



**Miano v County Government of Nyeri (Cause E018 of 2022)
[2022] KEELRC 13261 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13261 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E018 OF 2022
ON MAKAU, J
NOVEMBER 23, 2022**

BETWEEN

STANLEY MIANO CLAIMANT

AND

COUNTY GOVERNMENT OF NYERI RESPONDENT

RULING

1. This ruling relates to the respondent's preliminary objection contained in the Notice of Preliminary Objection dated September 28, 2022 and paragraph 3 & 9 its Memorandum of Response dated April 1, which seeks to have the suit struck out with costs on ground that it is time barred by dint of section 90 of the *Employment Act*. The claimant is in denial and has filed a Reply to the Memo of Response stating as much.
2. The preliminary objection was disposed of by written submissions. The respondent filed on November 11, 2022 while the claimant filed earlier on November 5, 2022.
3. The respondent submitted that according to the background information pleaded in paragraph 1 of the Statement of Claim, the cause of action arose on October 31, 2017 when the claimant's appointment as county executive member ended after the general elections. It was further submitted under section 90 of the Employment Act, this suit ought to be filed latest by October 30, 2020 but it was filed on March 30, 2022. Consequently, the court was urged to strike out the suit for being filed out of time.
4. For emphasis, reliance was placed on the case of *G4S Security Services (kenya) Limited v Joseph Kamau & 468 others* [2015] eKLR where the Court of Appeal upheld a similar preliminary and struck out the suit for being time barred.
5. The claimant, on the other hand submitted that his claim is for reimbursement and monies owed to him and it falls under the term continuing injury under section 90 of the Employment Act. He fortified



the foregoing submission by the definition of “continuing” by the Oxford English Dictionary. He also relied on the case of *Joseph Kamau & 468 others v G4S Security Services (kenya) Limited* [2015] eKLR where Nduma J held that once earned and accrued, the benefits remain due and owing to the employees continuously until paid in full.

6. As a consequence of the foregoing matters, the claimant contends that the suit is not time barred and prayed for the objection to be dismissed with costs.

Determination

7. The issues for determination in the preliminary objection are threefold:
 - a. Whether the preliminary objection raises a pure point of law.
 - b. Whether the suit is time barred.
 - c. Whether the court has no jurisdiction to hear and determine the suit.

Pure point of law

8. In the case of *Mukisa Biscuits manufacturing co. Ltd v West End Distributories Ltd* [1969] EA 699 the court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertain or if what is sought is the exercise of judicial discretion.”

9. I have carefully considered the grounds for objection raised herein and I am satisfied that pure points of law have been raised. The respondent is contending that the suit is time barred. The said issue does not require evidence to establish nor is judicial discretion necessary to determine the same. Besides if the same succeeds the suit will be disposed of and judicial time will be saved.

Time barred

10. The claim herein is founded on a contract of employment between the claimant and the respondent which brings the suit under the provisions of the Employment Act. Section 90 of the Act states 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 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.”



11. The question that arises is, what is the meaning of a cause of action and when does it arise. In *Letang v Cooper* [1964] 2 All ER 929 at 934, Lord Diplock defined cause of action as follows: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”
12. Again in *Drummond Jackson v Britain Medical Association* [1970] 2 WLR 688, Pearson J defined a cause of action as follow: -

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”
13. As regards when a cause of action arises, *Halsbury’s Laws (4th Edition) Vol 28* paragraph 662 (page 298) states that: -

“A cause of action arises in instances of breach of contract, upon the breach, and ... if a contract is to do something at a particular time or upon the happening of a contingency and the thing contracted for is not done, the cause of action arises at the time specified, or upon the contingency happening...”
14. In this case the claimant has pleaded the following in her Memorandum of claim:
 7. The agreement between the claimant and the governor was that after spending his own resources, he would then be reimbursed once he provided the necessary documentation as proof of the said expenditure.
 8. The claimant was reimbursed for some of the expenses in the course of his tenure. However, some of the reimbursements have not been paid up to this day.
 9. By the time the claimant’s contract came to an end, the reimbursement owed to him was Kenya shillings three million, seven hundred and seventy four (3,772,074).
 10. Further, when the Cclaimant was seeking clearance in order to officially separate from his employer and collect his gratuity, he was informed by the chief finance officer that he had a pending imprest of kshs 230,842, a claim the claimant disputed and proved that on several occasion no pending imprest, as the said amount had been paid in a timely manner in 2014, he was forced to pay the same.”
15. Having considered the above cited judicial precedents on the definition of a cause of action and the facts of this case, I would say that the cause of action herein arose on October 31, 2017 when the claimant’s the claimant’s contract of service came to an end and the respondent refused to reimburse the money owed, and further deducted the alleged imprest from his terminal dues. It means that his right to sue accrued from that day and lapsed three years thereafter.
16. The injury complained of was not continuous in nature as alleged by the claimant. In my view the injury is founded on a breach by the employer when all the claims between the employer and the employee were being settled through clearance procedure, at the end of the contract. The right to sue accrued upon separation the employer declined to acknowledge the reimbursement claim and went on even to deduct the terminal dues to recover un-surrendered imprest.



17. In the case of G4S Security Services (kenya) Limited v Joseph Kamau & 468 others [2015] eKLR the Court Appeal overturned the decision of the trial court and stated as follows: -

“In the circumstances of this case, we are satisfied that 464 respondents having conceded that their employment was terminated in the years 2008, 2009 and 2010 and filed their claim on January 22, 2014, that they filed their claims outside the limitation period of 3 years. The Employment and Labour Relations Court therefore erred in holding that it had jurisdiction to here and determine claims that were filed outside the statutory limitation period.

Accordingly, this appeal has merit and we allow it with costs with the effect that the appellant’s preliminary objection dated November 11, 2014 is upheld and the claims by 464 respondents ... are hereby struck out as they are statute barred.”

18. There is no dispute from the pleadings that the suit herein was commenced on March 30, 2022 which was outside the statutory limitation period of three years by more than one year. The court finds that the latest the suit should have been filed was October 31, 2020 when the statutory window given for commencing the suit was closed. Consequently, the court agrees with the respondent that the suit is time barred and for that reason the court lacks jurisdiction to determine it.

19. For the foregoing reasons the preliminary objection is upheld and the suit struck out with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 23RD DAY OF NOVEMBER 2022.

ONESMUS N MAKAU

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 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

