



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 14 OF 2019**

*(Formerly CMCC No. 4431 of 2017)*

**Before Hon. Lady Justice Maureen Onyango**

**TOURISM PROMOTION SERVICES**

**(MANAGEMENT) LIMITED.....CLAIMANT**

*VERSUS*

**CHARLES OTIENO OGADA.....RESPONDENT**

**RULING NO. 2**

Before me, for determination is the Respondent/Applicant's Notice of Motion Application dated 11<sup>th</sup> August, 2019. It seeks the following orders that:

1. The Claimant's Claims is statute time- barred and is hereby struck out with costs.
2. The Applicant's Counterclaim proceed for hearing and determination.
3. The Applicant is awarded the costs of this Application.

This Application is premised on the grounds that:

1. *The Employment Act No. 11 of 2007 sets a limitation of time wherein no civil action or proceedings based or arising out of the Act shall be commenced unless it is commenced within three (3) years next after the act, neglect or default complained of; or in the case of continuing injury or damage, within 12 months next after the cessation thereof.*
2. *As per paragraph 4 of the Plaintiff (Statement of Claim), the Applicant entered into a car loan agreement on September 20, 2010 with his employer for a car loan of Kshs.2,000,000/-. The Applicant maintains that the alleged default in paying this loan spans over 7 years and is therefore time barred.*
3. *Further, the loan of Kshs.900,000 referred to in Paragraph 5 of the Plaintiff (Statement of Claim) dated June 20<sup>th</sup> 2017 and filed in Court on 21<sup>st</sup> June, 2020 spans over a period of over 2 years and is thus time barred being a continuing injury and ought to have been filed within 1 year of cessation.*
4. *The Claimant is accused of using his position as the Claimant's Group Financial Controller to receive a series of unauthorized company advances which in the Applicant's view constitutes of a continuing injury under Section 90 of the Employment Act, 2007 which requires that the same be filled within one (1) year of cessation which is 15<sup>th</sup> September, 2015.*
5. *The Claimant as per paragraph 8 of the Plaintiff (Statement of Claim) received Kshs.18,874,924 in M-pesa advances and therefore ought to have lodged his Claim within a year of cessation of the injury and not after more than 1.5 years as in this case.*
6. *It is on this basis that the Applicant maintains that the instant claim as filed is time barred having been more than 1 year contrary to the provisions Section 90 of the Employment Act, 2007.*

7. *The Claimant's act of filing before the lower court was not a mistake but a calculated move to circumvent the requirement of bringing its Claim within the stipulated timelines.*
8. *This Court should not allow itself to be improperly, illegally and unprocedurally used by the Claimant to cure the incurable inordinate delay by the Claimant in bringing its Claim.*
9. *The Suit is time barred as it offends the mandatory provisions of Section 90 of the Employment Act, 2007 and ought to be struck out in its entirety with costs to the Applicant.*
10. *It is just and fair that this Court grants the orders sought herein.*

The Application is further supported by the Affidavit of **CHARLES OTIENO OGADA**, the Respondent/Applicant herein sworn on 11<sup>th</sup> August, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under **Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016** and **Sections 12 and 90 of the Employment and Labour Relations Court Act, 2011**.

In response to the Application the Claimant filed a Replying Affidavit sworn by **NOOREN HIRJANI**, the Chief Financial Officer of the Claimant Company, on 28<sup>th</sup> October, 2020. He contends that the Application as filed is malicious and intended to frustrate the Claimant's efforts to recover the sums admittedly due and owing to the Claimant by the Respondent and to further delay the hearing and determination of this matter.

He maintains that the suit was filed within the set timelines of the law and that the Application is therefore false and misleading to the Court.

The Claimant further maintained that this suit was filed following the Respondent's failure to repay an outstanding balance of Kshs.10,574,363.27 an amount which is acknowledged by the Respondent.

The Affiant avers that the Claim does not fall under the ambit of a continuing injury as alleged by the Respondent/Applicant within the meaning of Section 90 of the Employment Act, 2007 and is therefore not time barred.

It is on this basis that the Claimant maintained that the Respondent's request to have the Claim dismissed and the Counterclaim proceed is misconceived and urged this Court to dismiss the Application in its entirety with costs to the Claimant.

He maintained that the Application as filed is vexatious, amounts to an abuse of the Court process, is without any factual or legal basis and is an attempt by the Respondent/Applicant to prevent or frustrate the hearing of the Claim on merit and urged this Court to dismiss it.

Parties disposed of the Application by way of written submissions.

### **Submissions by the Parties**

In his submissions the Respondent/Applicant maintained that the Claimant's Claim is time barred by dint of the provisions of Section 90 of the Employment Act, 2007 and Section 4(1) of the Limitation of Actions Act being a claim for continuing injury that ought to have been filed within 12 months of the cessation. The Respondent/Applicant relied on the Court of Appeal decision in the case of **Kenya Co-operative Creameries Limited v Peter Manthi Mwau (2017) eKLR**.

It is further submitted that the Claimant in Paragraphs 10 to 14 admits having delayed to file its case for the reason that it was engaging in ADR with the Respondent and that this reason does not extend the limitation period as provided by the law. For emphasis the Respondent/Applicant relied on the case of **Rift Valley Railways (Kenya) Limited v Hawkins Wagonza Musonye & Another (2016) eKLR** where the Court was of the view that time does not stop running for reason that parties are engaged in out of Court negotiations. The Court further emphasised that it is the duty of the employee to bear in mind the provisions of Section 90 of the Employment Act as no Court has the power to extend time for bringing actions unless the statute itself allows such an extension.

The Respondent/Applicant further argued that having established that this Claim is time barred this Court is robbed of the requisite Jurisdiction to hear and determine this matter. The Respondent/Applicant relied on the Judicial decisions in the cases of **Peter Njogu Mwangi & 3 Others v General Motors E. A Limited & 3 Others (2018) eKLR** and **Samuel Kamau Macharia v Kenya Commercial Bank Kenya Limited & 2 Others (2012) eKLR** on jurisdiction of courts.

He further submitted that his Counterclaim filed on August 24<sup>th</sup> 2017 is not time barred as the same was filed within a year of his exit from the Claimant's employment and is therefore the only claim that can be adjudicated by this Court.

It is on this basis that the Respondent/Applicant argued that his Application is merited and therefore urged this Court to allow the same with costs. For emphasis he relied on the case of **Jasbir Singh Rai & Others v Tarlochan Sing Rai & 4 Others (2014) eKLR** where the Court held that a successful party is entitled to an order for payment of costs as it is the means by which they are recouped for expenses put in fighting the action.

### **Claimant's Submissions**

In its Submissions the Claimant maintained that the dispute between itself and the Respondent is one of debt recovery that was as a result of

an employment relationship between the Claimant and the Respondent.

It is contended that the cause of action does not relate to the Respondent's employment contract but default by the Applicant to settle outstanding loans arising from unpaid car loans and unauthorized company loans, Mpesa advances and salary advances. The Claimant relied on the case of **Mogas Kenya Limited v Spin Masters Limited & Another (2018) eKLR**.

It is further maintained that the same was properly filed and within the set timelines at the Chief Magistrates' Court as provided under the confines of Sections 4(1), 23(3) and 26 of the Limitations of Actions Act. The Claimant referred this Court to the judicial decisions in the cases of **Nicholas Mahihu Muriithi v Barclays Bank of Kenya Limited (2018) eKLR**, **Dickson Oruko Nyakach & Another v Chemilil Sugar Company Limited (2015) eKLR** and **Meshack Otieno Kachuodho v Commissioner General Kenya Revenue Authority (2017) eKLR** on limitation of action under Section 90 of the Employment Act, 2007.

The Claimant maintains that this Claim being a debt recovery claim was filed within the requisite timelines which is 6 years. It maintained that the argument that time starts running from the date of advancement of the loans by the Respondent lacks any legal basis and therefore ought to be disregarded by this Court.

It is further submitted that the suit was filed before the expiry of the limitation period provided under Section 90 of the Employment Act, 2007 and is therefore not time barred.

It is further submitted that the Claim before this Court is not a continuing injury as contended by the Respondent/Applicant as the same was filed after the relationship between the Claimant and the Respondent had ceased and after the latter's failure to settle unpaid debts owed to the Claimant despite numerous promises to settle the same. For emphasis it relied on the Court of Appeal decision in the case of **Mary Kitsao Ngowa & 36 Others v Krystalline Limited (2015) eKLR**.

The Claimant further submitted that the Respondent having failed to amend his pleadings to raise the issue of the suit being time barred under Section 90 of the Employment Act, 2007 his claim is without legal or factual basis as he remains bound by the pleadings as filed before this Court. The claimant relied on the cases of **Daniel Otieno Migore v South Nyanza Sugar Company Limited (2018) eKLR** and **Stephen Onyango Achola & Another v Edward Hongo Sule & Another (2004) eKLR** where Courts held that a defendant must specifically plead in his defence a specific matter so as to avoid taking the other party by surprise and that issues to be dealt with are those raised in the Defence.

The Claimant further submitted that the Respondent has failed to demonstrate how the cause of action relating to debt recovery arising from his employment contract is statute barred by Section 90 of the Employment Act, 2007. That the instant Application is a deliberate attempt to mislead this Court.

In conclusion the Claimant urged this Court to find the instant Application devoid of merit and to proceed and dismiss it with costs to the Claimant.

In his brief rejoinder to the Claimant's Submissions the Respondent/Applicant maintains that the Claim against him for the alleged concealment of unauthorised company loans, salary advances and Mpesa advances ought to have been filed within 12 months from December 2015 which is when his employment with the Claimant ceased and as such the Claims are statute barred.

### **Analysis and Determination**

After considering the parties' arguments and the evidence adduced, I find that the issues for determination are:

1. Whether the Claim is Statute barred.
2. Whether this Court has Jurisdiction to hear and determine the Claim
3. Whether the Application dated 11<sup>th</sup> August, 2020 is merited.

### **Whether the Claim is Statute barred**

The Respondent/Applicant maintains that the Claim as filed constitutes a continuing injury and is therefore statute barred by dint of the provisions of Section 90 of the Employment Act, 2007 and Section 4(1) of the Limitation of Actions Act.

The Claimant on the other hand maintained that the Claim is not time barred as contended by the Applicant as the Claim is centred on a debt accrued by virtue of the Respondent's employment with it.

It further contended that the said debts do not constitute continuing injuries as submitted by the Respondent herein and therefore the Claim is properly before this Court.

### **What constitutes a continuing injury**

The definition of continuing injury in Blacks' Law Dictionary was given as *an injury that is still in the process of being committed*.

The Respondent argues that the alleged unauthorized company loans, M-pesa advances and salary advances are continuing injuries and that the Claimant ought to have filed its case within 12 months from December 2015 when the Respondent left the Claimant's employment.

The law is clear. If there is a continuing injury or damage, limitation is capped at 12 months from the cessation thereof.

The question then is whether or not the unauthorized company loans, M-pesa advances and salary advances constitute continuing injuries within the meaning of Section 90 of the Employment Act, 2007. The response is in the negative.

The above gives rise to contracts between the Claimant and the Respondent for the repayment of the sums owed by virtue of advancement of the funds to the Respondent by dint of his employment. He is therefore bound to comply with his obligations to pay the same even after termination of the employment relationship.

In the circumstances the Claim as filed is therefore not time barred under Section 90 of the Employment Act as contended by the Respondent/Applicant. The Act refers to wrongs arising out of an employment relationship, not debts. Debts cannot constitute continuing wrongs.

**Whether this Court has Jurisdiction to hear and determine the Claim**

Having found that the Claim is not time barred as contended, this Court is clothed with the requisite jurisdiction to hear and determine the same by dint of Section 12 of the Employment and Labour Relations Act.

The upshot is that the Application dated 11<sup>th</sup> August 2019 is devoid of merit and is accordingly dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF JANUARY 2021**

**MAUREEN ONYANGO**

**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 has 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.

**MAUREEN ONYANGO**

**JUDGE**