



**Teachers Service Commission v Suji (Appeal 5 of 2023)  
[2023] KEELRC 2923 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2923 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL 5 OF 2023  
CN BAARI, J  
NOVEMBER 16, 2023**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPELLANT**

**AND**

**ERICK ODHIAMBO SUJI ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. M. O.Wambani (C.M)  
delivered on 15th December, 2022 in Siaya CMCC Misc. Case No. E015 of 2022)*

**JUDGMENT**

1. The appeal herein arises from an order issued on 15<sup>th</sup> December, 2022, allowing the Respondent to lodge an employment claim out of time.
2. The Appellant being dissatisfied with the decision of the Trial Court to enlarge time, lodged this appeal on 5<sup>th</sup> May, 2023.
3. The appeal is premised on the grounds that:
  - i. The Learned Magistrate acted without jurisdiction and grossly erred in law by granting a relief which is contrary to the provisions of Section 90 of the Employment Act. In doing so, he failed to appreciate that Section 90 is couched in mandatory terms and negates the Court of any power to extend time.
  - ii. The Learned Magistrate erred in law when he determined a substantive matter ex parte and in doing so, condemned the Applicant unheard contrary to the provisions of Articles 47, 48 and 50 of the Constitution and the rules of natural justice.
  - iii. The Learned Magistrate grossly misinterpreted and misapplied the relevant law and the facts and arrived at an erroneous conclusion of law.



- iv. The Learned Magistrate erred in law and fact when he made a decision that is contrary to the law, judicial authorities and jurisprudence. In doing so, he violated the doctrine of stare decisis which is key in the justice system.
  - v. The Learned Magistrate erred in law when he failed to deliver a reasoned ruling highlighting the points for determination, the decision thereon, and the reasons for such decision.
  - vi. The Learned Magistrate erred in law and fact by failing to appreciate and find that the Respondent's cause of action against the Appellant did not warrant extension of time, and neither is the same envisaged under Section 90 of the *Employment Act*.
  - vii. The Learned Magistrate erred in law and fact by failing to appreciate that the Application by the Respondent was otherwise an abuse of the court's process.
4. The Appellant prays that this Appeal be allowed and the Orders of Hon. M. O. Wambani (CM) delivered on 15/12/2022, in Siaya Misc. Civil Case No. E015 of 2022 be set aside.
  5. The Appellant further prays that Siaya Employment and Labour Relations Court Cause No. 1 of 2023 be struck out with costs to the Appellant.
  6. Parties canvassed the appeal through written submissions. Both parties filed submissions.

### **The Appellant's Submissions**

7. It is submitted for the Appellant that the Learned Magistrate acted without jurisdiction by extending time in a suit based on an employment contract and thus failed to appreciate that Section 90 of the *Employment Act* is couched in mandatory terms.
8. The Appellant further submits that that the said Section, noting the nature of the employment contract, in mandatory terms, limits the time for instituting claims arising from employment contract to 3 years. It is submitted that the Section does not give room for extension of time beyond the stipulated 3 years. The Appellant sought to rely in the decision of Justice Radido in Josephat Ndirangu v Henkel Chemicals (EA) Ltd to buttress this position.
9. It is the Appellant's submission that the Learned Magistrate acted ultra vires by extending time to file the Claim out of the required 3 years as required by the *Employment Act*. Reliance was had to Civil Appeal 28 of 2014 - Beatrice Kahai Adagala v Postal Corporation of Kenya to support this assertion.
10. It is submitted that the Learned Magistrate was stripped of jurisdiction by the lapse of 3 years. The Appellant further submits that the Court's jurisdiction flows from either *the Constitution* or Statute, and that jurisdiction is everything and when a Court has determined it has no jurisdiction, it must not proceed further. The Appellant had reliance in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR.
11. It is the Appellant's further submission that the Learned Magistrate erred in law when he determined the Application for extension of time ex parte, and thus condemned the Appellant unheard contrary to the rules of natural justice.
12. It is the Appellant's submission that pursuant to the rules of natural justice, specifically, that no man shall be condemned unheard, the Appellant ought to have been involved in the dispensation of the Application for the extension of time as the Court has a duty to act fairly.
13. It is submitted for the Appellant that in determining the application ex parte, the Learned Magistrate negated Articles 48 and 159 (2) (a) of *the Constitution* that requires justice to be done to all. The



Appellant further submits that it was denied an opportunity to respond to the application, even though the issues raised therein, were substantive and ought to be defended. The Appellant had reliance in the decision of Nyakundi J. in Civil Suit No. 14 of 2020: Doa Doa Tented Camps and Lodges Limited v Jubilee Insurance Company of Kenya Limited to buttress this position.

14. The Appellant urge that this Court allows the appeal and strikes out Siaya ELRC Cause 1 of 2023, as the same is filed 5 years late, and outside the time limit of 3 years.

### **The Respondent's Submissions**

15. The Respondent submits that he admits that his claim before the Trial Court is time barred, and further submits that it is not his fault that he did not file his case within time, the filing having been delayed by Covid.19 and the closure of Courts on account of a government directive.
16. It is the Respondent's submission that the Siaya ELRC Court was convinced that his application had merit and hence the order granting him leave to lodge his claim out of time.
17. The Respondent submits that Appellant's appeal is an intention to manipulate the Court process, and violates Article 159 (d) of *the Constitution* that demands that Courts renders justice without undue reliance on technicalities.
18. It is the Respondent's submission that leave to extend time is a matter of discretion and which should be exercised in the interest of justice.
19. It is the Respondent's submission that the Chief Magistrate's Court at Siaya has original jurisdiction to handle cases where the Applicant earned Kshs. 80,000 and below. It is his further submission that the Trial Court has jurisdiction to over his case, since he was earning Kshs. 65,000 per month.
20. The Respondent submits that his application for extension of time was urgent, and hence the reason the Trial Court acted ex parte to pave way for a fair and just hearing by granting him leave.
21. The Respondent prays that the appeal by the Teachers Service Commission (TSC) be dismissed and the order of Hon. N. O. Wambani of 15<sup>th</sup> December, 2022, be upheld. The Respondent further prays that Siaya Chief Magistrates employment Cause No. 1 of 2023 be allowed to proceed to full hearing.

### **Analysis and Determination**

22. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized as follows:
  - a. The Learned Magistrate erred in law when he determined a substantive matter ex parte and in doing so condemned the Applicant unheard contrary to the provisions of Articles 47, 48 and 50 of *the Constitution* and the rules of natural justice.
  - b. The Learned Magistrate acted without jurisdiction and grossly erred in law by granting a relief which is contrary to the provisions of Section 90 of the *Employment Act*. In doing so, he failed to appreciate that Section 90 is couched in mandatory terms and negates the court of any power to extend time.
23. The Trial Court heard the Respondent's application and allowed him leave to lodge a claim out of time ex parte. The Appellant is aggrieved by this turn of events, on the premise that it was contemned unheard contrary to the express provisions of Articles 48 and 50 (1) of *the Constitution*.



24. The Respondent's only response to this assertion is that his application was urgent, and hence the decision by the Trial Court to hear him and grant ex parte orders.
25. Indeed, the rules of natural justice require that no one should be condemned unheard. The Trial Court should have, at the very least allowed the Appellant to be served with the Respondent's application for leave before granting final orders without allowing the Appellant an opportunity to respond.
26. Nyakundi J. in Civil Suit No. 14 of 2020- Doa Doa Tented Camps and Lodges Limited v Jubilee Insurance Company of Kenya Limited, while citing the case Sangram Singh v Election Tribunal Kotch (AIR 1955 SC 664) had this to say on Natural Justice: -

“There must be ever present to the mind; the fact that our Laws of Procedure are guided on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that not be precluded from participating on them.”
27. No matter how urgent a matter before a Court is, a Court cannot reach a final decision without allowing a party an opportunity to respond, except where a party is served, the service is proved by filing of a return of service and the party does not appear.
28. The Respondent did not allude to having in any way, notified the Appellant of his application before the Trial Court. The Appellant was without a doubt condemned unheard, and I so hold.
29. The next issue is whether or not the Trial Court had jurisdiction to extend time and to continue entertaining the Respondent's claim before it. Jurisdiction they say is everything, and without which a court cannot go one more step (See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR.)
30. The issue of jurisdiction arises firstly, from whether or not a Court had the power to enlarge the time allowed under Section 90 of the [Employment Act](#) for filing of employment related claims. Section 90 states thus: -

“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.”
31. The time limitation by this section is three (3) years. The question is whether this time is elastic. In *George Amoth & 14 others v Kenya Medical Research Institute (KEMRI)* [2016] eKLR, Maureen J, while citing the Court of Appeal's decision in *Mary Osundwa V Nzoia Sugar Company Limited* [2002] eKLR, held that Section 27 of the [Limitation of Actions Act](#), does not give jurisdiction to the Court to extend time for filing suit out of time in cases involving contract or any other cause of action other than those in tort.
32. Again, in *Kisumu Civil Appeal No.6 of 2015 between Kenya Airports Authority V Shadrack Abraham Kisongochi*, the Court held that the Trial Court acted without jurisdiction in allowing the Respondent to file his suit outside the statutory period.



33. Further, Radido J in Josephat Ndiranqu - vs - Henkel Chemicals (EA) Limited (2013) eKLR had this to say on extension of time: -

“To my mind, similar principles in respect of what the Court of Appeal stated about section 4(1) of the Limitation of Actions Act apply in respect of section 90 of the Employment Act and I would for the sake of clarity state that no employee has the right or power to bring after the end of three years from the date of dismissal or termination, an action founded on a contract of service and that the Industrial Court has no right or power to entertain such claims or extend time for bringing such action.”

34. Similarly, the Court of Appeal in Civil Appeal 28 of 2014 - Beatrice Kahai Adagala v Postal Corporation of Kenya held thus: -

“.....Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of Divecon Limited -vs- Samani [199519981 1 EA P.48. a decision relied upon by Radido, J. in Josephat Ndiranqu - vs - Henkel Chemicals (EA) Limited [20131 eKLR, the limitation period is never extended in matters based on contract (emphasis own). The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act.”

35. It is therefore clear as day, that the limitation period given under Section 90 of the Employment Act is not elastic. No Court can extend the three-year period. The Respondent having admitted that indeed his claim was indeed statute barred by the year 2020, leaves this Court with nothing to offer him but sympathy.

36. It is settled that jurisdiction is the bedrock of any Court decision and without it, a Court's findings are a nullity. To this end, I hold the lower Court's decision to extend time a nullity.

37. Further, for reason that the claim before the lower Court is statute barred, I proceed to order that the Respondent's claim, being Siaya Chief Magistrates Employment Cause No. 1 of 2023, be and is hereby struck out.

38. I make no orders on costs.

39. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

N/A for the Appellant

N/A for the Respondent

Erwin - Court Assistant.

