



**Gituanja v Spread Eagle Ltd (Employment and Labour Relations Cause E963 of 2022) [2023] KEELRC 3291 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3291 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E963 OF 2022  
BOM MANANI, J  
DECEMBER 14, 2023**

**BETWEEN**

**JAMES KIBATHI GITUANJA ..... CLAIMANT**

**AND**

**SPREAD EAGLE LTD ..... RESPONDENT**

**RULING**

1. The parties to this action had an employment relation which was anchored on a fixed term employment contract that was executed between them at the tail end of April 2019. The contract was intended to have run from 1<sup>st</sup> May 2019 to 30<sup>th</sup> April 2022. However, it was terminated prematurely.
2. From the record, the Claimant tendered his resignation from the relation on 12<sup>th</sup> September 2019. He contends that he was forced into resigning for the reasons that appear in the body of his statement of claim. Thus, he posits that his exit from employment was involuntary.
3. Apparently, the employment relation between the parties had begun much earlier than 1<sup>st</sup> May 2019. They had an earlier contract of service which was replaced with the contract under consideration. This reality is informed by the fact that at the time that the Claimant was tendering his letter of resignation on 12<sup>th</sup> September 2019, he had allegedly accumulated 86.5 leave days.

**Preliminary Objection**

4. After the Respondent was served with the Memorandum of Claim, it filed a Notice of Preliminary Objection. The Respondent contends that the Claimant's suit is time barred. As such, it should be struck out.
5. The Respondent contends that the Claimant resigned from employment on 12<sup>th</sup> September 2019. Yet, he filed his case on 22<sup>nd</sup> December 2022, approximately three years and three months down the line.



6. According to the Respondent, the suit was filed outside the timelines that are prescribed under section 90 of the Employment Act. This provision requires that such suit be filed within three years from the date of the cause of action.
7. The Claimant has contested the objection. According to him, the date of the cause of action is not the date that he tendered his resignation. Rather, it is the date that the said resignation took effect.
8. According to the Claimant, in his letter of resignation, he requested that he be allowed to proceed on his accumulated annual leave pending the taking effect of the resignation. He contends that the Respondent acceded to this request and permitted him to proceed on leave for the 86.5 accrued leave days.
9. The Claimant contends that the leave days aforesaid excluded public holidays and rest days. Therefore, his accrued leave ran up to 27<sup>th</sup> December 2019 or thereabouts.
10. According to the Claimant, before 27<sup>th</sup> December 2019, he was still in the Respondent's employment but on annual leave. Consequently, closure of the contract of service between the parties took place on 27<sup>th</sup> December 2019 or thereabouts after he had utilized the outstanding leave days. The Claimant contends that this is the date that the resignation took effect.

### **Analysis**

11. It is not in dispute that the Claimant's letter communicating his election to resign from employment is dated 12<sup>th</sup> September 2019. The dispute is on when the resignation took effect.
12. In order to answer this question, it is important to look at the wording of the letter. The letter is couched in the following terms:-

“ref: Resignation Letter

Following our conversation yesterday I wish to tender my resignation for the position of the General Manager Sagana Resort as per the terms dictated in the employment dated 30<sup>th</sup> April 2019.

After completion of the handover to the incoming manager I wish to request to proceed on my accumulated annual leave.

I wish to thank you, staff and entire Spread Eagle fraternity for the period I have served the company.

With kind regards I wish you all the Lord's providence.

Yours sincerely,

James K G ituanja”

13. From this letter, it is clear that the Claimant's resignation was to take effect upon utilization of his accrued annual leave days. One cannot be on leave in respect of a contract of service that has already been closed. The employment relation still subsists during the period that one is on leave.
14. At paragraph 10 of the Memorandum of Claim, the Claimant indicates that as at 12<sup>th</sup> September 2019, he had 86.5 accumulated annual leave days. He avers that from 12<sup>th</sup> September 2019, the 86.5 days were to run up to 27<sup>th</sup> December 2019 or thereabouts excluding public holidays and rest days. It is the Claimant's case that the Respondent granted his request.



15. The preliminary record before court shows that there is a leave request form for 86.5 days. It bears a signature indicating that the leave request was approved.
16. The Claimant contends that this request was tendered pursuant to his letter to the Respondent dated 12<sup>th</sup> September 2019. The Respondent has not denied this fact.
17. In effect, the contract of service between the parties remained alive until after the Claimant had utilized the accrued 86.5 leave days commencing from 12<sup>th</sup> September 2019 or thereabouts. Put differently, the Claimant's resignation took effect after the lapse of the 86.5 leave days from 12<sup>th</sup> September 2019 or thereabouts excluding rest days and public holidays. A computation of when this number of days ran up to excluding public holidays and rest days takes us to 27<sup>th</sup> December 2019 or thereabouts.
18. This claim was filed on 22<sup>nd</sup> December 2022, approximately six (6) days before the lapse of three years from the date that the Claimant's resignation took effect (27<sup>th</sup> December 2019). Therefore, the case was filed within the timelines that are stipulated under section 90 of the Employment Act.

### **Determination**

19. Having regard to the preliminary information before me, the Claimant's cause of action accrued on 27<sup>th</sup> December 2019 or thereabouts. It is around this time that the Claimant's resignation took effect after he had utilized his accrued leave days. Therefore and in terms of section 90 of the Employment Act, he had up to 27<sup>th</sup> December 2022 to file his case.
20. This action was presented to court on 22<sup>nd</sup> December 2022 before the cause of action became time barred. Therefore, it was validly filed.
21. Accordingly, the preliminary objection is unmerited. It is thus dismissed with costs to the Claimant.

**Dated, signed and delivered on the 14th day of December, 2023**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

\*\*\*\*

..... for the Claimant

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.....for the Respondent

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**ORDER**

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In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

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