



**Awino v Insight Management Consultants Ltd (Cause  
E288 of 2022) [2023] KEELRC 1640 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1640 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E288 OF 2022**

**JK GAKERI, J  
JULY 10, 2023**

**BETWEEN**

**DOUGLAS EVANS AWINO ..... CLAIMANT**

**AND**

**INSIGHT MANAGEMENT CONSULTANTS LTD ..... RESPONDENT**

**RULING**

1. Before the court for determination is a Preliminary objection by the respondent dated January 5, 2023 that;
  1. The suit is statute barred pursuant to section 90 of the *Employment Act* and is therefore unsustainable and must be struck out with costs; and
  2. The court lacks jurisdiction to hear and determine this suit.
2. In opposition to the preliminary objection, the claimant filed grounds of opposition dated April 5, 2023 that;
  1. The respondent misapprehended the procedural sequence adopted in resolving the dispute and misapplied section 90 of the *Employment Act* as the claimant was represented by a trade union.
  2. That the claimant employed the doctrine of exhaustion as requisite when seeking a remedy after administrative action and the court was an avenue of last resort after the Department of Labour failed to resolve the issue having been represented by a trade union, Kenya Chemical Workers Union (KCWU) as evidenced by the Secretary General's letter dated August 18, 2017 shows.



3. That the claimant had the right to invoke section 62 of the [Labour Relations Act](#) and did not sleep on his rights as alleged.
4. The Claimant took the right action as employees cannot take direct court action but are rather represented by their trade unions and the matter is based on a contract and as such has a 6 year window of action before it is barred by the [Limitation of Actions Act](#) and the court has jurisdiction to entertain the suit and the Respondent's Preliminary Objection is an abuse of court process and ought to be struck out.

### **Applicant/Respondent's submissions**

3. The Respondent's counsel analysed the applicability of section 90 of the [Employment Act](#), 2007. Counsel submitted that since the claim before the court was filed on May 4, 2023 and paragraph 3 of the statement of claim and letter of appointment are clear that the Claimant's employment was terminated on July 31, 2017, the suit was instituted 4 years and 9 months after termination of employment. That the Claimant's monthly salary was below Kshs.80,000/=.
4. Counsel submitted that the delay denied the respondent the protection provided by the law against institution of suits late.
5. Counsel urged that the court had no jurisdiction or discretion to extend time in causes of action based on breach of contract of service as held in *Daniel Kiptoo Kaakima v East Africa Portland Cement Co. Ltd* [2018] eKLR.
6. Counsel further submitted that the Claimant's cause of action arose on the date of termination as captured by the statement of claim and letter of termination.
7. Finally, counsel submitted that the respondent had met the threshold for a preliminary objection as enunciated in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and prayed for the striking out of the suit.

### **Claimant's submissions**

8. Counsel for the claimant identified 3 issues for determination, namely;
  - i. Whether the claimant adopted the required procedural sequence in resolving the employment dispute by employing the doctrine of exhaustion.
  - ii. Whether the claimant's case is statute barred.
  - iii. Whether the court has jurisdiction to determine this matter.
9. On procedural sequence, counsel relied on article 41 of the [Constitution](#) of Kenya, 2010 on labour rights as well as Section 87 of the [Employment Act](#) and section 62 of the [Labour Relations Act](#), 2007 on reporting of trade disputes to the Minister.
10. According to counsel, the claimant invoked an alternative means of dispute resolution provided by the [Constitution](#).
11. Counsel relied on the sentiments of the court in William [Odhiambo Ramogi & 3 others](#) on exhaustion of administrative remedies as well as [Kenya Union of Printing Publishing, paper Manufacturers Pulp and Packaging v Bags \(E.A\) Ltd](#) [2014] eKLR.



12. As to whether the action was statute barred, counsel urged that the Claimant could not approach the court within the timelines prescribed by section 90 of the *Employment Act*.
13. On jurisdiction, counsel urged that section 12 of the *Employment and Labour Relations Court Act*, 2011 prescribed the jurisdiction of the court.
14. Finally, counsel relied on section 29 of the *Labour Relations Act* to urge that matters should be resolved in an equitable and progressive manner.
15. The issues for determination are;
  - (i) Whether the respondent's preliminary objection meets the threshold and
  - (ii) Whether the same is merited.
16. On the competency of the preliminary objection before the court, the court is guided by the test enunciated by the Court of Appeal in the *Mukisa Biscuits case (supra)* as follows;

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which raises by clear implication out of pleadings, and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the 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.”
17. Since the respondent's preliminary objection is based on limitation, the court is satisfied that the instant preliminary objection meets the threshold in the *Mukisa Biscuits case (supra)*.
18. The pith and substance of the instant Preliminary Objection is that the instant suit is statute barred by virtue of the provisions of section 90 of the *Employment Act*, 2007.
19. Section 90 of the *Employment Act* provides that;

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 of or in the case of continuing injury or damage within twelve months next after cessation thereof.
20. From the pleadings filed by the claimant, it is common ground that the claimant's employment was terminated on July 31, 2017 and the instant suit was filed on May 9, 2022 close to 5 years later, a fact the Claimant has not contested but contends that he opted to engage in alternative dispute resolution before invoking the court's jurisdiction.
21. It is not in dispute that the Claimant's suit is grounded on the provisions of the *Employment Act*, 2007 and the cause of action arose on July 31, 2017.
22. Although the claimant's counsel urges that the claimant invoked alternative dispute resolution, the claimant availed no evidence of the alleged process. The copies of the two letters attached to the grounds of opposition are from the Ministry of East African Community, Labour & Social Protection, Department of Labour to the union and the Managing Director of Henkel Kenya Ltd dated August 18, 2017 and 18<sup>th</sup> April respectively and none relate to the termination of the claimant's employment.
23. The dispute reported by the union by its letter dated June 21, 2017 relate to failure to implement a CBA and outsourcing of employees to the respondent.



24. The union's letter referred to by the Ministry's letter was dated June 21, 2017, before the claimant's employment was terminated as alleged.
25. The claimant has not availed any shred of evidence of having complied with the provisions of section 62 of the Labour Relations Act, 2007 on reporting of his termination of employment within 90 days and how the process progressed. There is no Conciliator's Certificate of unresolved dispute or other communication at all.
26. In the court's view, the claimant counsel's argument that he exercised his constitutional right to invoke alternative dispute resolution as ordained by article 159 of the Constitution of Kenya, 2010 and had to exhaust the same before invoking the courts jurisdiction is unsustainable against the provisions of section 90 of the Employment Act, 2007.
27. Even assuming that the claimant engaged in conciliation through the union, would that process have postponed the running of time under section 90 of the Employment Act, 2007? The court is not persuaded that that would have been the case.
28. The provisions of section 90 have no room for extension of time by the court or postponement of the running of time.
29. Strangely, the claimant's counsel urged that since the claimant's action is based on a contract, he had 6 years within which to enforce his cause of action as provided by the provisions of the Limitation of Actions Act.
30. In the court's view, to urge that the provisions of the Limitation of Actions Act regulate employment contracts, the provisions of section 90 of the Employment Act, 2007 notwithstanding, is to overstretch imagination.
31. For the above reasons, the court is satisfied that the claimant's action herein is statute barred.
32. Since limitation of time is essentially a jurisdictional issue, court is persuaded that it has no jurisdiction to hear and determine the suit.
33. In the upshot, the preliminary objection dated January 5, 2023 is merited and is accordingly upheld and the claimant's instant suit is struck out for being statute barred.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10TH DAY OF JULY 2023**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

DR. JACOB GAKERI

JUDGE

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