



**Makokha v Judicial Service Commission (Employment and Labour Relations Cause E579 of 2022) [2023] KEELRC 2526 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2526 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E579 OF 2022  
BOM MANANI, J  
OCTOBER 19, 2023**

**BETWEEN**

**KWAMCHETSI PATRICK MAKOKHA ..... CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**RULING**

1. The Claimant avers that sometime in July 2012, he entered into a contract with the International Development Law Organization (IDLO) through which he was to provide consultancy services to the Judiciary and the Office of the Chief Justice, Republic of Kenya. The contract ran up to 31<sup>st</sup> December 2012.
2. The Claimant contends that upon the lapse of the initial contract, the parties continued to engage periodically with the Respondent promising to issue him with a formal contract of service, perhaps on fulltime basis. Specifically, it is the Claimant's contention that upon the lapse of the last periodic engagement between the parties on 30<sup>th</sup> August 2013, he continued to serve the Judiciary and the Office of the Chief Justice pending conclusion of a formal employment contract between the parties.
3. The Claimant states that on 17<sup>th</sup> April 2015, he was forced to resign from the relation when he realized that the Respondent was unwilling to formalize it and pay him for his services. He contends that before he resigned, he had been forced to work at the Office of the Chief Justice on full time basis due to the increased volume of work at the said office.
4. It is the Claimant's case that at the time of his resignation, the Respondent owed him salary arrears for 19 months. The Claimant also states that due to the Respondent's failure to keep its part of the bargain, he was exposed to financial embarrassment which subjected him to other pecuniary losses as set out in the Statement of Claim.



5. The Claimant avers that efforts to have the Respondent amicably pay him terminal and other dues on account of the failed relation yielded no fruit. Hence the necessity for these proceedings.
6. The Respondent has filed a defense denying liability for the claim. According to the Respondent, there was no employment relation between the parties.
7. It is the Respondent's case that the consultancy contract that was executed between the Claimant and IDLO engaged him as an Independent Contractor. At the same time, the Respondent denies being party to the alleged subsequent engagements between the Claimant and the Office of the Chief Justice under which the Claimant alleges that he offered certain services to the Judiciary.
8. The Respondent contends that if the Offices of Chief Justice and Chief Registrar of the Judiciary made any representations to the Claimant as regards employment, such representations were made outside their mandate. Only the Respondent has the mandate to hire staff for the Judiciary. The Respondent denies having made any such hiring in respect of the Claimant.

### **Preliminary Objection**

9. Contemporaneous with the Statement of Defense, the Respondent filed a Notice of Preliminary Objection dated 8<sup>th</sup> September 2022. In the objection, the Respondent contends that the Claimant's action is time barred in terms of section 90 of the *Employment Act*. Therefore, the suit is an abuse of the court process and ought to be struck out.
10. The basis of the objection is that the Claimant's cause of action is based on an alleged employment relation between the parties which the Claimant contends was closed on 17<sup>th</sup> April 2015 when he allegedly resigned. Therefore and in terms of section 90 of the *Employment Act*, any suit based on the alleged relation ought to have been filed within three (3) years of 17<sup>th</sup> April 2015. This suit, coming in August 2022, is outside the timelines that are prescribed by section 90 of the *Employment Act*. It is thus statute barred.
11. On the other hand, the Claimant contends that the issue that is raised by the Respondent is not suitable for adjudication through an objection based on a point of law due to a number of reasons. First, it is the Claimant's contention that the facts of the case are contested. Therefore and in terms of the decision in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs. West End. Distributors Ltd* [1969] EA 696, this suit does not qualify for the taking up of a preliminary point of law.
12. Second, the Claimant argues that the Respondent remained ambivalent about his claim until 2021 when it indicated that it was not going to settle the matter. Therefore, it (the Respondent) is estopped from pleading that the cause of action in the suit is statute barred.
13. Third, the Claimant asserts that by failing to pay for his services, the Respondent violated his constitutional rights for which he has sued. The Claimant argues that his case being premised on violation of his constitutional rights cannot be defeated by reference to the law on limitation of actions.
14. Finally, the Claimant contends that the Respondent is a public body with a constitutional mandate to foster constitutionalism, good governance and protection of human rights. Therefore, it should not be permitted to engage in conduct that violates the very constitutional values that it is bound to protect and promote by hiding behind the law on limitation of actions.



## Analysis

15. As suggested by the Claimant, a preliminary objection ought to present a pure point of law which, if successfully urged, ought to dispose of the case. It is also true that such objection should be taken only when there is agreement on the primary facts in the action.
16. My understanding of this edict is that in order for a litigant in a cause to raise a preliminary point of law, the parties to the action must be in agreement on the primary facts that inform the objection. However, it is not a requirement that the entire spectrum of facts in the case must be agreed. If the latter were to be the case, no preliminary points of law to the competence of suits would ever be successfully raised.
17. In the case before me, the Claimant has pleaded that he entered into a consultancy agreement with IDLO and the Judiciary in 2012 through which he was to offer some services to the Office of the Chief Justice and the Judiciary. The Respondent does not dispute this fact.
18. Further, the Claimant asserts that he resigned from the Office of the Chief Justice in April 2015 when it became apparent that the Respondent was unwilling to grant him a formal employment contract. From the record, the Respondent does not expressly contest the fact that the Claimant may have left the office of the Chief Justice in April 2015.
19. The point of divergence between the parties is in relation to the nature of the relation that they had. Whilst the Claimant suggests that the two had an employment relation, the Respondent contends that the relation between them was one of an independent contract. Further, the Respondent's position is that this relation terminated well before 2015.
20. Whilst the Respondent does not expressly deny that the Claimant may have remained at the Office of the Chief Justice after the lapse of the consultancy contract, it (the Respondent) insinuates that if he did, this was not at its (the Respondent's) behest. Rather it was at the behest of the Chief Justice who had no mandate to hire staff for the Judiciary. As such, the Respondent asserts that it was not bound by any such arrangement.
21. Looking at the foregoing, there is no doubt that the parties do not contest the fact that they had a labour relation beginning 2012. However and contrary to the position expressed by the Claimant, the Respondent contends that the relation terminated earlier than 2015.
22. Similarly, there is no doubt that the Respondent does not overtly contest the Claimant's assertion that he may have stayed at the Office of the Chief Justice until April 2015 when he allegedly resigned. What the Respondent disputes is the Claimant's suggestion that his continued stay at the said office was with its (the Respondent's) blessings.
23. Despite the contested employment status of the Claimant at the time that he purportedly resigned from office, it is apparent that the primary facts that inform the preliminary objection to wit that the parties had a labour relation from 2012 and that after the formal relation, the Claimant may have stayed on at the Office of the Chief Justice, albeit controversially, until April 2015 when he allegedly resigned are not contested by the parties. In my view, these uncontested facts form the foundation for the preliminary objection on limitation of actions.
24. Importantly, the case of *Mukisa Biscuits Manufacturing Co. Ltd vs. West End. Distributors Ltd (supra)* identifies a plea of limitation of actions as one which a party to an action may legitimately raise as a preliminary point of law. The court expressed itself on the issue as follows:-

‘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.”

25. The question of limitation of actions in the case before me arises by implication from the pleadings on record. The Claimant’s case, as pleaded, is that he resigned from his engagement with the Judiciary on 17<sup>th</sup> April 2015. As such, the cause of action as per the Statement of Claim accrued on 17<sup>th</sup> April 2015.
26. The Respondent has contended that the claim is statute barred. It is the Respondent’s case that the suit offends the express provisions of section 90 of the *Employment Act*.
27. From the record, the Statement of Claim was received in court in August 2022, more than seven years after the cause of action accrued. This necessitates an inquiry regarding whether the case was filed within the timelines that are contemplated under section 90 of the *Employment Act*.
28. In terms of section 90 of the *Employment Act*, the Claimant ought to have moved the court within three years of his resignation since his case alleges breach of an employment relation. The cause of action in the suit having arisen on 17<sup>th</sup> April 2015, the Claimant ought to have filed suit by 17<sup>th</sup> April 2018.
29. The record shows that he filed suit on 16<sup>th</sup> August 2022, slightly more than seven years from the date of the alleged resignation. Certainly, this was well outside the timelines that are provided for under section 90 of the *Employment Act*.
30. The Claimant has argued that the case raises questions regarding violation of his constitutional rights. As such, it is not subject to the law on limitation of actions.
31. Apart from paragraph 20 of the Statement of Claim in which the Claimant asserts that withholding of his salary violated his rights in law and subjected him to servitude, there is no express constitutional claim in the case. The Statement of Claim does not expressly invite the court to evaluate and interpret the *Constitution* in the course of adjudicating on the dispute. As a matter of fact, there is no constitutional relief that the Claimant seeks in the action.
32. In discerning what constitutes a constitutional question Mativo J (as he then was) in *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) stated as follows:-

“.. a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute. When determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the court to consider Constitutional rights or values. The issues raised in this case will stand or fall on whether the parties entered into a valid marriage and whether the Petitioner was subjected to the acts of cruelty cited and if the family court is persuaded, it will be able to issue effective remedies. These are matters which can be resolved without resorting to the Constitution.”
33. By parity of reasoning, the issues that the Claimant raises will stand or fall depending on whether the parties had an employment relation and whether the Respondent breached the relation by failing to honour its obligation to remunerate the Claimant. These matters do not require recourse to the Constitution to resolve. They can conclusively be determined by application of the existing statutory framework on employment law in Kenya without the necessity of resorting to the *Constitution*.
34. It is now settled that a party to a dispute is not entitled to invoke the Constitution to resolve a matter which can be resolved through application of ordinary legislation (see *KKB v SCM & 5 others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR)). The only time that a party will be



allowed to directly invoke the Constitution to resolve a dispute is when it is clear that this is the only way that the outstanding dispute can be resolved.

35. At the same time, parties are not entitled to frame ordinary disputes as constitutional claims in order to circumvent the law on limitation of actions. The court ought not to permit a litigant to invoke the Constitution in order to avoid the law on limitation of actions (see *Thuita Mwangi v Attorney General & 2 others* [2021] eKLR).
36. In my view therefore, the current action does not raise constitutional questions for determination by the court. Consequently, I decline the Claimant's contention that the cause has a constitutional foundation and is therefore not amenable to the law on limitation of actions.
37. The Claimant has also stated that the parties were initially engaged in negotiations in an attempt to amicably resolve the dispute. The Claimant points out that the Respondent belatedly communicated its decision not to settle the matter in 2021. In the premises, it is the Claimant's contention that the Respondent is estopped from pleading limitation of actions.
38. I do not agree with this view. It is clear from the pleadings that the Claimant allegedly resigned on 17<sup>th</sup> April 2015. Therefore, time for filing suit begun running on this date.
39. Even if there were attempts to amicably resolve the dispute as is suggested by the Claimant, this did not stop time from running for purposes of the law on limitation of actions. Therefore, the Claimant cannot invoke the principle of estoppel to overcome the express requirements of section 90 of the *Employment Act*.
40. In alluding to this fact, the Court of Appeal in the case of *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another* [2016] eKLR expressed itself as follows: -

"Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of section 90 of the *Employment Act* even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service."
41. It is true as the Claimant argues that the Respondent has a constitutional duty to foster constitutionalism, good governance and protection of human rights. It is also true that the Respondent ought not to be at the forefront of trampling on the rights of those whose rights it ought to protect including the Claimant. However, I do not understand this constitutional obligation to require of the Respondent to fulfill obligations that are stale.

#### **Determination**

42. In the ultimate, I arrive at the conclusion that the Claimant's suit is time barred.
43. Consequently, it is struck out with costs to the Respondent.

**DATED, SIGNED AND DELIVERED ON THE 19<sup>TH</sup> DAY OF OCTOBER, 2023**

**B. O. M. MANANI**

**JUDGE**

