



Mwaniki v Kenya Wildlife Service (Employment and Labour Relations Cause 792 of 2017) [2023] KEELRC 3416 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3416 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 792 OF 2017
K OCHARO, J
DECEMBER 20, 2023**

BETWEEN

ABEDNEGO MUSAVI MWANIKI CLAIMANT

AND

KENYA WILDLIFE SERVICE RESPONDENT

RULING

Introduction

1. Through a notice of preliminary objection dated May 25, 2022 the claimant contends:
 - 1) That the respondent's counter-claim dated May 10, 2022 ought to be struck out with costs to the Claimant for being statutorily time barred.
 - 2) That the counter-claim offends the mandatory provisions of section 90 of the [Employment Act 2007](#).
2. The parties agreed that the said preliminary objection be canvassed by way of written submissions.

The Claimant's written submissions

3. The claimant filed his written submission in support of the preliminary objection on the October 19, 2022 distilling only one issue for determination thus:
 - a) Whether the respondent's counter-claim dated May 10, 2022 ought to be struck out for being statutorily time barred



4. The Claimant's counsel submitted that the preliminary objection is anchored on the provisions of Section 90 of the [Employment Act](#), 2007 which provides:

“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.”

5. Further, the preliminary objection is properly raised and it meets the threshold set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, thus:

“... A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

6. The Claimant submits that the Respondent's counterclaim is anchored on the fact that between the period 2012 and 2014, whilst the Claimant was in employment, it advanced him a loan. The claimant never repaid the facility. It is clear therefore that the cause of action arose way back on or around the year 2014. By dint of section 90 of the [Employment Act](#) 2007, the Respondent's Counterclaim is time barred.

7. To support the above stated point, reliance was placed on the case of *Peter Katithi Kitbome v Laboratory & Allied Limited* [2021] eKLR where it was held:

“Section 90 of the [Employment Act](#), 2007 has now amended the [Limitation of Actions Act](#) to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the [Employment Act](#), 2007. This Court neither has the 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 of the [Employment Act](#), 2007.”

8. Counsel further argued that there is nothing that bars the claimant from pleading limitation of action in this matter. He is not estopped in any way from so doing. To buttress this, the claimant relied on the case of *Maersk Kenya Limited v Murabu Chaka Tsuma* [2017] eKLR where it was held:

“We have considered the materials placed before the court and find that they do not disclose any contract made by the appellant stating that it would not plead limitation, and the respondent has not demonstrated in any way how the appellant was estopped from pleading limitation, more particularly as it is not in dispute that the respondent was dismissed from employment on November 20, 2006. Following his dismissal, nothing precluded him from filing a claim for compensation and loss of earnings within the stipulated period. In our view, the respondent slept on his rights, and equity does not come to the aid of the indolent.”

9. Lastly, it is submitted that by reason of the premises, the Respondent's counterclaim should be struck out as it is time barred.



The Respondent's submissions

10. The respondent's counsel submits that the counterclaim herein was onboarded by way of an amendment that was by leave of the Court. Further, the doctrine of relation back applies against the Claimant's plea of limitation of action. According to the doctrine whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth of attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.
11. It was further submitted that the counterclaim arises out of the contract of employment between the Claimant and the Respondent as the amount claimed through the counterclaim was advanced to the latter during his employment. The Counterclaim should therefore be deemed to relate back to the date the reply of the claim was filed. To support this position taken, Counsel placed reliance on the case of *Easter Radio Services and another v R J Patel T/A Tiny Tots and Another* [1962] EA.
12. Further reliance was placed on the case of *Mitchell v Harris Engineering Company Limited* [1967] 2 QB where Lord Denning in dismissing an appeal held:

“It is the most beneficial provision which enables the courts to amend proceedings whenever the justice of a case so requires. The amendment relates back to the date of the issue of the writ.”
13. It is submitted that the issue of limitation of time ought to have been raised before the amendment was allowed and once the application was allowed to amend the response, the amendment and the counterclaim dates back to the original response filed by the respondent. The issue cannot be raised now.
14. The Respondent submits that between December 2013 and April 2014, the Claimant's wife fell ill and needed medical attention in Kenya and India. The Claimant could not afford the cost of treatment as it exceeded what was provided for in the medical cover. The Respondent advanced to the Claimant the sum of Ksh. 1,194,001.70 to offset the medical bills and the said amount was to be deducted from the Claimant's salary, however, he left the Respondent's employment without having paid back the said amount. These facts form the foundation of the Respondent's cause of action.
15. It was further submitted that this Court canvassed the issue when it allowed the application for amendment of the Respondent's pleadings. Therefore, the issue of limitation of action raised by the Claimant is res judicata.
16. Counsel submitted that where a cause of action is brought by amendment of pleadings, that cause of action cannot be declared as time barred. To support this point, reliance was placed on the decision in the case of *Kuloba v Oduol* [2001] eKLR where it was held:

“Even if the amendment seeks to set up a new cause of action which is outside the limitation period, I am of the view that it is an amendment which is permissible under Order VIA rule 3 of the rules as it is a claim emanating from the same set of facts.”

Analysis and determination

17. I have carefully considered the preliminary objection on record as well as the rival submissions by the respective parties and the following issues present themselves for determination thus:
 - i) Whether the issue of limitation of time raised by the claimant is res judicata.



- ii) If the answer to [i] above is in the negative, whether the Respondent's counter-claim dated May 10, 2022 should be struck for being statutorily time barred.
- iii) Who should bear the costs of the application?

Whether the issue of limitation of time raised by the Claimant is res judicata.

- 18. Through its notice of motion application herein dated October 12, 2021, the respondent sought; leave to amend the memorandum of reply to incorporate a counterclaim and leave to file additional documents by way of a supplementary bundle of documents and witness statement in support of the counterclaim. This Court rendered itself on the application through its ruling dated April 28, 2022.
- 19. True as the respondent's counsel states, in response to the application, the claimant expressed that the counterclaim that was sought to be brought onboard was time barred. However, what isn't true is the assertion that this court did consider the issue of limitation of time. Contrary to the assertion this Court did save the directing of its mind on the issue for a future date. It directed;

“ 18.

- (e) The Claimant/Respondent contends that the intended counterclaim is time barred by the operation of the law. I am of the view that the matter of limitation can only be adequately canvassed in the course of the main hearing as a preliminary objection.”

- 20. The direction was necessitated by the fact that at the time there was not adequate material before the Court to enable it to justly render itself on the issue. In my view, the most appropriate time for interrogation of the issue was after the Respondent had put on record the necessary documents in support of the counterclaim. In limb two of its application, it had sought leave to file the documents.
- 21. By reason of the premises, I find no difficulty in concluding that the argument by the Respondent that the issue of limitation of time raised by the claimant is res judicata, is misplaced.

Whether the Counterclaim should be struck out for being statutorily barred.

- 22. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696 is the locus classicus on the issue of what constitutes a preliminary objection. The Court rendered itself:

“... A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

- 23. In the same case Sir Charles Newbold, P added the following:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”



24. The Supreme Court in Independent *Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objection:

“The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

25. I have carefully considered the matter raised in the claimant’s preliminary objection and hold that the preliminary objection is properly taken as it meets the threshold set out by the authorities cited above.

26. The backbone of the claimant’s preliminary objection is the fact that the Respondent’s cause of action, the basis of its counterclaim, arose in or about the year 2014. Indeed, the Respondent in its submissions seems to admit this by submitting inter alia;

“ 11. The Counterclaim is based on the grounds that;

- a) Between December 2013 and April 2014, the Claimant’s wife, fell ill and needed medical attention in Kenya and India. The Claimant could not afford the cost of the treatment as it exceeded what was provided for in his medical cover.
- b) The Respondent advanced to the claimant the sum of Kshs. 1,194,001.70 to offset the medical bills. The money advanced was to be deducted from the Claimant’s salary.
- c) The Claimant left the Respondent’s employment without having paid back the sum of Kshs.1,194,001.70.

12. The aforementioned grounds form the foundation of the respondent’s cause of action against the Claimant in the counterclaim.”

27. I have carefully considered the matters raised by the Respondent against the Claimant’s preliminary objection and with great respect hold that they are so raised in ignorance of crucial aspects of counterclaims known or that ought to be known by Advocates and litigants alike. A counterclaim is substantially a cross-action not merely a defence to the claimant’s claim. It is a tool that enables a defendant to enforce a claim against the Claimant as effectively as in an independent action. It need not be an action of the same nature as the original action or even analogous thereto.

28. The counterclaim must be of a nature that the Court would have jurisdiction to entertain it as a separate action. Statutory limitation of actions acts as a jurisdictional deprivation factor. Therefore, if the matters raised in a counterclaim cannot be successfully litigated in a separate suit by the initiator of the counterclaim on an account that they are time-barred, then the Court cannot have jurisdiction to entertain the counterclaim.

29. In my view, filing of counterclaims therefore is affected by statutory limitation of actions just like they do on plaints. There are therefore time limits for filing counterclaims. The time limit is what is prescribed by the law of limitation in relation to the particular counterclaim. If it appears from the material placed before the court that the counterclaim set up is time-barred by the law of limitation, the counterclaim is for rejection.



30. Section 90 of the *Employment Act* provides:

“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. It is worth noting that the coming into effect of the *Employment Act*, 2007 and therefore the foretasted provision, had a twin effect. First, it ousted the applicability of section 4 [1] of the *Limitation of Actions Act* on civil suits or proceedings premised on or arising from the *Employment Act*, or a contract of service in general. Second, unlike for actions of contract, tort and certain other actions contemplated under section 4 [1] of the *Limitation of Actions Act*, the provision reduced the limitation of time from 6 [six] years to 3 [three years] for the matters stipulated therein.

32. Having stated as I have hereinbefore, I am persuaded that the Respondent’s counterclaim herein was filed almost seven [7] years after the cause of action arose. Section 90 of the *Employment Act* being the law applicable to the counterclaim, I find it time-barred as it was filed outside the three [3] contemplated therein.

33. The Respondent contended that the application of the doctrine of relation back vanquishes the Claimant’s preliminary objection. With great respect, how the Respondent has advanced the doctrine in this matter, is misguided. The Respondent argued that its Counterclaim filed herein should be deemed to relate back to the filing of the original claim by the Claimant, and thus should be considered timely filed within the three-year statute limitation.

34. Costs of the counterclaim shall be to the Claimant.

35. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF DECEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the Presence of;

Mr. Opere for the Respondent.

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 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.

A signed copy will be availed to each party upon payment of Court fees.



OCHARO KEBIRA
JUDGE

