



Michira & 41 others v Aegis Kenya Ltd t/a Leopard Beach Hotel (Cause E088 of 2023) [2023] KEELRC 2551 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2551 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E088 OF 2023
M MBARÚ, J
OCTOBER 19, 2023**

**BETWEEN
ELIJAH ISABOKE MICHIRA & 41 OTHERS CLAIMANT
AND
AEGIS KENYA LTD T/A LEOPARD BEACH HOTEL RESPONDENT**

RULING

1. The ruling herein relates to Notice of Preliminary Objections dated 12 September 2023 filed by the respondent on the grounds that;
 1. The claimants' causes of action are all said to be founded on employment contracts as between the claimants and the respondent entered into on diverse dates and which contracts were all terminated in April, 2020.
 2. All the causes of action are therefore time barred by virtue of section 90 of the *Employment Act*, 2007 having arisen in April 2020 and this action having been instituted in court in August 2023. This suit is thus incompetent, frivolous and mala fides for the aforesaid reasons.
2. The claimants in response filed Grounds of Opposition on the reasons that;
 - a. Termination of the employment contracts and specifically the date of termination are contested issues of facts that are up for determination by this court. The Claimants' position is that they remained as the Respondent's employees even at the time of filing of this case, hence their pleadings at paragraphs 20 (a) and 22 of the Statement of Claim and prayers (a) and (e) thereof;
 - b. The time for limitation of actions could not have started running from April 2020 because the dispute was under statutory conciliation process whose final report was made on 23 February 2023;



- c. In any event, the respondent has continued to recognise the claimants as its employees. It recently issued letters confirming the same and has recently paid them Kshs 7,000 for service charge, evidence of which shall be produced in due course;
 - d. In any event, the fact of termination and the date of termination is actually one of the declarations sought by the claimants and it is for this reason that the claimants are also seeking payment for salary arrears for the period between April 2020 and the date of filing of this case; and
 - e. The claimants seek other reliefs that are not the subject of the three years limitation of actions period.
3. Both parties attended and filed written submissions and highlighted in court.
 4. The respondent submitted that, section 90 of the *Employment Act*, 2007 (the Act) has a statutory bar with regard to filing of claims within 3 years from the date the cause of action arose. Any claim filed after 3 years denies the court jurisdiction and should be struck out. This being a question of law, the respondent has relied on the principles outlined in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA that a preliminary objection must be on a point of law, once addressed on the given facts can dispose of the case.
 5. The claimants have pleaded that employment terminated in April 2020 when they were sent on indefinite leave. Part of the claim is the failure by the respondent to pay salaries from April 2020. The claimants were aware of ELRC Cause No. E002 of 2020 *Khawu v Aegis Ltd*, filed against the respondent herein, which suit has since been determined by this court. The claimants herein filed ELRC Cause No.658 of 2021 against the respondent seeking remittance to their Sacco dues and the suit has since been concluded. They cannot return under a different suit to claim as herein done out of time.
 6. In the case of *David Ngugi Waweru v Attorney General & another* [2017] eKLR the court held that time starts running at the point employment terminated and not the date internal disciplinary process concluded. The cause of action under Section 90 of the Act accrues from the date of termination stated in the termination letter as held in *Hilarion Mwabolo v Kenya Commercial Bank* [2013] eKLR.
 7. The cause of action having arisen from the indefinite compulsory leave from April 2020, any claim therefrom ought to have been addressed on or before lapse of 3 years, that is by March 2023 but the claimants filed the instant suit in August 2023 out of time and the same is time barred and should be dismissed with costs.
 8. In reply, the claimants submitted that a preliminary objection must be on a pure point of law and should not require call of evidence. The question of when employment terminated is contested and one of the prayers is for a declaration of such fact. The claimants are therefore seeking payment of salaries up to the point of filing suit. From April 2020 on the onset of COVID pandemic the claimants were sent home without a return date and therefore employment continued. In the NSSF statement, the respondent is noted as the employer.
 9. The claimants submitted that the dispute herein was under statutory conciliation and such legal mechanisms stopped time running. On 23 February 2023 the conciliator issued a report and directed the claimants to pursue their claims in court. For such law to apply, the suit herein cannot be said to be time barred as held in the case of *BIFU v Bank of India* and *Kenya Electrical Traders v Kenya Power & Lighting Co* that time stops running while parties are under statutory conciliation.



10. The claimants seek various remedies including payment of gratuity which is not covered under section 90 of the Act. There were rights violation and claims going back to the year 1998. Some claimants were due to retire and to find the suit time barred will deny them their legal entitlements and defeat the purpose of the CBA. With the date of termination of employment being uncertain, the claimants should be allowed to call evidence and their case heard on the merits.

Determination

11. Section 90 of the Act is framed in mandatory terms. A claim based on a contract of employment or labour relations must be filed within 3 years. This Court is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose.
12. Section 90 of the Act requires that;

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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.
13. The cause of action arises with end of employment. The last day the employee exits the shop floor, any accruing dues must to addressed within 3 years, any continuing injury must be addressed within 12 months.
14. The assertion by the claimants that there was non-payment of salaries from April 2020 to date, any such claim ought to have been addressed as a continuing injury with 12 months. Failure to address such benefit, the window of 3 years ought to have applied to consolidate all dues accruing and unpaid as held in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR that any suit by an aggrieved party must be filed within twelve months of such cessation of injury/damage or termination of employment. See *Johnson Kazungu v Kenya Marine & Fisheries Research Institute* [2021] eKLR, *John Kiiru Njiri v University of Nairobi* [2021] eKLR.
15. The claimants do not deny that the respondent directed them to proceed on indefinite and compulsory leave from April 2020. Paragraph 9 of the Memorandum of Claim is that on 30 April 2020, due to COVID pandemic, the respondent decided to send the claimants on compulsory leave without a return date.
16. The assertion that employment is ongoing and hence the claim for unpaid salaries, within the context of Section 90 of the Act, any alleged non-payment of salaries, being a continuing injury within the meaning of Act, ought to have been filed within twelve months next after cessation in April 2020.
17. The fact that in the NSSF statements the respondent is listed as the employer, such record is not a contract of employment. Such a statement only lists the last known employer who remitted the statutory dues to the body and nothing more. It cannot confer employment.
18. The conciliation process, even though allowed under statute does not stop time running. Parties are at liberty to file suit to secure their rights under section 90 of the Act and then seek to apply section 15 of the Employment and *Labour Relations Act*, 2011 which allow for conciliations while the matter is pending in court. To avoid going against the time limitations, a party with good cause is allowed to move the court and then seek to proceed for conciliation if that is found a viable option while retaining the right under Section 90 of the Act. Hence, the reference of the claimants' matter to conciliation did



not stop time from running and thus does not avail a defence against a plea of limitation as held in *Monicab Wanjiku Kanyingi v Our Lady of Mercy Secondary School* [2018] eKLR.

19. To file a claim in August 2023 following a cause of action which arose in April 2020 is outside the limitation period, both for claims under continuing injury or a claim arising out of an employment contract. This is a matter addressed in the law, on the facts presented, the objections by the respondents are with good foundation, and the claim herein is time barred and filed contrary to the provisions of section 90 of the *Employment Act*, 2007. The court is denied the requisite jurisdiction to proceed further.
20. The suit hereby struck out. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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