



Kaino v Kenya Commercial Bank & another (Employment and Labour Relations Cause E423 of 2023) [2023] KEELRC 3279 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3279 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E423 OF 2023
BOM MANANI, J
DECEMBER 7, 2023**

BETWEEN

EVANS KIPKEU KAINO CLAIMANT

AND

KENYA COMMERCIAL BANK 1ST RESPONDENT

JUSTUS KIOKO 2ND RESPONDENT

RULING

Background

1. The parties to this action had an employment relation until February 12, 2019 when the claimant's contract was summarily terminated by the 1st respondent. The validity of the 1st respondent's decision in this respect is the subject of this litigation.
2. The claimant contends that the decision was unfair. On the other hand, the 1st Respondent avers that the claimant was dismissed from employment for just cause and in accordance with due process.

Preliminary Objection

3. Upon being served with the Statement of Claim, the 1st respondent filed a Notice of Preliminary Objection to the suit. Through the objection this respondent questions the competence of the suit and the court's jurisdiction to entertain it.
4. The objection is two pronged. First, the 1st respondent contends that the case has been filed outside the timelines that are set under section 90 of the *Employment Act*. Therefore, it is statute barred.
5. Second, it is contended that section 12 of the *Employment and Labour Relations Act* (ELRC Act) bars the court from reinstating an employee outside three years of the date of termination of his contract.



Therefore, the claimant's plea for reinstatement is statute barred and the court has no jurisdiction to entertain it.

Analysis

6. When the matter came up for directions on the mode of canvassing the preliminary objection, the court directed the parties to file Written Submissions. This was done.
7. According to the 1st respondent, the claimant was dismissed from employment on February 12, 2019. The decision to terminate the contract was communicated to him by a letter of even date.
8. The 1st Respondent avers that the claimant's contract having been terminated on the aforesaid date, the cause of action in relation to the decision accrued as from February 12, 2019. Therefore and in terms of section 90 of the *Employment Act*, if the claimant wished to challenge the dismissal, he ought to have moved the court within three years of the decision. In the 1st respondent's view, this action, filed on June 2, 2023, was presented to court well outside the prescribed timelines.
9. The 1st respondent also points out that under section 12 of the *ELRC Act*, the court's power to order reinstatement is exercisable only within three years of the decision to terminate a contract of service. Therefore, that remedy is no longer available to the Claimant since the current action was filed more than three years after his dismissal from employment.
10. The claimant has filed a statement and submissions opposing the objection. In his response, the claimant argues that section 90 of the *Employment Act* is subordinate to the *Constitution of Kenya* which guarantees the rights to access justice and fair hearing under articles 48 and 50 respectively.
11. The claimant further contends that the respondents are bound to process his removal from office in strict compliance with section 45 of the *Employment Act*. Until they do so, time does not run for purposes of section 90 of the *Employment Act*. That time will only begin to run after due process is observed in terms of section 45 of the *Employment Act* as read with article 50(2) of the *Constitution*.
12. The law on limitation of actions in employment disputes is now settled. An employee whose contract of service has been terminated has three years from the date of the decision to approach the court to determine the validity of the decision. The only exception to this statutory edict is in respect of continuing injury claims in respect of which, suit must be filed within one year of cessation of the injury.
13. The above position has been restated in a plethora of judicial pronouncements. There is no room for reinventing the wheel.
14. In this respect, I can do no better than to quote Kiage JA in *Attorney General & another v Andrew Maina Gitthinji & another* [2016] eKLR where he expressed himself on the matter as follows:-

“The Preliminary Objection that had been raised before the court below was a jurisdictional one. It raised a statutory bar to the bringing of the claim by the respondents herein outside of the three year cut-off imposed by section 90 of the *Employment Act*. Such a plea, if upheld, would have been dispositive of the claim and therefore constituted “a pure point of law” in the language employed by Sir Charles Newbold P, in the oft-cited case of *Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd* [1969] EA 696. It was therefore properly taken.

As to whether it should have been sustained, I, like Waki JA, would answer in the affirmative. Of their own showing, the respondents were dismissed from employment on February 2, 2010. The three year period within which they could lawfully challenge their dismissal



expired on or about February 1, 2013. They did not file suit within that period, doing so only on June 13, 2014, which was well out of time. That ought to have led to a striking out of the suit as sought through the Preliminary Objection.”

15. The argument by the claimant that the respondents have violated section 45 of the *Employment Act* ought to have been made in a properly filed suit. It cannot be used to circumvent the express provisions of section 90 of the *Employment Act*.
16. At the same time, although it is true as the claimant argues that the *Constitution* is supreme, it must always be remembered that it (the *Constitution*) does not operate in a vacuum. In order to guarantee orderly enjoyment of the various constitutional entitlements, various pieces of legislation have been enacted. The mere fact that these pieces of legislation may appear to place limitations on the manner of enjoyment of these entitlements does not mean that they (the pieces of legislation) should be considered contra the *Constitution*.
17. For instance, whilst it is true that the right to access justice is constitutionally protected, this cannot be construed as providing individuals with a blank cheque to file claims at whatever time that they elect. In order to safeguard the right of those who may be dragged into court to effectively defend themselves, the law fixes timelines within which one must claim his rights.
18. If these limitations were not imposed through subsidiary legislation, the rights of Respondents to a fair trial will equally be jeopardized. The injustice that may flow from individuals being forced to defend stale claims long after they have lost their evidence in respect of such claims is what the law on limitation seeks to prevent.
19. For the foregoing reasons, I am in agreement with the 1st Respondent that the claimant’s suit is an affront to the law on limitation of actions as enshrined in section 90 of the *Employment Act*. As a result, the preliminary objection in this respect succeeds.
20. The 1st respondent’s other preliminary objection relates to whether the claim for reinstatement is tenable. Since the first limb of the objection that was based on section 90 of the *Employment Act* has succeeded, there would be no need to delve into this other limb. As a result, I make no pronouncement on it.

Determination

- a. The court finds that this suit was filed outside the timelines that are set under section 90 of the *Employment Act*.
- b. It is therefore statute barred.
- c. That being the case, the court has no jurisdiction to entertain the matter.
- d. As a consequence, the claim is struck out.
- e. Costs of the suit are granted to the 1st respondent.

DATED, SIGNED AND DELIVERED ON THE 7TH DAY OF DECEMBER, 2023.

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant



.....for the 1st Respondent

.....for the 2nd Respondent

ORDER

In light of the directions issued on 12th 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

