



**Ondiek v Peter Gougus & Alice Chemirmir t/a Nakuru Teachers Training
College (Cause 78 of 2015) [2022] KEELRC 1328 (KLR) (13 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1328 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 78 OF 2015
DN NDERITU, J
JULY 13, 2022**

BETWEEN

WALTER NYAMBOK ONDIEK APPLICANT

AND

**PETER GOUGUS & ALICE CHEMIRMIR T/A NAKURU TEACHERS
TRAINING COLLEGE RESPONDENT**

RULING

Background

1. The Claimant initiated this cause vide a statement of claim dated 12th March, 2015 filed in court on 13th March, 2015 claiming the following:-
 - (a) Payment of total sum of Kshs.9,720,000/= being his salary from January, 2003 to the year 2012
 - (b) Leave allowance from the year 2003 to March, 2012
 - (c) Interest in a and b above
 - (d) Gratuity
 - (e) Costs and interest of this suit at court's rate
 - (f) Any other relief that this Honourable court deems fit and just to grant.
2. The Respondents filed a joint memorandum of response dated 15th April, 2015 in which they denied liability and prayed that the Claimant's cause be dismissed with costs.
3. In Paragraph 28 of the memorandum of response the Respondents pleaded that "The jurisdiction of this Honourable court is admitted."



4. However, the Respondents later on filed a Notice for Preliminary Objection (P.O) dated 17th March, 2022 in which they objected to the jurisdiction of this court to hear and determine this cause on the basis –

“That the court lacks jurisdiction to hear and determine this suit by virtue of the cause of action being time barred under Section 90 of the *Employment Act, 2007*.”

On the basis of the foregoing the Respondents pray that this cause be struck out with costs.

5. On 21st March, 2022 this court ordered that the Preliminary Objection be heard by way of written submissions before any other or further step is taken towards hearing of the cause. As expressed in *Owners of the Motor Vessel Lilian “S” v Caltex Oil (Kenya) Ltd* (1989) KLR 1 and restated in *Samuel Kamau Macharia v Kcb & Others* (2012) eKLR jurisdiction is everything and where the issue of lack of jurisdiction is raised and the court apprehends and takes cognizance of the same, such jurisdictional issue should be dealt with at the earliest opportunity before the court takes any further steps.
6. Ochieng’ Ajigo & Co. Advocates for the Respondents filed their submissions on 5th May, 2022 while Gordon Ogola, Kipkoech & Company Advocates for the Claimant filed on 11th May, 2022.

II. Respondents’ submission

7. It is the Respondents’ argument that this claim is time barred based on Section 90 of the *Employment Act* (the Act). They argue that since the Claimant alleges in paragraph 13 of the memorandum of claim that he was constructively terminated in March, 2012 he ought to have filed his claim within 12 months from March, 2012. The Respondents therefore submit that since the claim was filed in March, 2015 the same was filed out by time and as such should be struck out with costs for it is time barred.
8. According to the Respondents the reliefs sought for by the Claimant concern a continuing damage, loss, or injury and as such ought to have been filed in court within 12 months as per Section 90 of the Act.

III. Claimant’s submission

9. On the other hand, the Claimant takes the view that his cause is not time barred as the same relate to accrued rights under the contract of service between him and the Respondents as opposed to continuing injury, loss, or damage and as such he had three (3) years from the date of termination in March, 2012 within which the file his claim and that he complied therewith when he filed his claim in March, 2015.
10. The Claimant prays that the preliminary objection be dismissed with costs for lack of merits.

IV. Issues for determination

11. There is only one main issue for determination in this Preliminary Objection:-
 - (a) Is the Claimant’s cause time barred under Section 90 of the Act and hence amenable to striking out at this stage?
 - (b) Costs



V. Limitation

12. Section 90 of the Act provides as follows:

Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act* (Cap 22), no civil actions 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 case of continuing injury or damage within twelve months next after the cessation thereof.”

13. Counsel for both parties have taken diametrically opposed positions in the interpretation of the above provisions of law, especially in regard to what constitutes a “continuing injury or damage.” While Counsel for the Respondents takes the view that what the Claimant is praying for concerns a continuing damage or injury and hence he should have filed his claim within twelve months of termination, Counsel for Claimant takes the view that the reliefs sought for by the Claimant are not based on continuing damage or injury and hence the claim is not time barred as it was filed within three (3) years of termination.

14. Black’s Law Dictionary, Tenth Edition, defines continuing damage as –

1. Ongoing damage arising from the same injury
2. Damages arising from the repetition of similar acts within a definite period”

Continuing injury is defined as

An injury that is still in the process of being committed – An example is the constant smoke or noise of a factory – Also termed as continuing harm.

15. Prior to the Act coming into operation on 2nd June, 2008 the law applicable on limitation in employment matters was Section 4(1) of the *Limitation of Actions Act* (Cap 22) as the *Employment Act* (Cap 226), which was repealed by the Employment 2007, had no provisions on limitation as now provided for in Section 90 of the Act.

16. This court has carefully gone through the submissions by Counsel for both parties and it is not disputed that the Claimant was terminated or left the employment of the Respondents in March, 2012.

17. From the materials placed before the court he was a month to month employee whose termination would have called for one month’s notice - See Section 35 of the Act. The salary was payable at the end of each month and hence became due and payable at the end of each month. The alleged failure by the Respondents to pay the monthly salary to the Claimant as and when the same fell due, at the end of each month, to this court, constitutes a continuing injury or damage as defined in the Black’s Law Dictionary above.

18. The view and holding of this court in paragraph 17 above is fortified by the holding of the Court of Appeal in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* (2018) eKLR. This means that the Claimant ought to have moved to court within 12 months of March, 2012 when he was terminated.

19. Leave allowance became due and payable at the end of each year worked and completed and as such non-payment of the same at the end of each such year worked is again a continuing damage or injury as defined and explained above.



20. The claim for salary arrears and leave allowances are based on continuing injury or damage and ought to have been filed in court within 12 months of termination. This court notes that the claim on salary and leave allowance arrears allegedly dates back from 2003 to 2012.
21. This court also notes that the Claimant is not challenging the termination as unfair or unlawful and no compensation is claimed on the said termination.
22. It is the view and holding of this court that the claim by the Claimant relate to continuing injury or damage and the same ought to have been filed within 12 months of termination in March, 2012. This cause was filed in March, 2015 which is three (3) years after termination and the same is clearly time barred. This finding and holding strikes out prayers (a), (b) and (c) of the claim and this court so holds.
23. Onyango J in *Charles Ogola & 2 Others v Mansion Hart Kenya Limited* (2019) eKLR stated that underpayments are rights to an employee not continuing injury. However, the learned Judge did not deal directly with the issue of salary and leave allowance arrears. Such arrears, in the view of this court cannot be classified as “other terminal benefits.”
24. In this cause the Claimant’s position is that he worked for the Respondents between 2003 to March, 2012 without a salary or leave allowance. Clearly, if that be the case, that was a continuing injury or damage and the Claimant was indolent and not vigilant in pursuing his rights within the period provided for by the law.
25. This court is in agreement with Radido J in *David Ngala Ochieng’ v Hatari Security Guards Ltd* (2022) eKLR that “contractual benefits which accrues at the end of each month amounts to continuing injury for purposes of the law of limitation.”
26. Prayer (d) is on gratuity. Unless provided for in a written contract of employment gratuity is only payable at the discretion of the employer and this court cannot impose payment of the same on the Respondents without the evidence of a written contract, other evidence, or willingness or undertaking on the part of the Respondents to pay the same. Both parties have pleaded that there was no written contract of service and the Respondent has denied that any gratuity is payable to the Claimant.
27. In view of the contents of Paragraph 26 above it would serve no purpose to allow this matter to pend in court on the issue of payment of gratuity for which there is no prima facie or remotest indication or evidence that the same has any chances of success. In the interest of justice, the claim for gratuity is as well dismissed as the Claimant has not in any event challenged the termination as unfair or unlawful. This holding is based on Section 3(1)(2) of the *Employment and Labour Relations Court Act* on the need for this court to facilitate the just, expeditious, efficient, and proportionate resolution of disputes that come before it. It is also instructive that the alleged claim for gratuity has not been quantified. In my view this finding and holding does not in way violate the right of the Claimant to a fair hearing for the reasons stated above.

VI. Costs

28. Each party shall bear own costs of this court in the interest of justice.

VII Disposal

29. The entire claim by the Claimant is hereby struck out and each party ordered to meet own costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 13TH DAY OF JULY, 2022.

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DAVID NDERITU
JUDGE

