



**Ogola v Mount Kenya University (Miscellaneous Civil Application
E046 of 2022) [2023] KEELRC 2281 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2281 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E046 OF 2022
DN NDERITU, J
SEPTEMBER 28, 2023**

BETWEEN

PROF FREDRICK OGOLA APPLICANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

RULING

I. Introduction

1. By way of a notice of motion dated November 17, 2022 (the application) the applicant, through Ndeda & Associates, Advocates, prays for the following –
 1. Spent
 2. That the applicant be granted leave to file this suit against the respondent out of the stipulated time.
 3. That the intended application and suit annexed herein be deemed to have been filed within the time specified.
 4. That the costs of this application be provided for.
2. The application is expressed to be brought under Article 41 of the *Constitution*, sections 3, 3A, and 95 of the *Civil Procedure Act*, section 4(1) of the *Limitation of Actions Act*, Section 12 of the *Employment and Labour Relations Court Act*, Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules*, and any other enabling provisions of the law.
3. The application is based on the grounds on the face of it and supported with the affidavit of Prof Fredrick Ogola, the Applicant, sworn on November 17, 2022 with several annexures thereto.



4. Upon service of the application the respondent filed a replying affidavit sworn by Linda Khagali, a senior human resource officer, sworn on December 9, 2022.
5. On December 14, 2022 it was agreed and directed by the court that the application be canvassed by way of written submissions. Miss Awuor for the Applicant filed her submissions on January 31, 2023 and Mr. Omondi for the Respondent filed on January 30, 2023.

II. Issues For Determination

6. In a draft memorandum of claim attached to the supporting affidavit, the applicant states that in August, 2018 he worked for the respondent teaching various courses and units but the Respondent failed, refused, and or neglected to pay to him a sum of Kshs.111,000/=. He has annexed various documents to confirm that he indeed taught, lectured, and supervised students in various courses as claimed.
7. The applicant alleges that he failed to file the claim in court within the time allowed by law as he had confidence that the respondent would settle the claim as it kept on giving him promises of a settlement. The Applicant acknowledges that the three years within which he was supposed to file his claim have expired but prays that the same be extended to allow him file his claim against the Respondent out of time. He pleads that the application be allowed as prayed.
8. In the replying affidavit the respondent takes the position that no reason has been given by the applicant for not filing the claim within the time allowed in law. It is deposed that the applicant through his counsel made a demand for payment of the money vide a letter dated April 27, 2021 which letter was served upon the Respondent on April 29, 2021. The respondent did not respond to the said demand letter yet there is no explanation as to why the applicant did not proceed to file the claim in court immediately thereafter.
9. It is the respondent's position that the applicant has been indolent and is now statutorily barred from filing a claim in court over the subject matter and views the application as an abuse of court process seeking that the same be dismissed with costs.
10. In her submissions counsel for the Applicant has alluded to the foregoing facts and argued that this court has an overriding objective to do justice. It is submitted that the court should apply the oxygen principle by invoking article 159(2)(d) of the *Constitution*. Counsel has cited *Gatune v Nairobi Technical High School & another* (1988) eKLR wherein protracted negotiations led the Claimant into believing that the Respondent was to settle the claim. It is argued that the draft memorandum of claim raises triable issues and in any event the Respondent has not denied owing the Claimant the amount as claimed.
11. Counsel submits that the cause of action arose after the demand for payment was made vide the letter of April 27, 2021 and that the Applicant had three years from that date to file his claim in court.
12. On the other hand, counsel for the respondent has submitted that there is only issue for determination – whether the Applicant may be allowed to file his claim out of time. It is submitted that section 90 of the *Employment Act* (the Act) is clear, unambiguous, and specific that a claim relating to employment and labour relations shall be filed in court within three years. Counsel argues that the section 4(1) of the *Limitation of Actions Act* is ousted by the above provisions which are specific to employment and labour relations actions and counsel has cited *Josephat Ndirangu v Henkel Chemicals E.A. Ltd* (2013) eKLR among other decisions in support of this position.



13. Counsel has also submitted that the issue of limitation of action is not a mere technicality and that once an action is out of time a court of law lacks jurisdiction to entertain such a claim. He has cited [*James Muriithi Ngotho V Judicial Service Commission*](#) (2012) eKLR and [*Nyanamba O. Steve v Teachers Service Commission*](#) (2016) eKLR to buttress this point.
14. Further, counsel has cited In the matter of the [*Interim Independent Electoral Commission*](#) (2011) eKLR and [*Wilson Nyabuto Areri v Postal Corporation of Kenya*](#) (2018) eKLR in laying emphasis that a court cannot arrogate unto itself jurisdiction through judicial craft or innovation as jurisdiction is conferred only by the [*Constitution*](#), the statutes, or in rare circumstances established judicial precedents.
15. For the foregoing reasons, it is the Respondent's position that this court lacks jurisdiction to allow the application and prays that the same be dismissed with costs.
16. Upon thorough reading and analysis of the application, the replying affidavit, and submissions by counsel for both parties, it is in the considered view of this court that there is only one issue for consideration and determination by this court – Should this court enlarge, expand, or extend time and allow the Applicant to file his intended claim out of time?

III. Determination

17. Section 90 of the Act provides 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(of) or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

18. The above provision of the law ousts application of the [*Limitation of Actions Act*](#) to matters employment and labour relations. Prior to coming into force of the Act the limitation of the time of filing a claim was based on the law governing contracts and more specifically section 4 of the [*Limitation of Actions Act*](#). However, the law now is that claims concerning employment and labour relations SHALL be filed within three years and the Act is very clear on this.
19. The above applicable law does not provide for enlargement, extension, or expansion of the time within which the claim shall be filed beyond the three years from the date that the cause of action arose. The law does not donate to this court any widow of judicial craft or innovation to expand, extend, or enlarge the time in the limitation. Even if there was such widow, which is however not available, the Applicant has not advanced any reason or at all as to why he did not file his claim within three years from the date that the cause of action arose.
20. The Applicant admits and appreciates that the three years within which he was supposed to file his claim expired sometimes in August, 2021. A demand notice was issued by his counsel to the Respondent dated 27th April, 2021 and it is admitted that the Respondent received the said demand letter on April 29, 2021. In the said letter the Applicant indicated that if the Respondent did not settle the amount due within 14 days of the receipt of the letter legal action was to be instituted. The Respondent failed, refused, and or neglected not only to respond to the letter but also to settle the alleged debt. There is no explanation given as to why the Applicant did not take the intimated action at that point which was well within the time allowed by the law for filing the claim.
21. This application was filed in court on November 21, 2022, well over one year after the expiry of the period allowed by the law for filing the claim. Again, no explanation is given for this delay.



22. It does not matter how good or hopeless a claim is; once the time limited in law expires the same shall not be accepted in court as the action becomes stale. The court agrees with the submission by counsel for the Respondent that the issue of a time-barred claim is not a matter of technicality as it goes to the core of the jurisdiction of the court in entertaining such a claim. The authorities cited by counsel for the Respondent on this issue are apt.
23. For all the foregoing, this application is bad in law and misconceived and the same is hereby dismissed.

IV. Orders

24. The Applicant's notice of motion dated November 17, 2022 has no merits and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF SEPTEMBER, 2023.

.....

DAVID NDERITU
JUDGE

