



REPUBLIC OF KENYA



**Mbindyo v Private Safaris (E.A) Ltd (Cause E894 of 2021)  
[2022] KEELRC 3819 (KLR) (18 August 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3819 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E894 OF 2021  
AN MWAURE, J  
AUGUST 18, 2022**

**BETWEEN**

**JULIUS MUTINDA MBINDYO ..... CLAIMANT**

**AND**

**PRIVATE SAFARIS (E.A) LTD ..... RESPONDENT**

**RULING**

1. The claimant (Julius Mutinda Mbindyo) through his advocates filed a memorandum of claim dated November 1, 2021 wherein he alleged that the respondent company had unprocedurally and illegally dismissed him from the company where he served as an accountant. He prayed that judgment be entered against the respondent for:
  - (a) General damages for illegal and unlawful dismissal
  - (b) One-month salary *in lieu* of notice
  - (c) Unpaid/untaken leave
  - (d) Damages for unfair/unlawful and malicious criminal accusation
  - (e) House allowance for the period of work
  - (f) Unpaid/untaken public holidays
  
2. The claimant avers that on or about April 24, 2006, he was employed by the respondent as an accountant and was later promoted to the position of senior accountant. On March 4, 2014, the claimant, in the company of others, was charged with the offence of stealing by servant contrary to section 281 of the *Penal Code* a sum of Kshs 104,660,512 from the respondent. He states further, that while in custody he was called by his employer to show cause why disciplinary action should not



be taken against him, an act he terms malicious. This was followed by a letter of termination from employment dated July 17, 2014. He was acquitted of the criminal charge on December 6, 2018.

3. The respondent raised a preliminary objection against the claimant's memorandum of claim on April 5, 2022 wherein he prayed that the claim be struck out on grounds that this honourable court lacks jurisdiction to adjudicate over the matter by dint of section 90 of the *Employment Act* and that the claimant's suit violates mandatory provisions of law and cannot sustain the reliefs sought as it is incurably defective and cannot stand in law.
4. It is the preliminary objection raised by the respondent that forms the core of this ruling. This court finds it important to briefly go through the submissions of both parties for and against the preliminary objection.

### **Submissions by Counsel**

5. The respondent quoted section 90 of the *Employment Act* under the title 'limitations' which provides that:

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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.
6. It is submitted that the claimant's employment was terminated on July 17, 2014, seven years and three months before this suit was filed on November 1, 2021. The respondent adds that the suit ought to have been filed within three years from July 17, 2014 when the alleged cause of action arose. This would have been on or about July 17, 2017.
7. The respondent further submits that the claimant failed to exercise diligence to prosecute his alleged suit within the statutory 3-year period. The claim is thus time barred under section 90 of the *Employment Act*. Furthermore, it is incapable of remedy.
8. The claimant submitted that the cause of action that gave rise to this suit commenced after the date of verdict of the criminal case No 330 of 2014 which date is December 6, 2018. He states that the suit was filed by November 1, 2021 which was within the 3-year timeline. Furthermore, he submits that the letter of termination dated July 17, 2014 was unlawful and unenforceable since the respondent was required to await the verdict of the criminal case. The verdict, he says, is the act that dictated the next course of action by both parties. He reaffirms that this suit is not time barred and that this court has jurisdiction to entertain the same.

### **Determination**

9. As is custom, this court has considered the submissions of by counsel, the law the pleadings and the authorities cited. It has thus framed one issue for determination:

#### **Whether the court lacks jurisdiction to hear and determine the claim?**

10. Section 90 of the *Employment Act* (supra) guides us on the question of limitation. Quoted verbatim it states as hereunder:

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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.



11. It is imperative to understand what a preliminary objection entails. A preliminary objection, as was said in the celebrated case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd* [1969] EA raises a pure point of law which is usually on the assumption that all facts pleaded by the opposing side are correct. It also consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and if argued as a preliminary point may dispose of the suit. An example is an objection to the jurisdiction of the court or a plea of limitations.
12. This court seeks to answer the question ‘when does termination of employment take effect?’ it is noteworthy that a cause of action in an employment claim such as this one arises once the letter of termination has been issued. The wisdom of the court in *Hilarion Mwabolo v Kenya Commercial Bank* [2013]eKLR is appreciated. The court stated that:-
 

“ .....termination kicks in from the date stated in the letter of termination.”
13. It is this court’s finding that the cause of action arose on July 17, 2014 when the claimant was issued with the letter of termination and not on December 6, 2018 when he was acquitted of the criminal charge against him. Consequently, the claimant should have filed his claim within 3 years since the indicated date of termination on the letter. Ideally, the 17<sup>th</sup> day of July 2017 would have been the last day for filing the claim. The claimant suit is evidently time barred.
14. The claimant’s allegation is that the date the claimant was acquitted of the criminal case should be the date where time limitation should be calculated. He says that subjecting the claimant to disciplinary proceedings when there was a pending criminal case was an exercise in futility.
15. However the court should point out that a number of authorities have ruled that criminal proceedings do not determine the reasons for termination of employment. In the case of *Abdi Mohamed Daib vs Kenya Ports Authority*[2016]eKLR cause No 760 of 2015 the court held
 

“There is no requirement to wait for conclusion of criminal investigation or trial before any employer may exercise managerial prerogative discipline on an employee.”

There was no requirement for claimant as well to await finalization of the criminal proceedings before filing a suit for unlawful termination.
16. Furthermore in the case of *Mathew Kamanu Mwaura v the Permanent Secretary Office of the President Provincial Administration and 2 others* [2018]eKLR the court stated:
 

“The preliminary objection is based on section 90 of the *Employment Act* which is couched in mandatory terms. The claim by the petitioner is clearly time barred. The petitioner having realized that the claim would not go anywhere due to the operation of the law brought it as constitutional matter. The only reasonable conclusion is that the matter was filed as a constitutional petition to circumvent the *Employment Act*. It is clear that the petitioner’s claim was filed out of time and offend the mandatory provision of the *Employment Act*. It is incompetent and a clear abuse of court process.’
17. Jurisdiction of courts in Kenya is regulated by the *Constitution*, statutes and judicial precedents. Courts of law cannot claim jurisdiction over matters by dint of interpretation. In *Samuel Kamau & Another v*



Kenya Commercial Bank Limited and 2 others SC Application No 2 2012 [2012] eKLR the Supreme Court stated that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of parliament where the wording is clear and there is no ambiguity.’

18. In light of the foregoing, this court has no jurisdiction to hear and determine the claim dated November 1, 2021. In the words of Nyarangi J in Owners of Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Limited [1989] :

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....”

19. Having found that this court lacks jurisdiction by dint of section 90 of the Employment Act, this court allows the preliminary objection and dismisses the claimant’s suit with no order as to costs.

20. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18<sup>TH</sup> AUGUST, 2022**

**ANNA NGIBUINI MWAURE**

**JUDGE**

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

