



**Kazungu v Kenya Ports Authority (Miscellaneous Application
E002 of 2025) [2025] KEELRC 982 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 982 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E002 OF 2025
M MBARŪ, J
MARCH 27, 2025
[FORMERLY NAIROBI MISC. APPL. NO E008 OF 2025]**

BETWEEN

JAMES WANJE KAZUNGU APPLICANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. The applicant filed an application dated 13 January 2025 seeking orders that leave be granted to apply to the respondent to enforce the award and assessment of the Director of Occupational Safety and Health Services (DOSHS), Mombasa, made on 28 November 2018 outside the limitation period under the statute. The draft application will be deemed as filed.
2. The applicant's affidavit supports the application. Whereas section 89 of the *Employment Act* allows a party to file a claim within 3 years from the date the cause of action arose, the circumstances precipitating this application are primarily beyond the applicant's control. He could not lodge the claim within the prescribed period.
3. The applicant avers that under Section 89 of the *Employment Act*, a claimant under a continuing injury is addressed within 12 months from the date of cessation, such as in the case herein. However, the applicant has moved the seat of justice to consider the circumstances of obtaining the claim and to extend the time to file it.
4. The delay in filing the claim arose because, as an employee of the respondent, he sustained a work injury while offloading and loading cargo on 28 July 2018. The incident was reported to the DOSHS, and upon assessment, it was established that there was 10% permanent incapacity. On 28 November 2018, DOSHS notified the respondent to pay Ksh. 850,118 within 90 days. There was no payment. The respondent did not file objections or appeals regarding the DOSHS award and assessment.



5. Through Jubilee Insurance, the respondent wrote a letter dated 9 January 2019 to M/S Liaison Insurance Brokers requiring the applicant to present himself to their preferred doctors for a second medical assessment. Despite the applicant visiting Dr. Omar as directed, no assessment report was placed before the DOSH or settlement of the claim by the respondent.
6. Although the requirement for a second assessment is allowed in law, it materially delayed the applicant from filing his claim under the belief that he could not do so before DOSH had made an assessment. The respondent's delay in submitting the secondary report was beyond the applicant's control. The request for a second assessment by the respondent's insurers has not ceased. It is still pending, hence a continuing injury, but the applicant is seeking an extension of time to file his claim due to abundant caution.
7. In reply, the respondent filed the Replying Affidavit of George O. Ochieng, the principal Insurance Officer, who averred that the applicant was an employee who sustained an injury while on duty on 28 July 2018. He lodged a claim with DOSH, which was assessed.
8. Ochieng avers that no provision in law envisages an extension of time to apply to enforce an award by DOSH. The applicant was aware of his rights, having secured an award from DOSH. There are timelines within which an employer should settle a claim where there are no objections or appeals.
9. The *Employment Act* under Section 89 sets a time limitation of 3 years within which a claimant should lodge a claim. The cause of action arose on 28 November 2018, and the time to lodge a claim expired on 28 November 2021.
10. The applicant cannot rely on the absence of a second medical assessment to urge a claim of a continuing injury and hence seek enlargement of time. There is no cogent reason that prevented the applicant from filing his claim, and the provisions of the *Limitation of Actions Act* cannot be applied herein to seek an enlargement of time.
11. Both parties filed submissions and attended court to make oral submissions.
12. The applicant submitted that the DOSH award is a function discharged under a quasi-judicial role. Upon the DOSH award and assessment, the respondent did not file an appeal or make any objections. By directing the application for a second medical assessment, the process re-opened and is yet to conclude; hence, his time to file a claim continues. The applicant finds himself under a legal conundrum; he cannot move without the second medical assessment, and cannot enforce the initial award by DOSH. The claim is not strictly an employment claim but a DOSH enforcement; hence, it depends on the orders sought to extend the time to lodge the claim.
13. In the case of *Naftali (sung as the Legal Administrator and representative of the Estate of the late Monica Nafula Lucheli – deceased) v County Government of Kakamega*, Misc. Appl. E001 of 2024, the court held that the limitation period under section 89 of the *Employment Act* for 3 years does not apply, which is premised on WIBA. The court appreciated that to seek leave to file a claim before 12 years lapsed was premature under the provisions of Section 4(4) of the *Limitation of Actions Act*. A DOSH award is an order contemplated under the law and hence payable before the lapse of 12 years. In *Malaba v Securex Agencies (K) Limited* Misc. Appl. E166 of 2023, the court held that the respondent acknowledged the debt as the employer by accepting the DOSH award. For purposes of Section 89 of the *Employment Act*, the refusal to pay such debt was recoverable in proceedings such as herein.
14. The respondent submitted that the applicant was injured while at work on 28 November 2018. There was no appeal or objection by the respondent. Under Section 89 of the *Employment Act*, he should have filed his claim within 3 years, which has since lapsed. In *Divercon Ltd v Simani*, the Court of



Appeal held that the statutory limitations are mandatory and the court has no discretion to extend time. In this case, the applicant has no legal basis for failing to file his claim on time. The absence of an express provision in WIBA allowing for an extension of time to file a DOSH award does not allow the applicant to apply under Section 89 of the *Employment Act* for a time extension. Judicial discretion is removed in such a matter, and the application should be dismissed with costs as held in *Rajput v Barclays Bank of Kenya Ltd* [2004] 2 KLR.

Determination

15. The applicant has moved the court under the instant application and is seeking an extended time to file his claim. His case is that under Section 89 of the *Employment Act*, there is a continuing injury following his work injury on 28 November 2018 and the DOSH assessment, for which the respondent asked to undertake a second medical report, which is still pending. Under the *Limitation of Actions Act* and Sections 51 of the *Work Injury Benefits Act* (WIBA), there is no objection or appeal and hence, under Sections 10(1) and 26(1) of *WIB*, compensation for a work injury is a statutory right that does not abate, and hence there is no time bar.
16. Section 89 of the *Employment Act* does not envisage an extension to file claims out of time. Court of Appeal in *Divecon Ltd v Samani* [1995-1998] 1 EA 48, in addressing an appeal arising from a claim seeking leave to file an employment claim out of time, held that section 4(1) of the *Limitation of Actions Act* was clear beyond any doubt and that the section meant that;

No one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done, namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it would be unacceptable to imply, as the learned Judge of the Superior Court did, that ‘the wording of section 4(1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked.
17. In the case of *Maria Machocho v Total Kenya Limited* [2013] KEELRC 577 (KLR), the court appreciated that, unlike commercial disputes, employment claims are premised under the *Employment Act*, under which a claim must be lodged within 3 years from the date the cause of action arose. There is no discretion to extend time beyond the 3 years. The court rationalized that the *Limitation of Actions Act* would only apply to causes of action grounded on negligence, nuisance, or breach of duty.
18. This position is reiterated in the case of *Mitei v National Social Security Fund Board of Trustees* [2022] KECA 974 (KLR) that;

... in the case of actions based on breach of contract of service or arising out of the *Employment Act*, no court may or shall have the right or power to entertain what cannot be done, namely, an action that is brought in contract, six years after the cause of action arose or any application to extend such time for the bringing of the action.
19. On the one hand, the applicant asserts that the case relates to enforcing the DOSH award for a work-related injury that occurred on 28 November 2018. On the other hand, the orders sought herein are premised on the provisions of Section 89 of the *Employment Act*. Section 89 can only apply to an employment claim or a continuing injury. Does a work-related injury premised under the WIBA constitute such a claim?



- 20. The purpose of WIBA is set out under its preamble. Claims arising from work injury must be addressed within the provisions of WIBA. Where the cause of action accrued on 28 November 2018, the applicant was bound under WIBA provisions. To seek an enlargement of time under Section 89 of the Employment Act is unnecessary, as such a matter cannot aid the applicant. The rationale is that section 98 of the Employment Act is couched in mandatory terms. A party must lodge a claim of employment and labour relations within 3 years and for a continuing injury within 12 months from the date the cause of action, injury or damage accrued. The purpose of WIBA would thus be lost where a party is to base a claim under the Employment Act for time enlargement as the court is denied such discretion as held in Peter Ndaka Mutavi v Pembe Flour Mills Limited [2020] KEELRC 250 (KLR).
- 21. Is this a continuing injury as defined under Section 89 of the Employment Act?
- 22. The applicant appreciates that this is not an employment claim in the strict sense but a DOSH enforcement claim. So why seek to apply for time enlargement under Section 89 of the Employment Act? This cannot be cured using the Limitation of Actions Act since, under WIBA, the modalities of enforcing a work-related injury are addressed.
- 23. Accordingly, the orders seeking an enlargement of time to file a claim out of time under the application dated 13 January 2025 shall not be issued. The application is without merit and is hereby dismissed. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 27 MARCH 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

