



REPUBLIC OF KENYA



KENYA LAW
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**Ndoli v Butali Sugar Mills Limited (Claim 101 of 2021)
[2022] KEELRC 1215 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1215 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CLAIM 101 OF 2021**

**JW KELI, J
MAY 5, 2022**

BETWEEN

PATRICK WANAKOCHA NDOLI CLAIMANT

AND

BUTALI SUGAR MILLS LIMITED RESPONDENT

RULING

1. The Ruling is on the Notice of Preliminary Objection under paragraph 4 of the respondent's Memorandum of Reply (defence) dated July 6, 2017.
2. The basis of the objection is that the Memorandum of Claim dated February 27, 2017 seeking compensation for claim of unlawful and unfair termination is statutory time barred.
3. The Notice of Preliminary under paragraph 4 of the statement response dated July 6, 2017 states as follows:-

“Take notice that the respondent will at the hearing of the claimant's suit raise Preliminary Objection on grounds that:-

- a. The suit offends provisions of section 90 of the *Employment Act* 2007 and is therefore time bared.
- b. That the claimant has come to court too late in the day as he filed this claim more than 3 years after his employment was terminated on December 11, 2013. The grounds of the Preliminary objection are stated under paragraph 5,6,7,8,9.
 - i. The claimant's case is misconceived, incompetent and bad in Law and ought to be dismissed for the following reasons:- The dispute is time barred.



- ii. The claim violates the provisions of section 90 of the *Employment Act* which provides that “Notwithstanding the provisions of section 4 (1) of the *Limitation of Act*, 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 3 years next after the act, neglect or default complained or in case of continuing injury or damage within twelve months after the cessation thereof”.
 - iii. The claimant's claim is based on a contract of employment which was terminated on December 11, 2013, more than three years after the Claimant filed his memorandum of Claim on February 28, 2017.
 - iv. The claimant's action would deny the respondent the protection of the Law against unreasonable delay in bringing legal action. The claimant's action is unreasonable and lacks due diligence since there has been inordinate delay of more than three years in filing the memorandum of claim, contrary to the provisions of the Law. The Law obliges litigants to exercise and take reasonable steps to bring action.
 - v. Consequently, it is apparent that the claimant is time barred from filing this claim and the respondent prays that the suit be dismissed with costs to the Respondent.
4. The claimant filed reply to the respondent's statement of response to the claim dated July 26, 2017. In paragraph (2), the claimant states:- “in response to paragraph 4,5,6,8 & 9 of the respondent's statement of response in which the respondent narrates shallowly what it thinks happened on the material day, the claimant's response is that the Preliminary objection will be handled when and if raised. At the moment it is not yet raised”.
 5. On February 17, 2022 the respondent indicated to the court in the presence of the claimant that it was relying on the Notice of Preliminary objection in its response. The court gave directions for the claimant to file submissions in 7 days. The Respondent filed its submissions on the Preliminary Objection on the October 19, 2020. The court gave mention date of February 24, 2022 to confirm compliance by the claimant and issue ruling date.
 6. On the February 24, 2022 both parties were absent. The court gave notice of ruling date of May 5, 2022 with directions for the parties to be notified.
 7. By the time of writing this ruling, the court had not received the submissions of the claimant.

DETERMINATION

8. The Notice of preliminary objection is brought under section 90 of the *Employment Act* which provides for Limitation of time for filing claims of employment as follows:-

“notwithstanding the Provisions of section 4 (1) of the *Limitation of Actions Act* (cap 22) No civil action proceedings based or arising out of this Act or 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”.
9. The respondent submits that the instant claim is time barred having been filed on February 28, 2017 outside the 3 years of termination. The contract of service for the claimant having been terminated on the December 11, 2013.



10. Paragraph 4 of the statement of Claim states that the date of the claimant's unfair termination from service by the respondent was the December 11, 2013.
11. The claimant's witness statement dated February 27, 2007 and signed by the claimant states that the "Respondent vide letter dated December 11, 2013 terminated my service on the allegations of loss of items in the store".
12. The court then finds there is no dispute as to the date of termination of claimant's contract of service being December 11, 2013.
13. According to the court record, payment of fees on filing of the instant claim was received on the 28th February 2017 same day the claim was received in court vide the Form 2 by the Deputy Register dated 28th February 2017.
14. The court finds that the three years statutory limitation period under section 90 of the Employment Act started running on December 12, 2013 or thereabouts and ended on December 12, 2016.
15. The instant claim was filed on February 28, 2017. This was not a case of continuing injury or damage but of termination of service. The court finds that from December 13, 2016 the claim was time barred.
16. The Respondent submits it is now settled law that the court's hands are tied when it comes to matters filed outside the limitation period. That the court cannot exercise discretion to extend time.
17. The court agrees with the respondent that the claim having been filed outside the statutory limitation of time of 3 years post termination of services, it has no jurisdiction to hear and determine the instant suit. Section 90 of the Employment Act is couched in mandatory terms and the court has not discretion to extend time.
18. The court finds and determines that the Claim dated February 27, 2017 was time barred at the time of filing which was after expiry of the 3 year limit post termination of the Claimant's employment contract. The court has no choice but to down its tools. The Notice of Preliminary objection is upheld. The suit dated February 27, 2017 is dismissed for being time barred. Each party to bear it own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE THIS 5TH DAY OF MAY, 2022

J. W KELI,

JUDGE.

In the Presence of:-

Court Assistant : Brenda - online

Claimant : Absent

Respondent: Mr. Ouma- online

