



Barasa & another v Inter Christian Fellowship Evangelism Mission (Cause 257 of 2013) [2022] KEELRC 12952 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12952 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 257 OF 2013
S RADIDO, J
OCTOBER 19, 2022**

BETWEEN

ELIUD BARASA 1ST CLAIMANT

MOHAMED ASMAN WERUNGA 2ND CLAIMANT

AND

INTER CHRISTIAN FELLOWSHIP EVANGELISM MISSION RESPONDENT

JUDGMENT

1. On or around 30 April 2009, Inter-Christian Fellowship Evangelism Mission (the Respondent) notified Mohamed Asman Werunga (2nd Claimant) that his employment would stand terminated effective immediately. Eliud Barasa (1st Claimant) was informed of the termination of his contract on or around 9 June 2010.
2. The Claimants consulted a trade union, and it reported a trade dispute to the Minister for Labour. The dispute was not resolved at conciliation, and the Conciliator issued a certificate of unresolved dispute on 6 May 2013.
3. On a date that is not clear from the record, the Claimants filed a Notice of Motion dated 16 September 2013, seeking the grant of leave to file suit out of time.
4. Again, it is unclear whether the application, Kisumu Misc Application No. 7 of 2013, *Eliud Barasa & Mohamed Aswan Werunga v Inter-Christian Fellowship Evangelism Mission*, was heard or whether leave was granted.
5. Nevertheless, the Claimants filed a Statement of Claim dated 30 August 2013 with the Court, and the Respondent filed a Response on 4 October 2013.
6. The hearing commenced on 16 September 2014 when the Court sent the parties back to conciliation.



7. The attempt at conciliation failed, and the hearing resumed on 8 November 2018. The Respondent did not attend the hearing.
8. In a judgment delivered on 16 November 2018, the Court entered judgment for the Claimants.
9. When the Respondent got wind of the judgment, it moved the Court to set aside the *ex-parte* judgment.
10. The Court set aside the judgment on 23 January 2019 and directed the Cause to be heard afresh before the Court sitting in Bungoma on 29 January 2019.
11. The hearing was adjourned severally, and on 10 March 2022, the Court allowed the Claimants to file and serve an Amended Statement of Claim. It was filed on 15 March 2022.
12. When the Cause came for a new hearing on 20 June 2022, the Respondent, despite service of a hearing notice, was not present. The Claimants testified, and the Court reserved judgment to today.
13. The Claimants filed their submissions on 5 September 2022.
14. The Court has considered the pleadings, evidence, and submissions and has identified the issues for adjudication as examined hereunder.

Jurisdiction

15. As already stated by the Court, it is not clear whether the Claimants secured leave to file the Cause out of time.
16. Be that as it may, jurisdiction is foundational, and it behoves the Court to revisit it.
17. The Court will first address whether it could competently grant leave or extend the time to file suit out of time.
18. The Court of Appeal addressed the question in *Divecon v Samani* (1995-1998) EA 48, where it held that:

to us, the meaning of the wording of section 4(1)is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done, namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply, as the learned Judge of the Superior Court did, that "the wording of section 4(1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked.

19. This Court endorses the law as stated therein as equally sound in employment contracts and/or causes of action to which section 90 of the *Employment Act*, 2007 applies.

Limitation

20. Next, the Court will examine whether the action(s) were statute time-barred.
21. The 2nd Claimant was dismissed on 30 April 2009, and by virtue of section 90 of the *Employment Act*, 2007, he should have commenced legal action within 3 years, on or before 30 April 2012. He did not.



22. The 1st Claimant was dismissed on 9 June 2010, and he should have commenced action on or before 9 June 2013.
23. The instant Cause was lodged with the Court around 30 August 2013, outside the prescribed limitation period.
24. While recognising that the dispute was taken through conciliation and a Certificate of Disagreement was only issued on 6 May 2013, the delay occasioned by the conciliation cannot aid the Claimants in resisting a plea of limitation.
25. The Court of Appeal held in *Rift Valley Railways (Kenya) Ltd V Hawkins Wagunza Musonye & Ar* (2016) eKLR that:

While there is no doubt that section 15 of the *Employment and Industrial Relations Act* encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the *Employment Act* even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service.

26. The same approach was taken by the same Court in *G4S Security Services (K) ltd v Joseph Kamau & 468 Ors* (2018) eKLR thus:

time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under *the Constitution* or any other law.

27. Clearly, to this Court, the actions advanced by the Claimants were statute time-barred.
28. Having reached the above conclusions, the Court must down its pen.

Conclusion and Orders

29. Flowing from the foregoing, the Court declines jurisdiction and strikes out the Cause with no order on costs as the Respondent did not appear for the hearing.

DELIVERED VIRTUALLY FROM KWALE, DATED AND SIGNED ON THIS 19TH DAY OF OCTOBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimants Nchogu, Omwanza & Nyasimi Advocates

For Respondent J. S. Kakhula & Co. Advocates

Court Assistant Chrispo Aura

