay in presenting the case that would defeat a constitutional claim. However, looking at the Memorandum of Claim, one struggles to discern the constitutional claim that the Claimant alleges he has filed. Besides praying for compensation for violation of rights under the Bill of Rights, no specific provisions of the Constitution that are said to have been violated are mentioned. Simply put, the Memorandum of Claim has no sufficient particulars of the alleged constitutional violations.
20. In *Anarita Karimi Njeru v Republic* [1979] eKLR, the court emphasized the significance of pleading constitutional claims with a measure of precision and exactitude. The court expressed itself on the matter as follows:-

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

21. Absent clarity on what the Claimant describes to be a constitutional claim, it will be an exercise in futility to sustain this action. If the Claimant hoped to save the matter by relying on the fact that it seeks to vindicate his constitutional rights, he ought to have clearly pleaded the constitutional breaches that he complains about.
22. But even if it were to be assumed that the Memorandum of Claim is founded on an allegation of breach of the Constitution, one has to ask himself whether the matters that the Claimant asserts raise a constitutional issue for the court’s



determination. The general position is that litigants ought not to resort to the Constitution to litigate their grievances if the matter complained about can be resolved by reference to subordinate legislation. This prohibition is anchored on the theory of constitutional avoidance (*KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR)).

23. In the Memorandum of Claim, the Claimant alludes to alleged discrimination against him on account of his ethnicity. This, he does without giving any particulars to support the assertion. Importantly, section 5 of the *Employment Act* deals with matters of discrimination at the workplace. This means that the grievance regarding discrimination that is raised by the Claimant can be adequately addressed by invoking provisions of the *Employment Act* without the need to invoke the Constitution of Kenya 2010.
24. Where a cause of action can be litigated as an ordinary claim, a court will not permit a party to disguise it as a constitutional claim in order to defeat the express provisions of the law on limitation of actions (see *Reuben Ngila Kitonyi v Central Bank of Kenya* [2019] eKLR and *Morris Kyengo Makovu v Kenya Power & Lighting Company Ltd & 3 others* [2021] eKLR). As observed earlier, the issues that the Claimant raises can be adequately addressed under the *Employment Act*. They do not require reference to the Constitution for appropriate relief. Therefore, it will be improper for the court to allow the Claimant to invoke the Constitution to avoid the limitation period set out under section 90 of the *Employment Act*.

#### **Determination**

25. It is clear to me that the cause of action in this suit arose on January 20, 2019 when the Claimant's position was declared redundant. Therefore, any suit seeking to challenge this decision ought to have been filed by January 19, 2022 to meet the three (3) year timelines set under section 90 of the *Employment Act*.
26. This suit was filed on January 21, 2022, some two (2) days outside the limitation period provided under section 90 of the *Employment Act*. The action is therefore time barred.
27. The claim that the case raises constitutional questions is not supported by the pleadings on record. Accordingly, it is rejected.
28. Accordingly, the suit is hereby struck out with costs to the Respondent.

**Dated, signed and delivered on the 27<sup>th</sup> day of July, 2023**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**



**B. O. M MANANI**

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