



**Maina v Kenya Revenue Authority (Miscellaneous Application
E188 of 2023) [2023] KEELRC 2967 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2967 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E188 OF 2023**

**B ONGAYA, J
NOVEMBER 20, 2023**

BETWEEN

CYRUS MACHARIA MAINA PETITIONER

AND

KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. The Petitioner filed a notice of motion application dated 11.09.2023 through J.A Guserwa & Company Advocates seeking the following orders:
 - a. That this honourable Court be pleased to grant the petitioner leave to file his petition out of time.
 - b. That the petition annexed hereto be deemed as duly filed upon payment of the requisite court fees.
 - c. That the costs of this application be in the cause.
2. The said application is made on the following grounds:
 - a. That the delay in filing the instant suit is not intentional and that it is in the interest of justice that the court do grant the applicant leave to file the instant suit out of time as he was awaiting the verdict.
 - b. That the petitioner's rights have been violated by the respondent and can only be safeguarded by filing his petition after leave has been granted as sought herein.
3. The Respondent or Applicant has in reply filed a preliminary objection dated 06.10.2023 through Nick Otieno Osoro Advocate.
4. The preliminary objection was made upon the following grounds:



- a. That the suit is time barred and offends mandatory provisions of section 90 of the [Employment Act](#).
 - b. That the reliefs sought in the intended petition are in violation of section 90 of the [Employment Act](#), 2007 which is couched in mandatory terms.
 - c. That the applicant's contract of employment was terminated on 27.03.2009 whilst this application or intended petition was filed on 11.09.2023 and served upon the respondent on 02.10.2023, 14 years on.
 - d. That the applicant is circumventing the [Employment Act](#), 2007 by relying on the constitutional provisions having realised the matter is statute barred under the parent Acts.
 - e. That the applicant or petitioner herein is raising none existent constitutional issues and is trying to enforce employment contract, which is regulated by [Employment Act](#) 2007. By going behind the statute and seeking to rely on Article 41 of the Constitution on the right to fair labour practices, which is given effect to in various statutes, of which [Employment Act](#) and [Labour Relations Act](#) are primary. The primary statute should not be circumvented as per holding in [Matthew Kamanu Mwaura v Permanent Secretary Office of the President Provincial administration & 2 others](#) [2018] eKLR.
 - f. That the Honourable Court neither has statutory jurisdiction nor discretion to grant leave or extend time in causes of action based on breach of contract of service or actions arising out [Employment Act](#), 2007.
 - g. That this suit is an abuse of the court process.
 - h. That the suit is incompetent and ought to be struck out with costs.
5. The parties filed their respective submissions. The court has considered the parties' respective cases and makes finding as follows.
 6. The Court has considered the matter at hand. Pertinent is paragraph 17 of the draft petition thus,

“On 21st of April, 2009 the petitioner wrote a letter for appeal of the decision and several other letters requesting for a review of the decision to dismiss him as follows: 21st April 2009, 30th August 2010 and 24th October 2011 but no response was forthcoming from the respondent.”

Thus, the applicant having been dismissed by letter dated 27.03.2009, he promptly appealed per the prevailing contractual terms and applicable service regulations. It appears that the respondent does not deny that the applicant was entitled to appeal administratively. The applicant did reminders and waited patiently. It appears the petitioner has a constitutional lamentation that his appeal took inordinate delay until the letter of May 2023. It appears that he has a claim related to the contract of employment and blended with the delayed determination of the appeal. The delayed determination of the appeal appears to the Court to have been a continuing injury lapsing with the letter of May 2023 so that in absence of any other thing, that continuing injury would not be barred under section 90 of the [Employment Act](#), 2007 because, the time of limitation is 12 months from the cessation of a continuing injury and which has not lapsed at all. It is by that letter said to have been in May 2007 that the applicant learned that his appeal would not be decided. It thus appears that the time of limitation has not lapsed at all for that continuing cause of action. The parties should then be able to define their respective positions if and when the proposed petition is filed.



7. While the applicant has established a continuing injury, no leave is essentially needed. Further, as submitted for the respondent, where time of limitation under section 90 of the *Employment Act* has lapsed, there appears to be no statutory provision for the Court to extend the lapsed time or grant leave as prayed for. However, in petitions to enforce the *Constitution* or the Bill of Rights, time may have lapsed, but for good reasons shown, the petition may be entertained outside the period of limitation. In the instant case, the permissible scope of claims based on the established continuing injury that is not time barred will be determined by the pleadings, the evidence, and submissions made.

In conclusion the application is hereby determined with orders:

- a. The applicant appears to have a continuing cause of action and is at liberty to file petition as long as the time of limitation in section 90 of the *Employment Act*, 2007 has not lapsed in that regard.
- b. The costs of the application to abide the outcome of the proposed petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 20TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

