



**Otieno v Music Copyright Society of Kenya Ltd (Cause 343 of 2019)  
[2023] KEELRC 2971 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2971 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 343 OF 2019  
JK GAKERI, J  
NOVEMBER 21, 2023**

**BETWEEN**

**ANTHONY CHRISTOPHER OTIENO ..... CLAIMANT**

**AND**

**MUSIC COPYRIGHT SOCIETY OF KENYA LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this claim by a Memorandum of Claim filed on 27<sup>th</sup> May, 2019 alleging unfair termination and non-payment of lawful dues and benefits.
2. It is the Claimant's case that he joined the Respondent as a Consultant on 1<sup>st</sup> September, 2013 at a monthly salary of Kshs.103,450/= per month and the appointment was renewed on 30<sup>th</sup> September, 2014.
3. The Claimant avers that he became an employee of the Respondent (Legal Officer) on 22<sup>nd</sup> June, 2015 and served dutifully and diligently until 8<sup>th</sup> June, 2016 when he was summoned by the Board of Directors to the Boardroom at 5.45 pm and questioned about being a director of Otieno Arum & Co. Advocates which had allowed the Respondent to file proceedings under its name from 1<sup>st</sup> September, 2013, which he denied.
4. The Claimant avers that he was further questioned about a letter from Otieno Arum & Co. Advocates acknowledging instructions of the then Chief Executive Officer of the Respondent to take over 2 matters in court, details he was unaware of.
5. That he was suspended on 9<sup>th</sup> March, 2016 until 11<sup>th</sup> March, 2016 when he received a text informing him to appear before the board on 16<sup>th</sup> March, 2016 but no agenda was provided.
6. The Claimant avers that he was questioned on similar issues which he denied and there was no further communication from the Respondent until 30<sup>th</sup> March, 2016 when he received an email from the



- Human Resource Manager with an attachment of the summary dismissal letter dated 24<sup>th</sup> March, 2016.
7. The Claimant further avers that he filed an appeal on 2<sup>nd</sup> April, 2016 and was notified of its rejection by the board of directors and was requested to clear on 30<sup>th</sup> May, 2016.
  8. The Claimant faults the termination of his employment for non-compliance with the procedure and non-payment of dues.
  9. The Claimant prays for;
    - i. Declaration that termination of employment by the Respondent was illegal, unlawful and unfair.
    - ii. Loss of income Kshs.3,713,400.00.
    - iii. General damages for unlawful termination, 12 months gross salary Kshs.1,237,800/=.
    - iv. Salary for March 2016, April, 2016 and May 2016 Kshs.309,450/=.
    - v. Punitive and exemplary damages Kshs.18,000,000/=.
    - vi. Costs and interest.
    - vii. Any other relief as the court may deem fit.

#### **Respondent's case**

10. In its response to the Memorandum of Claim filed on 29<sup>th</sup> January, 2020, the Respondent avers that it engaged the Claimant as a consultant on 1<sup>st</sup> September, 2013 and when it attempted employment of the Claimant, it had to terminate it as he was charging legal fees via a law firm where he was a partner and absented himself from work due to commitments at the law firm which exposed the Respondent to liability for conflict of interest.
11. According to the Respondent, the Claimant did not give his work full attention, failed to update the Respondent about the cases he was dealing with, raised fee notes against the Respondent, attempted to change company laws and was untruthful and disrespectful.
12. It is the Respondent's case that it took the Claimant through a disciplinary process before termination of employment.
13. The Respondent prays for dismissal of the suit with costs.

#### **Claimant's evidence**

14. On cross-examination, the Claimant confirmed that he was an Advocate of the High Court and was dismissed from employment on 24<sup>th</sup> June, 2016 and the suit herein was filed on 27<sup>th</sup> May, 2019 after 3 years and 2 months and was aware of the limitation period and had not sought leave to file the suit out of time.
15. The witness confirmed that he was an associate at Ochieng Arum Associates from 2012 to the present.
16. That he initially served as a Consultant and as an employee from 22<sup>nd</sup> June, 2015 and the contract of employment prohibited employment outside the Respondent.
17. In response to the letter from Otieno Arum Advocates dated 16<sup>th</sup> April, 2016, the witness confirmed that he had already left by that date and there was no conflict of interest.



## **Respondent's evidence**

18. RWI, Mr. Richard Sereti Nyamweya testified that the Claimant breached the employment contract by putting himself in a position of conflict of interest as he allocated work to the firm of Otieno Arum & Co. Advocates and issued an invoice of Kshs.350,000/= for work he had been employed to do.
19. The witness testified that the Claimant was given an opportunity to be heard.
20. On cross-examination, RWI confirmed that he had been an employee of the Respondent for 13 years and knew the Claimant well.
21. The witness confirmed that when the Claimant was employed as a Consultant, he handled court matters exclusively but as the Legal Officer, he assigned cases to external advocates among other duties.
22. The witness further confirmed that the Claimant was not issued with a notice inviting him for a hearing and had no evidence of any invitation at all.
23. He confirmed that after the suspension letter dated 9<sup>th</sup> March, 2016, the only other letter sent to the Claimant was the dismissal letter dated 24<sup>th</sup> March, 2016.
24. RWI was unambiguous that he had no record of minutes of the alleged meeting and could not confirm whether the Claimant attended the meeting in the company of a witness or not and had no record of attendance.
25. The witness further confirmed that the Claimant appealed by letter dated 2<sup>nd</sup> April, 2016.
26. That all the letters sent to the Claimant as a Consultant were addressed to Otieno Arum & Co. Advocates but for the letters dated 22<sup>nd</sup> June, 2015 and 1<sup>st</sup> September, 2016 on appointment as a Legal Officer.
27. The witness confirmed that the letter from Otieno Arum & Co. Advocates to the Respondent dated 16<sup>th</sup> April, 2019 demanding Kshs.3,032,280/= did not include the Claimant's name as a partner or employee.
28. Finally, the witness confirmed that he had no evidence of a demand of Kshs.350,000/= by the Respondent to the Claimant.
29. On re-examination, the witness maintained that the Claimant was accorded an opportunity to be heard as evidenced by letters on record.
30. That the Claimant appeared before an Adhoc Committee and the full board of the Respondent.
31. That the Respondent conducted a search and found that the Claimant was a partner at Otieno Arum & Co. Advocates.
32. Finally, the witness testified that the Claimant was dismissed from employment on 24<sup>th</sup> March, 2016 and commenced the instant case on 27<sup>th</sup> May, 2019.

## **Claimant's submissions**

33. As to whether the termination of the Claimant's employment by the Respondent was unfair, counsel submitted that the Respondent had not adduced evidence to establish the requirements of Sections 41, 43, 45(2)(b) and 47(5) of the *Employment Act*, 2007 and had no justifiable cause to terminate the Claimant's employment as the alleged complaints against him were not proven.



34. Counsel submitted that the summary dismissal was conducted without notice and the Respondent did not discharge the burden of proof under Section 43 of the [Employment Act](#), 2007. That the demand by letter dated 16<sup>th</sup> April, 2019 came long after the Claimant had left employment and no fee notes were produced.
35. Counsel urged that the Respondent violated its Human Resource Manual.
36. Counsel further submitted that the alleged untruthfulness and disrespect for the board by the Claimant was not proved as no evidence was adduced to substantiate the allegations.
37. On payment of dues, it was submitted that the Respondent did not dispute that no dues were paid and adduced no evidence of payment, including salary for March and April 2016.
38. Counsel urged that since the summary dismissal letter dated 24<sup>th</sup> March, 2016 stated that the termination was effective from 23<sup>rd</sup> March, 2016, the one (1) month's notice was not given.
39. As regards other reliefs, it was submitted that since the termination of employment was unfair, the Claimant was entitled to the reliefs sought namely; 12 months compensation, unpaid leave for one year and salary for March and April 2016.
40. Reliance was made on the Supreme Court decision in Kenfreight (EA) Ltd V Benson K. Nguti (2019) eKLR to reinforce the submission.

#### **Respondent's submissions**

41. As to whether the summary dismissal of the Claimant was fair, counsel cited the provisions of Section 44(3) of the [Employment Act](#), 2007 and the sentiments of the courts in Mckinley V BC Tel (2001) 2 SCR 161, 2001 SCC 38 and Kenya Power & Lighting Co. Ltd V Aggrey Lukorito Wasike (2017) eKLR, to submit that summary dismissal of the Claimant be upheld as he did not act in good faith
42. As to whether the Claimant breached the contract of employment, counsel submitted that the Claimant violated Clause 10 on conflict of interest as he did not seek permission from the board when he assigned work to Otieno Arum & Co. Advocates.
43. In conclusion, counsel submitted that the Claimant filed the instant suit outside the 3 years period prescribed by Section 90 of the [Employment Act](#), 2007.

#### **Determination**

44. The issues for determination are;
  - a. Whether the Claimant's suit against the Respondent is statute barred.  
Depending on the answer to (a)
  - b. Whether termination of the Claimant's employment was unfair.
  - c. Whether the Claimant is entitled to the reliefs sought.
45. As to whether the Claimant's suit is statute barred, the Claimant's counsel ignored the issue altogether while the Respondent's counsel mentioned it in his conclusion urging that the suit was statute barred by virtue of Section 90 of the [Employment Act](#), 2007.



46. It is not in dispute that the Claimant first joined the Respondent as a Consultant under the contract dated 1<sup>st</sup> September, 2013 for 6 months which was renewed by letter dated 24<sup>th</sup> March, 2014 until July 1<sup>st</sup> 2014 and renewed again up to 30<sup>th</sup> September, 2014 and subsequently upto 31<sup>st</sup> December, 2014.
47. The last renewal commenced on 2<sup>nd</sup> January, 2015 and ended on 31<sup>st</sup> June, 2015.
48. Subsequently, the Claimant was on 22<sup>nd</sup> July, 2015 offered the position of Legal Officer which he accepted on 1<sup>st</sup> July, 2015 under a long term contract of employment subject to a six (6) months probation period.
49. It is common ground that the Claimant was a partner in Otieno Arum & Co. Advocates.
50. In his undated written statement, the Claimant stated that after he was suspended by letter dated 9<sup>th</sup> March, 2016 and there was no communication from the Respondent until around 30<sup>th</sup> March when he received an email from the Human Resource Manager with an attachment of a summary dismissal letter dated 24<sup>th</sup> March, 2016. On cross-examination, the Claimant confirmed that he was dismissed from employment on 24<sup>th</sup> March, 2016.
51. The Claimant further confirmed that he filed the instant suit on 27<sup>th</sup> May, 2019. He also testified that he filed an appeal to the Human Resource and Administration Committee on 2<sup>nd</sup> April, 2017.
52. Similarly, RWI confirmed that the Claimant filed an appeal on 2<sup>nd</sup> April, 2015.
53. It is the Claimant's testimony that the Human Resource Administration Committee scheduled to sit on 23<sup>rd</sup> May, 2016 did not but the Human Resource Manager informed the Claimant that the Committee had rejected his appeal.
54. Finally, the Respondent's witness testified that the Claimant's employment was terminated on 24<sup>th</sup> March, 2016.
55. Section 90 of the [Employment Act](#), 2007 places a limitation of time within which causes of action under the Act must be instituted. It states 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 the Act or a contract of service in general shall lie or be instituted unless it is commenced within 3 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.”
56. In ascertaining whether the Claimant's claim was statute barred, it is critical to determine when the three (3) year period start running.
57. In *Nyabuto Arambe Abusa V Kenya Power & Lighting Co. Ltd* (2017) eKLR, the Court of Appeal stated as follows;
- “On question of when time starts running, it is the accrual date of the cause of action that determines it. This was settled in our recent decision of *Attorney General & another V Andrew Maina Githinji & another* (1916) eKLR.”
58. Waki JA with whose decision Kiage JA agreed, examined the same issue and stated as follows;
- “When did the cause of action in this case arise” put another way, when did the Respondents become entitled to complain or obtain a remedy from their employer through the court.”



On the one hand the AG contends that it was on the date of the Respondent's dismissal while the Respondents insists it was after their criminal trial was exhausted. There does not seem to be a direct authority from this court on the issue but the Employment and Labour Relations Court has pronounced itself on the matter in several cases sometimes in conflicting fashion. In many of them, however, it has been held that the cause of action for wrongful/unfair termination arises once a Claimant is terminated from employment. I will refer to a few by way of illustration . . .

This court has however taken a different view on this matter in the case Hilarion Mwabolo V Kenya Commercial Bank (2013) eKLR to the effect that accrual of the cause of action in a claim emanating from an 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 seeks a review or an appeal does not mean that the accrual of the cause of action is held in abeyance until a final verdict on the review of appeal.”

59. The court is in agreement with these sentiments.
60. The court expressed similar sentiments in Ben Kiplagat Tunduny V Standard Chartered Bank Ltd (2019) eKLR.
61. From the foregoing authorities, it is evident that time starts running from the date of termination of employment or dismissal.
62. In the instant case, on re-examination, the Claimant testified that he was still an employee until 3<sup>rd</sup> May, 2016 when he was notified of the termination of employment.
63. This testimony contradicts the contents of his written statement filed on 27<sup>th</sup> May, 2019 which, as adverted to elsewhere in this judgement is explicit that he was notified of the termination of employment by email from the Human Resource Manager on 30<sup>th</sup> March, 2016 to which the summary dismissal letter was attached.
64. Equally puzzlingly is the fact that the Claimant's statement and oral testimony on cross-examination are clear that he lodged an appeal with the Human Resource & Administration Committee on 2<sup>nd</sup> April, 2015 and was informed by the Human Resource Manager that the appeal fell through as did his attempts to have the matter discussed at a board meeting held on 30<sup>th</sup> May, 2016 and was instructed to clear and handover yet the summary dismissal letter had instructed him to make arrangements to handover any company property in his possession.
65. Finally, the summary dismissal was effective from 23<sup>rd</sup> March, 2016.
66. Since time started running on 23<sup>rd</sup> March, 2016 and the instant suit was filed on 27<sup>th</sup> May, 2019, it is clear that it was statute barred.
67. Even assuming that the date of dismissal was 30<sup>th</sup> March, 2016 when the Claimant was notified of the same, the action would still be time barred as it was instituted pursuant to the provisions of the [Employment Act](#), 2007.
68. For the above-stated reasons, it is the finding of the court that the Claimant's suit herein filed on 27<sup>th</sup> May, 2019 was statute barred and is accordingly dismissed as this court lacks jurisdiction to determine it.
69. It is trite that jurisdiction is everything.
70. Having found as above, the other issues are not amenable to determination.



71. Parties shall bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF NOVEMBER 2023**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**DR. JACOB GAKERI**

**JUDGE**

