



**Omwengo v Judicial Service Commission & another (Cause  
286 of 2015) [2017] KEELRC 102 (KLR) (2 November 2017) (Ruling)**

*Zaphaniah Sagana Omwengo v Judicial Service Commission & another [2017] eKLR*

Neutral citation: [2017] KEELRC 102 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 286 OF 2015  
MA ONYANGO, J  
NOVEMBER 2, 2017**

**BETWEEN**

**ZAPHANIAH SAGANA OMWENGO ..... CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of preliminary objection dated 17th June 2016 the first respondent raises objection that:
  1. That the claim is statute time-barred and is incompetent, fatally defective and an abuse of court process as the same offends provisions of section 90 of the *Employment Act*, 2007 Laws of Kenya.
2. On 26<sup>th</sup> 2016 when the Notice of Preliminary Objection was set for hearing parties sought and were granted leave to argue the same by way of written submissions. The 1<sup>st</sup> Respondent filed submissions on 1<sup>st</sup> December 2016. Neither the Claimant nor the 2<sup>nd</sup> Respondent filed submissions.
3. In the submissions of the 1<sup>st</sup> Respondent it is stated that the Claimant filed this suit on 28<sup>th</sup> July, 2015 seeking judgment against the Respondents jointly and severally for –
  - a) The termination and/or dismissal of the claimant be declared unlawful from the beginning.
  - b) The Claimant to be paid his termination benefits as follows:-
    - (i) Services of gratuity for 3 [three] years  $25 \times 3 \times 12,611 = 945,825$
    - (ii) 12 months compensation for loss of employment  $Kshs. 12,611 \times 12 = 151,332/-$



- c) Reinstatement of services.
  - d) General damages thereof.
  - e) Costs of the claim.
  - f) Interest on the above at court rates.
4. The 1<sup>st</sup> Respondent submits that the claim is time barred and incompetent as it offends the provisions of the Employment Act as the termination occurred on 14<sup>th</sup> June 2012.
5. The *Employment Act*, 2007 is clear in its provisions on limitation of claims under Section 90 which states:

Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions* Act Cap 22 Laws of Kenya 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.

6. The 1<sup>st</sup> Respondent relied on the case of *Kenya Scientific Research International & Allied Workers union v T.N.S. Research International Limited*, Cause No. 27(N) of 2010 . It is submitted that there is no discretion to the court to do anything to the contrary as the court lacks jurisdiction and if the court were to be invited (which has not been done in the present case) to apply the constitutional Powers to extend time, then the applicant ought and is obliged to justify the application. The claimant has not made a case for that.
7. The 1<sup>st</sup> Respondent further relied on the Supreme Court of Kenya decisions in the cases of *In Re The Matter of the Interim Independent Electoral Commissions*, constitutional Application No. 2 of 2011; [2011]eKLR and in *Samuel Kamau Macharia & Another v. Kenya commercial Bank Limited & 2 others* S. C. Application No. 2 of 2012; [2012] eKLR, in which it was held that the assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, statute law, and judicial precedent. It stated:

“A Court’s jurisdiction flows from either the constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.

8. The 1<sup>st</sup> Respondent further relied on the decision of Justice O. N. Makau in the case of *Charles Musa Keyu v Wananchi Marine Products (K) Ltd* (2014) eKLR in which the court struck out the suit for being time barred under section 90 of the *Employment Act*, 2007 in his ruling he stated:

“It is trite that the court has no jurisdiction to entertain a time barred suit”.

9. Similarly in, *Augustine Odhiambo Abiero v KK Security Ltd* (2014) eKLR the learned Judge stated that the suit was incompetent and bad in law for having been brought outside the statutory limitation period of 3 years as provided for under Section 90 of the *Employment Act*, No. 11 of 2007.



10. The Respondent further relied on the case of *Peter Nyamai & 7 others v M. J. Clarke Limited* [2013]eKLR, in which Justice Radido Stephen in striking out the Claimants Claim stated:

“..... The end result is that I do uphold the Preliminary Objection filed on 19 February 2013 that the Memorandum of Claim herein was filed out of the time stipulated in section 90 of the *Employment Act*, 2007 and in any case this Court has no jurisdiction or discretion to extend time or grant leave to file a Claim out of time in respect of causes of action based on breach of employment contract. The Memorandum of Claim is therefore struck out”.

11. It is thus the 1<sup>st</sup> Respondent Submissions that the Claimants Claim should be struck off from the record for failing to meet the statutory requirements as set out under section 90 of the *Employment Act*, 2007.

### Determination

12. The law relating to limitation is contained in the *Limitation of Actions Act* which provides at section 4 as follows:

4. Actions of contract and tort and certain other actions

- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- (a) actions founded on contract;
  - (b) actions to enforce a recognizance;
  - (c) actions to enforce an award;
  - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
  - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
- (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

13. Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

- (3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.
- (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.
- (5) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of a written law may not be brought after the end of two years from the date on which the cause of action accrued.



- (6) This section does not apply to a cause of action within the Admiralty jurisdiction of the court which is enforceable in rem, except that subsection (1) of this section applies to an action to recover seamen's wages.
14. Section 90 of the *Employment Act* provides that:
90. Limitations
- 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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.
15. It is pleaded at paragraph 5 of the Memorandum of Claim herein that:
- That on 17/01/2012 the 1<sup>st</sup> Respondent unlawfully terminated services of the Claimant herein without according the Claimant an opportunity to defend himself as per the requirements of the *Employment Act* cap 226 laws of Kenya.
16. The suit having been filed on 28<sup>th</sup> July 2015 was more than 3 years from the date the cause of action arose on 17<sup>th</sup> January 2012. The period of 3 years lapsed on 16<sup>th</sup> January 2015.
17. In the case of *Peter Nyamai & 3 Others v M. J. Clarke Limited* that has been quoted by the 1<sup>st</sup> Respondent the court held that this court has no jurisdiction to extend limitation period relying on the decision of the Court of Appeal in *Divecon v Samani* and the High Court decision in *Timothy M. Mukalo v Reuben Alubale Shiramba & 3 Others*. Again in the case of *Charles Musa Kweyu v Wananchi Marine products* and in *Augustine Odhiambo Abiero v K.K. Security Ltd* the court held that a suit that is time barred is incompetent and bad in law. The court has no jurisdiction to entertain a suit that is time barred.
18. *In Re The Matter of the Interim Independent Electoral Commission* S.C. Constitutional Application No. 2 of 2011; [2011]eKLR and in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* S.C Application No. 2 of 2012[2012]eKLR the Supreme Court stated that jurisdiction is a matter regulated by the Constitution, statute law and judicial precedent. And as was stated in *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 jurisdiction is everything and without it a court has no power to make one more step.
19. For the foregoing reasons the preliminary objection is allowed and I consequently strike out this suit for being time barred under section 90 of the *Employment Act*.

**JUDGEMENT DATED, SIGNED AND DELIVERED THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2017**

**MAUREEN ONYANGO**

**JUDGE**

