



Kaniu v Kenya Airports Authority (Employment and Labour Relations Cause 585 of 2019) [2023] KEELRC 3047 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3047 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 585 OF 2019
AN MWAURE, J
NOVEMBER 24, 2023**

BETWEEN

JAMES MUTURI KANIU CLAIMANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

RULING

1. The Claimant filed a memorandum of claim against his former employer, Kenya Airports Authority the Respondent herein, on 27th August 2019.
2. On 25th May 2023, the Respondent filed a Notice of Preliminary Objection that this court lacks jurisdiction to hear and determine the suit by virtue of the cause of action being time barred under section 90 of the *Employment Act*, 2007. It is this objection that is the subject of this ruling.

Respondent's Submissions

3. The Respondent submitted that it employed the Claimant on 27th June 1995 and on 10th November 2010, the Claimant was dismissed on grounds of gross misconduct upon being subjected to a disciplinary process by the Respondent and the same has been duly admitted by the Claimant.
4. The Respondent submitted that the Claimant being dismissed on 10th November 2010, under Section 90 of the *Employment Act*, he ought to have filed any claim challenging his dismissal on or before 9th November 2013.
5. The Respondent submits that the Claimant's claim offends the provisions of Section 90 of the *Employment Act*, as it is unreasonable and lacks due diligence as there has been inordinate delay of nearly 9 years after his dismissal.



6. It is submitted for the Respondent that the Claimant filed his claim outside the statutory period without seeking leave of the court thereby resulting to the claim being incurably defective and this court has no jurisdiction to entertain it.
7. It was further submitted for the Respondent that the date of termination sets out the period when time begins to run for purposes of determining when the cause of action arose and when statutory limitation ought to be construed and relied on *Gerald Muli Kilu V Barclays Bank of Kenya Ltd* (2016) Eklr.

Claimant's Submissions

8. The Claimant submitted that this court is clothed with requisite jurisdiction to entertain the claim and that although Section 90 of the *Employment Act* provides a claim be brought with 3 years from the date of wrongful action it further provides that in the event of a continuous injury the action should be brought within 12 months after cessation thereof.
9. The Claimant submitted the term continuous injury in the claim herein means the continuous injury occasioned by the Respondent's failure to pay his salary that accrued prior to the letter of dismissal and that the same has not ceased on grounds that the Respondent has not filed a response to the claim demonstrating it paid the Claimant his final dues as set out in Section 18(4) of the *Employment Act* and relied on *German School Society v Helga Ohany* [2017] eKLR.

Analysis and Determination

10. The main issue for determination is whether the suit is time barred under section 90 of the *Employment Act*, 2007. The section provides thus: -

“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.”

11. The Respondent submitted that the Claimant filed its claim nearly 9 years after his dismissal on 10th November 2010 therefore the claim is time barred by dint of Section 90 hereinabove. However, the Claimant on opposition of the preliminary objection submitted that there is an element of the continuous injury occasioned by the Respondent's failure to pay his salary that accrued prior to the letter of dismissal and that the same has not ceased on grounds that the Respondent has not filed a response to the claim demonstrating it paid the Claimant his final dues.
12. This brings this court to the question whether there is a case of continuing injury herein? The Court of Appeal in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR defined what constitutes a continuing injury to mean that;

“Regarding ‘a continuing injury’, the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. ...The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.”



13. Therefore, the Claimant cannot claim there is a continuing injury on grounds that he was never paid his final dues, even if that would have been the case, he should have taken reasonable steps to lodge his claim within the additional 12 month period provided for under section 90 of the Employment Act. This Court agrees with the Respondent's submission that there has been inordinate delay of nearly 9 years by the Claimant to challenge any claim that he has with regard to his dismissal as seen in Serah Wairimu Kibara v Nokia Solutions Branch Operations [2021] Eklr where Hon. Justice Nzioki wa Makau observed and held that: -

“The Claimant's cause of action accrued on her resignation on 6th July 2017 and despite the negotiations that were ongoing the limitation of her claim which was on wages was 12 months in terms of Section 90. She ought to have filed her suit by the 5th July 2018 and in respect of any other claim by 5th July 2020. It does not show diligence to negotiate a matter of allowances for over one year with an employer who seems as reluctant to pay as the Respondent herein. Some of the claims in respect of which she seeks recompense were incurred in 2009, 2010, 2011, 2012 and 2013. As such her claim is stale and is therefore unfit to be entertained by Court.”

14. Objections made by the Respondent are found to have merits, and the suit herein is therefore time barred. The court is denied jurisdiction under the provisions of section 90 of the Employment Act, 2007. The suit is hereby dismissed and each party will meet their costs. Similarly, in the claim the claimant took too long to file his claim and he did not render any evidence to establish that this was a continuing injury. And even if it was it should have been filed 12 months after cessation of such injury. The court therefore finds that the suit is time barred.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2023.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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.

ANNA NGIBUINI MWAURE

JUDGE

