



**Amollo v Mitsumi Distribution FZ Company & 40 others (Cause E041 of 2025) [2025] KEELRC 2649 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2649 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E041 OF 2025  
JK GAKERI, J  
SEPTEMBER 30, 2025**

**BETWEEN**

**BRODERICK OTIENO AMOLLO ..... CLAIMANT**

**AND**

**MITSUMI DISTRIBUTION FZCOMPANY & 40 OTHERS ..... RESPONDENT**

**RULING**

1. The claimant commenced the instant suit on 9<sup>th</sup> June, 2025 vide a Memorandum of Claim dated 2<sup>nd</sup> June, 2025 citing 31 breaches by the respondents.
2. At paragraph 26 of the Memorandum of Claim, the claimant stated that he was employed by the 2<sup>nd</sup> respondent on 11<sup>th</sup> January, 2021 and was unlawfully and illegally terminated from employment by the 13<sup>th</sup> respondent on 9<sup>th</sup> June, 2021 via electronic mail and forced to resign as a director of 6<sup>th</sup> respondent by the 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup> and 15<sup>th</sup> respondents.
3. The claimant sought various reliefs including declaration that violation of the Employment Agreement dated 11<sup>th</sup> January, 2021 was unconstitutional and *ultra vires* the Constitution of Kenya and the Employment Act, respondents be jointly and severally ordered to compensate the claimant for wrongful dismissal from employment and unfair labour practices, a declaration substituting the Employment Agreement dated 11<sup>th</sup> January, 2021 with the Employment Act and the claimant remunerated in accordance with the Employment Act, declaration voiding the termination agreement dated 11<sup>th</sup> June, 2021 and same substituted with terminal dues, compensation by way of one year contractual term together with another 12 months among other reliefs.

**Respondent's Case**

4. By a statement of Response dated 30<sup>th</sup> June, 2025, the respondents sought the striking out of the suit for being frivolous and disclosed no reasonable cause of action.



5. The respondents admitted that the claimant was an employee of the 2<sup>nd</sup> respondent and his employment was terminated on 9<sup>th</sup> June, 2021 and the parties mutually separated on 11<sup>th</sup> June, 2021 and the claimant was paid the sum of Kshs.295,000.00 by cheque dated 14<sup>th</sup> June, 2021 and was not entitled to the reliefs sought.
6. Subsequently, on 1<sup>st</sup> July, 2025 the respondent's counsel filed a Notice of Preliminary Objection urging that:
  - i. This Honourable Court lacked jurisdiction by dint of Section 89 of the *Employment Act*.
  - ii. The claimant mutually separated from the 2<sup>nd</sup> respondent on 11<sup>th</sup> June 2021 and had up to 11<sup>th</sup> June, 2024 to file any claims against the 2<sup>nd</sup> respondent and the instant suit was filed out of time.
7. When the matter came up for mention on 30<sup>th</sup> June, 2025 the claimant and counsel for the respondent were present and the respondent's counsel sought time to file a response and an application to struck out the Memorandum of Claim and a mention was scheduled for 28<sup>th</sup> July, 2025 to confirm compliance.
8. On 28<sup>th</sup> July, 2025, the respondent's counsel was absent. The claimant informed the court that the respondent had filed a Notice of Preliminary Objection and he had already filed submissions. The court fixed a ruling date.

#### **Claimant's Submissions**

9. The claimant submitted that he became a director of the 6<sup>th</sup> Respondent and was the sole director based in Kenya and all others were based in India. Significantly, the employment contract had a restraining clause for one (1) year after termination of employment.
10. The claimant argued that the unlawful termination of his employment under clause 9 of the employment contract extended the period for instituting the suit by 12 months that conformed with the 3 years under Section 89 of the *Employment Act* and thus the deadline to sue the respondents was 9<sup>th</sup> June, 2025.
11. The claimant further submitted that by virtue of being a director of the 6<sup>th</sup> respondent and having been forced to resign the position in September 2022, the deadline for filing the suit would have been September 2026 by virtue of clause 9 of the Employment Contract that the 12 months period was extended by the contract as he would not be in gainful employment.
12. The claimant further submitted that having alleged infringement of his rights under Article 25 of the *Constitution* of Kenya the *Constitution* prevailed over the provisions of the *Employment Act*, and according to him the instant Notice of Preliminary Objection was bound to fail by dint of Article 22 of the *Constitution* of Kenya as he had the right to institute the suit claiming denial infringement and violation of constitutional rights.
13. Reliance was placed on the provisions of Articles 25, 22 and (2) of the *Constitution* of Kenya, and to underscore the supremacy of the *Constitution* of Kenya and urge that even if the suit was statute barred, the *Constitution* of Kenya gave the court original jurisdiction to hear the same under Article 162(2)(a).
14. Reliance was also placed on the provisions of Rule 10(3) of the *Employment and Labour Relation Court (Procedure) Rules, 2024* on enforcement of constitutional rights and freedoms.
15. The claimant sort the striking out of the Preliminary Objection with costs.



16. As to what constitutes a Preliminary Objection, the sentiments of Law JA and Sir Charles Newbold P. in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 merit recapitulation

Law JA stated:

“... A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

Sir Charles Newbold P stated:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”

17. Evidently, a Preliminary Objection is a threshold issue and ought to be disposed of at the earliest possible opportunity whenever it is raised because of its potential to dispose of the suit before hearing and determination. Since the respondents are challenging the court’s jurisdiction on account of limitation of time, the Notice of Preliminary Objection dated 1<sup>st</sup> July, 2025 meets the threshold of a Preliminary Objection.
18. On the jurisdiction, it is trite law that jurisdiction is everything as exquisitely captured by Nyarangi JA in *Owners of Motor Vessel “Lilian S” v Caltex Oil Kenya Ltd* [989] eKLR. The jurisdiction of this court on enforcement of rights and fundamental freedoms has been clearly articulated by this court, the High Court, Court of Appeal and the Supreme Court of Kenya. All have held that the Employment and Labour Relations Court has jurisdiction to hear and determine suits on alleged violation, threatened violation, denial or infringement of rights or fundamental freedoms in the context of employment or labour relations.
19. In *Attorney General & 2 Others v Okiya Omtata & 14 others* [2020] eKLR, the Court of Appeal held: -
- “We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply the *Constitution* as held by the High Court in *United States International University (USIU) v The Attorney General & Others* [2012] eKLR and this Court in *Daniel N. Mugendi v Kenyatta University & 3 Others* [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply the *Constitution* is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters”.
20. See also *Kenya Tea Growers Association v 812 Others v National Social Security Fund Board of Trustees & 13 Others* Petition E004 of 2002 of 2023 (Consolidated) [2024] KESC 3 KLR (21<sup>st</sup> February, 2024) Judgment, where the Supreme Court held:

“For the avoidance of doubt and so as to stop the pendulum of jurisdictional re-jigging that has characterised this case from the beginning we hereby restate that the ELRC has jurisdiction to determine the constitutional validity of a statute in matters employment and



labour. Suffice it to say that the statute in question must be in focus and at the centre of the dispute in question...”

21. The court is in agreement with the claimant’s Submissions that this court has jurisdiction to enforce constitutional rights and fundamental freedoms through a claim as opposed to a Petition or Judicial Review. However, the claimant did not go far enough to sustain his case.
22. The suit in question must meet the threshold in *Anarita Karimi Njeru v Republic* [1979] eKLR on the degree of precision with which the party suing is required to articulate the complaint, the provisions allegedly infringed and the manner in which they are alleged to have been infringed.
23. Having pleaded that his employment was terminated via email on 9<sup>th</sup> June, 2021, a fact the respondents admitted and confirmed, the claimant fully appreciated that his action was statute barred by dint of the provisions of Section 89 of the *Employment Act* which provide:

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.

24. The only exception under the foregoing provision are cases of continuing injury or damage and the suit must be instituted within 12 months of cessation of the injury or damage.
25. The claimant did not allege that his complaint related to a continuing injury or damage and that he instituted the claim within 12 months of cessation of the injury or damage.

#### **Would a Petition Have Ameliorated the Claimant’s Case?**

26. It is trite that the *Constitution* of Kenya is the basic law, and prevails over all other laws. Its pre-eminent character is encapsulated in Article 2 cited by the claimant, which would mean that the claimant should have instituted a Constitutional Petition to ground his case on the relevant provisions of the *Constitution* and demonstrate how and to what extent they were violated, threatened or infringed and the court would have determined whether the alleged violations were real or the Petition was being used to evade the limitation of actions as is often the case in employment disputes where the 3 years limitation period had lapsed.
27. See in this regard *Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another* [2016] eKLR, *Alphonse Mwangemi Munga & Others v African Safari Club* [2008] eKLR and *Daniel N. Mugendi v Kenyatta University & 3 Others* (*supra*).
28. Since the claimant did not file a Constitutional Petition, this is the far the court is prepared to go.
29. Puzzlingly, the claimant used his employment contract as the basis of claiming that the suit was not statute barred.
30. Admittedly, the court found it difficult to follow the claimant’s submission that a contract in restraint of trade between parties increases the duration within which any suit arising therefrom ought to be filed and granted that limitation of time in employment contracts is governed by the provisions of Section 89 of the *Employment Act*, it is unclear to the court how an agreement between parties can alter or affect a statutory provision.



31. Another confounding argument relied upon by the claimant is the postulation that because he was forced to resign as a director of the 6<sup>th</sup> respondent in September 2022, the period within which the suit ought to have been instituted was increased till September 2026, a total of 4 years from 2022.
32. In the court's view, this argument lacks a factual and legal basis because the claimant did not avail a copy of the contract of service between him and the 6<sup>th</sup> respondent to demonstrate that he was its employee in September 2022. The foregoing is fortified by the fact that directors seldomly have written contracts of service with the organizations they serve as board members and are typically paid sitting allowance whenever they attend board meetings or participate in other activities of the organization.
33. The foregoing is important on account that the claimant's argument clearly suggests that parties may consensually confer jurisdiction upon a court of law which is not feasible.
34. As held in *Samuel Kamau Macharia & another v Kenya Commercial Bank & others* [2012] eKLR  

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...  
It cannot expand its jurisdiction through judicial craft or innovation...”
35. See also *Phoenix of E. A. Assurance co. Ltd v S. M. Thiga t/a Newspaper Service* [2019] eKLR.
36. It is trite law that parties cannot confer jurisdiction upon a court of law nor extend the limitation period by consent. Thus, the claimants' arguments grounded on the restraining clause in clause 9 of his employment contract would not extend the duration within which the instant suit ought to have been filed, nor could his directorship with the 6<sup>th</sup> respondent.
37. Having perused the claimant's documents and the respondents response and stripped of the legal jargon, it is evident that the suit before the court is a plain vanilla dispute between an employee and his former employer and ought to have been filed before expiry of three (3) years in consonance with the provisions of Section 89 of the Employment Act and having failed to do so, the instant suit is statute barred and this court has no jurisdiction to hear and determine it and proceeds to down its tools.
38. The upshot of the foregoing is that the claim dated 2<sup>nd</sup> June, 2025 is struck out.  
Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**DR. JACOB GAKERI**

**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.

**DR. JACOB GAKERI**

**JUDGE**

