



**Maleche v Kenya Revenue Authority (Cause 676 of 2011)
[2022] KEELRC 14660 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14660 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 676 OF 2011
M MBARŪ, J
OCTOBER 27, 2022**

BETWEEN

REUBEN S MALECHE CLAIMANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. The ruling herein relates to the respondent, Kenya Revenue Authority Notice of Preliminary Objections dated 1 September 9, 2022 on the grounds that;

This suit contravenes section 90 of the *Employment Act*, 2007 as read together with section 93 of the Act as the suit is time barred having been more than five years after the alleged act, neglect or default complained occurred

i.e. from September 1, 2005 to 28 April, 2011.

Parties filed written submissions.

2. The respondent submitted that the claimant was employed by the respondent through letter dated September 30, 1996 and on April 11, 2005 the respondent wrote to the claimant indicating that he was due to retire on September 1, 2005.
3. On August 13, 2006 the claimant filed suit at Chief Magistrates Court at Nairobi under Civil Cause No. 9576 of 2006 and in a ruling dated February 11, 2010 the court held that it had no jurisdiction and the claimant filed suit herein in the year 2011 a period of 5 years after the lower court ruling.
4. The suit contravenes section 90 of the *Employment Act* read with section 93 and the suit is time barred. The respondent relied on the case of *Martha Karwirwa Anthony v Barclays Bank of Kenya Ltd* [2019] eKLR.



5. The claimant submitted that the claimant worked for the respondent until 1st September, 2005 when he retired aged 55 years and before the enactment of the Employment Act, 2007 and the Constitution, 2010.
6. Aggrieved by the decision of the respondent on the retirement age, the claimant being a person with disability was supposed to retire at age 60 in accordance with the human resource policy and therefore filed suit on August 14, 2006 in Chief Magistrates Court No.957 of 2006. There was no delay.
7. The suit before the Chief Magistrate went through full hearing and reserved for judgement but instead the court delivered a ruling on February 11, 2010 stating that there was no jurisdiction to hear the dispute in light of the new employment laws. Aggrieved the claimant filed appeal at the High Court on March 9, 2010 and in the intervening period the Constitution, 2010 was promulgated creating this court.
8. On April 23, 2011 the claimant filed this claim relying on the proceedings of the Magistrates Court in Civil Case 957 of 2006. The suit was not filed on April 28, 2011 but on August 14, 2006. The allegations that suit was filed 5 years after the cause of action arose is without basis and should be dismissed. The claimant has relied on the case of *Mehta v Shah* [1965] EA; *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR.
9. The application of the Employment Act, 2007 came into force on June 2, 2008 almost 2 years after the original matter was initiated and for these reasons the objections made are without merit and should be dismissed with costs.

Determination

10. On record is the court ruling herein dated November 5, 2012 where the issue of res judicata and sub judice were addressed and the court noted that the claimant had filed Chief Magistrate Case No.9576 of 2006 before a court without jurisdiction and therefore the matter was not heard on the merits by a court with jurisdiction save, following the decision of the lower court, the claimant filed an appeal to the High Court being Civil Appeal No.73 of 2010.
11. Whereas the matter was not res judicata on the pending appeal at the High Court, on the claimant's submissions that the same had lapsed by operation of the law, the court held that the appeal was pending and should be withdrawn or otherwise disposed in order for this court to proceed with the claimant's case.

The claimant was hence directed.

Is the claim before the court time barred?

12. The claimant filed suit herein on May 5, 2011 and the issue in dispute is the unlawful termination of employment and the claimant is seeking various remedies in terminal dues and general damages for unlawful and unfair dismissal from employment.
13. At paragraph 6 of the Memorandum of Claim the claimant avers that the respondent retired him from his employment with effect from September 1, 2005 then aged 55 years instead of 60 years as a person with disability and was hence denied a service of 5 years.
Termination of employment took effect on September 1, 2005.
14. The Employment Act, 2007 came into operation on June 2, 2008. At the time the law allowed a claimant to file suit within 3 years from the date the cause of action arose and the claimant was within the limitation period as the 3 years were lapsing on August 31, 2008.



15. The claimant has admitted to having filed Case No.9576 of 2006 Nairobi Chief Magistrates Court and which matter was heard on the merits and while pending judgement, on February 11, 2010 delivered a ruling and held that there was no jurisdiction. The claimant filed High Court Civil Appeal No.73 of 2010 and the status of such appeal is not addressed.
16. Under the provisions of section 90 of the [Employment Act, 2007](#) a party has 3 years to file a claim over alleged unlawful and or unfair termination of employment. Even where the cause of action arose before the operationalisation of the court on July 12, 2012 any proceedings filed under the application of the [Employment Act, 2007](#) the same provisions apply.
17. Upon the Court in Chief Magistrate Court Case No.9576 of 2006 finding that there was no jurisdiction on February 11, 2010 there is an appeal pending before the High Court on the findings. To file the instant suit on 5th May, 2011 well aware of the proceedings before the High Court and despite being issued with directions herein on November 5, 2012 the claimant is avoiding the obvious; the claim herein offends the mandatory provisions of section 90 of the [Employment Act, 2007](#) and is time barred.
18. However, appreciating the challenges facing litigants upon the promulgation of the [Constitution, 2010](#) and the separation of jurisdiction between the High Court and the Employment and Labour Relations Court, prudence called for a transfer of a suit wrongly filed to the appropriate court with jurisdiction. This is appreciated by the Supreme Court in the case of [Law Society of Kenya v the Attorney General & COTU](#) Petition No. 4 of 2019.
19. The Court of Appeal in addressing the same challenge in the case of [Daniel N Mugendi v Kenyatta University & 3 others](#) (2013) eKLR, held that;

... in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to article 165(5) (b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Labour Court comes across a matter that ought to be litigated in any other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice. In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matter alongside claim of fundamental rights ancillary and incident to those matters, the same should go for the environment and Land Courts when dealing with dispute involving environment and land with any claims of breaches of fundamental right associated with the tow subjects
20. The time contemplated by the court above that parties should be well acquainted with the appropriate forum to file suit is long past having celebrated 10 years under the [Constitution, 2010](#) way back in the year 2020. Upon the court ruling on November 5, 2012 and until the respondent filed the instant objections, the claimant has not moved an inch to secure his rights.



21. On the findings above, the claimant well directed on November 5, 2012 to deal with the appeal pending before the High Court first and failed to take heed, herein he must suffer the obvious. The suit herein being time barred is dismissed with costs to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Okodoi

