



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.696 OF 2019

JOHN KIIRU NJIIRI.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

RULING

The ruling herein relates to Notice of Preliminary Objections filed by the respondent and dated 7th April, 2021 on the grounds that;

1. The court lacks the jurisdiction to admit, hear and determine this Claim by virtue of being time barred pursuant to Section 90 of the Employment Act, No. 11 of 2011.
2. This court lacks the jurisdiction to admit, hear and determine this claim as it has been filed by the claimant outside the mandatory statutory limitation period prescribed by Section 90 of the Employment Act No. 11 of 2007 for continuing injuries/damages which ought to be filed within twelve months next after cessation thereof;
3. From the Statement of Claim, it is not in dispute that the Claimant's contract lapsed on 12th July 2016. *The outstanding leave days are alleged to have accumulated from 2007 to 2015. Pursuant to Section 90 of the Employment Act No. 11 of 2007, the Claimant ought to have filed his claim for outstanding leave days and or payment thereof, the same being continuing injuries, within twelve (12) months from date of cessation that is on or before 12th July 2017. The Statement of Claim herein was filed, out of time, on 18th October 2019, two (2) years after the statutory limitation;*
4. The Claimant's right to sue having lapsed, he lacked the capacity to bring any cause of action against the Respondent and his claim as constituted herein should be struck out with costs.

Parties attended and made oral submissions.

The respondent submitted that the claimant filed the Memorandum of claim on 17th October, 2019 on the grounds that his employment was terminated on 12th July, 2016 and is owed leave days and leave travelling allowances for the period of 9 years while employment subsisted. The suit is filed outside the limitation period contrary to section 90 of the Employment Act, 2007 (the Act) and hence the court is denied jurisdiction.

The claim that there was a continuing injury does not apply as such a claim must be filed within one (1) but this was not done. The entire claim is time barred and the court should not entertain it.

The claimant submitted that section 90 of the Act is in two parts, one reduces cause of action within 6 to 3 years and the second part reduces claims to 12 months with regard to continuing injury. That one can choose to rely on the 12 months provisions or the 12 months to 3 years provisions.

The general principle of law is that parties are bound by their pleadings. The respondent has filed an Amended Response and denied the court has no jurisdiction and then later has alleged that the claimant was under a fixed term contract which expired. This is evidence that each contract forms a separate injury and one contract could not be carried forward and therefore no continuing injury. However such question of continuing injury cannot arise where the 3 years rule under section 90 of the Act apply and is now challenged by the respondent.

By memo dated 25th March, 2015 the respondent admitted to owing the claimant leave days and such acknowledgement under section 23 of the Limitation of Actions Act extended time. Such became a continuing injury and the claim filed on 17th October, 2019 is within time.

Determination

On 17th October, 2019 the claimant filed his Memorandum of Claim on the grounds that on 13th July, 2016 his employment contract lapsed by which time he had accumulated 334 leave days which he expected to be commuted into cash and be paid to him together with his final dues. On 6th September, 2017 he wrote to the respondent demanding payment of his commuted leave days but this was declined leading to filing of this suit.

Employment effectively ended on 12th July, 2016. The term contract ended by effluxion of time.

Section 90 of the Act is framed in mandatory terms. A claim based on a contract of employment must be filed within 3 years. This Court is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose.

Section 90 of the Act requires 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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.

The limitation period is never extended in matters based on an employment contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act which provisions do not apply in employment and labour relations claims.

In the case of **James Mugeria Igati v Public Service Commission [2014] eKLR** the court held that the accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination of employment as stated in the letter communicating the same.

The fact that an employee whose employment has been terminated seeks a review or an appeal or makes demand thereof does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal or a response on the demand is made. See **Hilarion Mwabolo v Kenya Commercial Bank [2013] eKLR**.

The claimant had a clear cause of action against the employer when his contract lapsed on 12th July, 2016. He had all the facts which had been placed before him for commutation of untaken leave days and should have filed suit if he felt aggrieved by the non-payment, but he did not until time lapsed as required under section 90 of the Act.

The cause of action herein arose on 12th July, 2016 when the employment contract lapsed. Any claim filed contrary to the provisions of section 90 of the Act and a period after 3 years is time barred.

The claimant ought to have filed suit with regard to unpaid leave days commuted on or before 11th July, 2019. He filed suit 33 months late and outside the limitation period. Such cannot be curd in any other matter save for the court to stop as there is no jurisdiction.

Is there a case of continuing injury?

As correctly submitted by the claimant, the second part of section 90 of the Act provides that **in the case of continuing injury or damage within twelve months next after the cessation thereof** such constitutes a *continuing injury* in employment and labour relations. Save such *continuing injury* cannot apply to extend the limitation period.

In the case of **Johnson Kazungu v Kenya Marine & Fisheries Research Institute [2021] eKLR** the court held that;

- nowhere in section 90 of the Act is it stated (and as submitted for the respondent) that in event of a continuing injury, the 12 months of limitation are an extension to a time of three years from the date the continuing injury commenced.

And in the case of **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** the court of Appeal defined what constitutes a *continuing injury* to mean that;

Regarding 'a continuing injury', the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cessation thereof. ...The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.

Equally in this case, upon cessation of employment on 12th July, 2016 any claims arising out of employment and relating to unpaid leave days commuted, such ought to have been addressed within 2 months as otherwise, these claims are time barred. The claimant cannot base his claim for leave days on the demand letter and any acknowledgement thereof, which is denied, as such does not apply to claim based on employment and labour relations.

Objections made by the respondent are found with merit, the claims herein are time barred and the court is denied jurisdiction under the

provisions of section 90 of the Employment Act, 2007. The suit is hereby dismissed. Costs to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2021

M. MBAR

JUDGE

In the presence of:

Court Assistant: Okodoi

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