



**Pacheco v Resort Kenya Limited (Cause E238 of 2024)
[2024] KEELRC 13534 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13534 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E238 OF 2024
SC RUTTO, J
DECEMBER 20, 2024**

BETWEEN

ANTHONY SEBBY FRANCIS PACHECO CLAIMANT

AND

RESORT KENYA LIMITED RESPONDENT

RULING

1. This Ruling is with respect to the Respondent’s Notice of Preliminary Objection dated 15th July 2024 which is premised on the ground that the Claimant’s suit against the Respondent is statute (time) barred in view of Section 90 of the *Employment Act*, 2007 and should therefore be struck out with costs to the Respondent.
2. On 15th October 2024, the Court directed that the Preliminary Objection be canvassed by way of written submissions.

Submissions

3. In support of the preliminary objection, the Respondent has submitted that the Claimant’s suit is statute barred in view of Section 90 of the *Employment Act* and that this court does not have jurisdiction to either entertain it or extend time. It is the Respondent’s further submission that it does not matter that the Claimant first filed the suit at the Chief Magistrates Court as the said court was not clothed with jurisdiction to try the suit. To this end, the Respondent cited the case of *Josephat Ndirangu v Henkel Chemicals* (EA) Ltd [2013] KEELRC 890 (KLR) in support of its submissions.
4. The Claimant on the other hand has submitted that whereas Section 89(sic) of the *Employment Act* uses the word “shall”, the same is merely directive and does not take away the discretion of the court to proceed and hear and determine this matter for which a reasonable and plausible reason for delay has been given. In support of the Claimant’s submissions, reliance was placed on the cases of *David Njenga Njagi v Attorney General* (2016) eKLR and *In Re estate of George Barua* (Deceased) (2019) eKLR.



Analysis and Determination

5. To my mind, the singular issue for determination is whether the suit herein is time-barred.
6. The Claimant has averred in his Memorandum of Claim that he resigned from his position in the Respondent's company on 9th July 2020 since the business had closed for over a period of six months due to the COVID-19 pandemic. It is the Claimant's case that following his resignation, the Respondent failed to take into account the additional Kshs 30,000.00 that was being paid in cash in calculating his dues. To this end, his claim against the Respondent is for the payment of gratuity and unutilized leave days.
7. Pursuant to Section 90 of the [Employment Act](#) 2007, a suit founded on a contract of service as the one herein, cannot be sustained in Court after the lapse of three years from the date the cause of action occurred.
8. A cause of action refers to a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. (See the case [Attorney General & another v Andrew Maina Gitbinji & another](#) [2016] eKLR).
9. It thus follows that the cause of action in this case arose when the Claimant resigned from the Respondent's employment on 9th July 2020. That is the time he became entitled to payment of his terminal dues.
10. Therefore, and applying the provisions of Section 90 of the [Employment Act](#) to the case herein, the time for filing the instant suit started running from 9th July 2020 and lapsed on 9th July 2023 or thereabout. Thereafter, no action based on the contract of employment could be sustained.
11. In this case, the Claimant filed the Claim on 28th March 2024 hence by simple arithmetic, this was beyond the three-year limitation period stipulated under Section 90 aforesaid. Therefore, it goes without saying that as of 28th March 2024, the Claim herein was statute-barred.
12. Accordingly, and in following with the holding in the case of [Thuranira Karauri v Agnes Ncheche](#) [1997] eKLR, that the issue of limitation goes to the court's jurisdiction, it is this Court's position that it lacks jurisdiction to entertain the instant suit.
13. Further and with tremendous respect to the Claimant, his argument that the word "shall" in Section 90 of the [Employment Act](#), is not mandatory but directive, is an erroneous position. I am fortified by the decision of the Court of Appeal in [Beatrice Kahai Adagala v Postal Corporation of Kenya](#) [2015] eKLR where it was held that Section 90 of the [Employment Act](#) is in mandatory terms and that the limitation period is never extended in matters based on contract.
14. Accordingly, it is evident that pursuant to Section 90 of the [Employment Act](#), this Court's hands are tied and it has no jurisdiction to hear and determine a matter that is filed after the prescribed statutory period.
15. In the premises, the Respondent's Preliminary Objection dated 15th July 2024, is sustained, with the consequence that the Claim filed on 28th March 2024, is struck out for being time-barred.
16. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

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STELLA RUTTO



JUDGE

In the presence of:

Ms. Kamene instructed by Mr. Ondieki for the Claimant

Ms. Mideva for the Respondent

Millicent Court Assistant

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 March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

