



REPUBLIC OF KENYA



**Kenya Union of Domestic, Hotels, Education Institutions & Hospital
Workers v Vice Chancellor, Maseno University (Cause E052 of 2022)
[2023] KEELRC 2121 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2121 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E052 OF 2022
CN BAARI, J
SEPTEMBER 21, 2023**

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS &
HOSPITAL WORKERS CLAIMANT**

AND

THE VICE CHANCELLOR, MASENO UNIVERSITY RESPONDENT

RULING

1. This ruling relates to the Respondent's Notice of Preliminary Objection dated 3rd January, 2023 and filed on 11th January 2023. Vide the objection, the Respondent seeks the striking out of the Claimant's claim dated 7th December, 2022, on the premise that it is statute barred by dint of Section 90 of the [Employment Act](#), and further that the suit should have been lodged before the Magistrates Court which has the pecuniary jurisdiction to hear and determine the matter.
2. The Claimant opposed the Objection vide a response filed on 14th February, 2023. It is the Claimant's position that courts have interpreted the accrual of the cause of action to be the date of termination, yet the Respondent has never served the grievant with a letter of termination nor verbally informed him that he had been terminated from their service. The Claimant sought to rely on the holding of this Court in [Gilbert Otieno Okite v Kenya Sugar Research foundation](#) [2022] eKLR to support this position.
3. It is the Claimant's further assertion that this Court has jurisdiction to hear the matter under Section 73(1) of the [Labour Relations Act, 2007](#), as the matter was already conciliated and the Conciliator gave his report, thus concluding the conciliation process.
4. Parties sought to canvass the Preliminary Objection through written submissions. The Respondent filed submissions, while the Claimant did not.



The Respondent's Submissions

5. The Respondent's submission is that the grievant herein was dismissed from the service of the Respondent on 11th May, 2017, and which dismissal was communicated to him. It is its further submission that the Claimant admitted this fact at paragraph 16 of their claim.
6. It is the Respondent's submission that the Claimant lodged this suit about 6 years after the said dismissal contrary to the express provisions of Section 90 of the *Employment Act*, hence the claim is late by two (2) years. It had reliance in *Joseph Meiala Peralta v Vigelo and Gero Construction Company Limited (VGCL)* [20221 eKLR to buttress this position.
7. It is the Respondent's further submission that in determining when the cause of action accrued in employment cases, the Court should be guided by the decision in *Bernard Kimutai Maiyo v Ampath Plus* [20211] eKLR where the Court of Appeal quoted the case of *Hilarion Mwabalo v Kenya Commercial Bank* [2013] eKLR for the holding that:

“Accrual of the Cause of action in a claim emanating from employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seek a review or an appeal does not mean that accrual of the cause of action is held in abeyance until final verdict on review or appeal”.
8. It is the Respondent's submission that the purported denial of termination is an afterthought intentionally raised to mislead this Honourable Court because the Claimant knew very well at the time of filing this suit that the matter was statutorily time barred.
9. It is its further submission that under the Claimant's bundle of documents marked APP KW 8, APP-KW 9 and APP KW-10 the same are dated the year 2018, and are all titled unfair termination of Michael Jomo Odari (the grievant), which confirms that the grievant knew that he had been terminated.
10. The Respondent submits that the purported conciliation was done in violation of Section 62 (3) (a) of the *Labour Relations Act* which states that disputes regarding termination from employment ought to be preferred within 90 days from the date of the dismissal.
11. It is their submission that despite the matter being referred to conciliation, time never stopped running. It sought to rely in *Joseph Meiala Peralta v Vigelo and Gero Construction Company Limited (VGCL)* [20221 eKLR to support this position.
12. The Respondent seeks that the courts downs its tools for lack of jurisdiction, and dismisses the suit.
13. On the second limb of the objection, the Respondent submits that Section 29(3) of the *Employment and Labour Relations Court Act*, empowers the Chief Justice, by way of Gazette Notice, to appoint specific magistrates to preside over employment matters.
14. It is its further submission that by dint of the said section, the Chief Justice issued Gazette Notice No. 6024 dated 10th June, 2018, and appointed magistrates of the rank of Senior Resident Magistrates and above, to hear employment matters within their respective areas of jurisdiction limited to pecuniary jurisdiction not exceeding Kshs.80,000 gross monthly salary of the claimant.
15. It is its submission that the grievant's gross pay was Kenya Shillings Thirty-Five Thousand One Hundred and Twenty-One (Kshs. 35, 121/-), and as such, the magistrates court has the jurisdiction to hear and determine this matter.



16. The Respondent finally seeks that this Honourable Court dismisses the Claim dated 8th December 2022, for being time barred and awards the Respondent costs of the suit.

Determination

17. I have considered the Preliminary Objection, the response by the Claimant and the Respondent's submissions. The issues for determination are: -
- i. Whether the suit herein is statute barred
 - ii. Whether the claim should have been lodged before the Magistrate's Court.
18. The Court in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, spelt out the legal position on Preliminary Objections in the following words:
- “A Preliminary Objection consists of a point of law which has been pleaded or which arises 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... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
19. The Preliminary Objection in this suit, is firstly, a plea of limitation premised on Section 90 of the *Employment Act, 2007*. This without a doubt is a pure point of law which if proved, has the potential to dispose of the suit.
20. Section 90 of the *Employment Act* 2007, provides as follows in regard to filing of employment related claims;
- “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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
21. The Claimant filed its Memorandum of Claim on 8th December, 2022. Its contention is that the grievant was never informed in writing or otherwise that he had been dismissed from the service of the Respondent.
22. It is not disputed that the grievant was suspended from service on 20th December, 2016, pending investigation and disciplinary hearing. He was invited to appear before a disciplinary panel on 8th March, 2017.
23. In an undated letter from the Claimant to the Respondent, referenced “Unfair Termination of Mr. Michael Jomo Odari” the Claimant sought a meeting to discuss the grievant's termination on 26th July, 2018 and the letter shows on its face that it was received by the Respondent on 12th July, 2018.
24. The Claimant did a similar letter dated 15th August, 2018, on the issue of termination of five of its members including the grievant herein.



25. The Respondent's position is that the grievant herein, was dismissed from their service on 11th May, 2017, and a letter to this effect forms part of the court record.
26. The issue then is when the cause of action herein accrued to enable the determination on whether or not the suit is time barred.
27. The Respondent's position is that the Claimant's bundle of documents marked APP KW 8, APP-KW 9 and APP KW-10 dated the year 2018, are all titled unfair termination of Michael Jomo Odari (the grievant). This in my view is confirmation that the grievant knew that he had been terminated from way back in 2018, which lends credence to the Respondent's letter of dismissal of 11th May, 2017.
28. Further, the Claimant has not led any evidence to show that the grievant continued earning salary from the Respondent after 11th May, 2017 up to the year 2021, when conciliation is said to have failed to address the issues between the parties.
29. The date when time begins to run, was settled by the holding of the Court of Appeal in the case of *David Ngugi Waweru v Attorney General & Another* [2017] eKLR, where the court stated that the time of dismissal or termination, is the time contained in the letter of termination/dismissal and not the time of conclusion of internal disciplinary mechanisms.
30. Further, and as correctly submitted by the Respondent, the cause of action in cases arising out of employment contracts, accrues on the date of termination/dismissal. In *Hilarion Mwabolo v Kenya Commercial Bank* [2013] eKLR The Court dealt with this issue in the following words:

“.. the cause of action under Section 90 of the *Employment Act, 2007* accrues from the date of termination as stated in the termination letter...”
31. In *Joseph Mejala Peralta v Vigelo and Gero Construction Company Limited (VGCL)* [2022] eKLR the Court had this to say: -

More importantly, the preliminary objection raises points of law, specifically jurisdiction and limitation of time as adverted to in the Mukhisa Biscuits Case. The Court is persuaded that the preliminary objection before the Court meets the threshold established in the Mukhisa Biscuits Case. The effect of the provisions of Section 90 of the *Employment Act* is that the Court has no jurisdiction to entertain a suit that is time barred. ”
32. In the upshot, I find and hold that the grievant herein was dismissed on 11th May, 2017, and this suit having being lodged on 8th December, 2022, is time barred by dint of Section 90 of the *Employment Act, 2007*.
33. I further find and hold that the Court has no jurisdiction to entertain this suit for being statutorily time barred.
34. Although the second limb of the objection ought to fall by the wayside side on account of jurisdiction, it is important that I should mention for the sake of the Respondent or their Counsel, that matters delegated to the Magistrate's Court are employment matters and not labour matters. This suit having been lodged by a union is a labour matter and hence, squarely falls within the pecuniary jurisdiction of this Court.
35. The Preliminary Objection is upheld and the Claimant's suit is struck out with no orders on costs.
36. Orders accordingly.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST
DAY OF SEPTEMBER, 2023.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Michael Oyaka Present for the Claimant

Ms. Rama h/b for Ms. Akinyi for the Respondent

Ms. Christine Omolo-C/A

