



**Ajienga v Nairobi Bottlers Limited (Cause E412 of 2023)
[2023] KEELRC 2931 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2931 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E412 OF 2023
NZIOKI WA MAKAU, J
NOVEMBER 14, 2023**

BETWEEN

POLYCARP OWINO AJIENGA CLAIMANT

AND

NAIROBI BOTTLERS LIMITED RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Preliminary Objection dated 11th July 2023 on the ground that this Honourable Court lacks the jurisdiction to hear and determine this Claim as the same is time barred under the provisions of section 90 of the *Employment Act*, 2007 and the binding decisions of the Court of Appeal in the cases of: *Attorney General & another v Andrew Maina Gitbinji & another* [2016] eKLR; and *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another* [2016] eKLR.
2. In reply, the Claimant filed his Response dated 14th September 2023 opposing the Respondent's Preliminary Objection on the grounds that the claim as filed is not time barred in terms of section 90 of the *Employment Act*. In depth, that he was terminated from employment through a termination letter dated 6th April 2020 and being aggrieved, he immediately filed an appeal on 15th April 2020, which appeal was heard by the Respondent who issued a final verdict upholding the termination in its letter dated 2nd June 2020. That he thereafter filed his claim on 15th May 2023, which is within the three (3) years stipulated by statute. The Claimant relied on the case of *Rashid Dika Yussuf Ali v Director General, National Youth Service* - Petition No. E125 of 2022 in which Your Lordship distinguished the applicability of the Court of Appeal decisions cited by the Respondent and stated at paragraph 19 thereof that internal disciplinary mechanisms available to a party must be concluded before seeking court action/relief. It was the Claimant's stance that the P.O herein be dismissed with costs for not meeting the criteria of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Limited* [1969] EA 696.



3. In its Submissions, the Respondent/ Applicant asserted that whereas the Claimant's employment contract was terminated on 8th April 2020, he instituted this suit on or about 19th May 2023 to which it responded with their Statement of Response and the P.O herein raising the issue of jurisdiction. The Applicant maintained that this Court has no jurisdiction to hear this matter because it is time barred.
4. The Applicant cited the case of *Owners of Motor Vessel 'Lilian S' v Caltex Oil (K) Limited* [1989] KLR 1 in which the Court of Appeal held that jurisdiction is everything and without it, a court has no powers to make one more step. It further relied on the decision of the Supreme Court in Application No. 2 of 2011 - *Samuel K. Macharia & another v KCB & another* [2012] eKLR that a Court of law can only exercise jurisdiction as conferred by the constitution or other written law and that it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
5. It further submitted that the jurisdiction of this Court (ELRC) is established under Article 162 of the *Constitution of Kenya* and that it is trite law that the primary law governing an employer-employee relationship is the *Employment Act* of 2007. That section 90 of the *Employment Act* provides as follows:

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. (Emphasis added by Applicant)
6. It was the Respondent/Applicant's submission that the cause of action in an employment dispute regarding termination of employment arises when a termination letter has been issued against the employee. That various decisions concerning computation of time in employment matters have been premised on when the letter of termination was issued such as in the majority decision of the Court of Appeal in *Attorney General & another v Andrew Maina Gitinji & another* [2016] eKLR. That in the case of *John Muangi Ngugi v Orient Sacco Society Limited* [2021] eKLR, the Court found that the claim was not statute barred having been filed on 13th March 2020 just before the lapse of the limitation period on 14th March 2020, after considering that the claimant's employment was terminated on 13th March 2017. The Applicant thus urged this Court to find in favour of the position that the cause of action in employment disputes arises at the issuance of the termination letter.
7. The Respondent/Applicant argued that in the instant case, it is undisputed that the letter of termination was issued on 6th April 2020 and was to take effect on 8th April 2020, which date the cause of action thus arose and not in June when the Appeal was concluded. That this is so because: the employer-employee relationship became non-existent after 8th April 2020 as there was neither services being rendered nor remuneration for the same; an appeal is not an extension of the employment relationship and it is seeking reinstatement of the relationship; appellate proceedings do not preclude one party from going to court; the three-year rule is meant to encompass the time taken in the resolution of any internal mechanisms by the employer; and there are no exceptions to the three-year rule. It urged the Court to disregard the insinuation that because appellate procedures are ongoing by the employer, then the time provided for by section 90 of the *Employment Act* is held in abeyance, as was affirmed by the Court in *John Kiiru Njiiri v University of Nairobi* [2021] eKLR. That the only exceptions lay within the provisions of section 90, that is, in the case of continuing injury or damage where a suit may be instituted within twelve months after the end of that injury or damage.
8. Further, that the Court has also laid emphasis that the limitation period cannot be extended by the Court in matters based on an employment contract as held in *John Kiiru Njiiri (supra)*. That the Court of Appeal affirmed this position in the case of *Beatrice Kahai Adagala v Postal Corporation of Kenya*



[2015] eKLR in which it held that a claim based on a contract of employment must be filed within 3 years and that the limitation period is never extended in matters based on contract.

9. The Respondent/Applicant thus implored this Court to hold that it has no jurisdiction to hear and determine this matter and to strike out the Claim with costs to the Respondent.
10. The Respondent is correct in its surmise that the Claimant ought to have filed his suit within 3 years of termination of his contract. Why he waited for the eclipse of his rights before seeking relief is unfathomable. He had gone as far as to appeal the decision to terminate him and thus was alive to his rights. He should have filed his claim in July of 2020 and not wait till 26th May 2023 to file suit. The suit being time barred is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

