



**Muthinga v Kenya Relief Organization (Cause E057 of 2025)
[2025] KEELRC 2629 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2629 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E057 OF 2025
JK GAKERI, J
SEPTEMBER 30, 2025**

BETWEEN

HELLEN WANJIKU MUTHINGA CLAIMANT

AND

KENYA RELIEF ORGANIZATION RESPONDENT

RULING

1. The claimant instituted the instant suit on 30th June, 2025 vide a Memorandum of Claim dated on even date and amended on 18th July, 2025 alleging that the respondent had unlawfully and constructively terminated her employment on 29th May, 2021.
2. The claimant prayed for a declaration that termination of employment was wrongful, unlawful, discriminatory and unprocedural contrary to Article 27(1), (2), (3), (4), (5) and Article 47 of the Constitution of Kenya, 2010, 12 months compensation, aggravated damages, 3 months salary in lieu of notice, 19 months salary, 40 leave days, unremitted PAYE deductions for 19 months, costs and any other relief the court deemed fit.
3. The respondent's case was that the claimant was its employee from 2020 to 29th May, 2021 when it exercised its contractual right to terminate the claimant's employment and denied having done so unlawful and averred that the claim was statute barred and sought dismissal of the suit with costs.
4. By a Notice of Preliminary Objection dated 16th July, 2025, the respondent objected to the instant suit on the grounds that the court lacked jurisdiction to entertain the matter as the suit offended Section 90 of the Employment Act, 2007, barred by limitation of action and fatally incompetent and ought to be dismissed in limine.



Claimant's submissions

5. As to whether the suit was statute barred, counsel for the claimant's counsel posited that the court was being called upon to determine when the claimant's cause of action accrued, whether it was when she was summarily dismissed or suspended or acquitted and according to counsel, these were factual matters provable by evidence.
6. According to counsel, since the claimant's case was grounded on violation of constitutional rights under Articles 27(1), (2), (3), 5 and 47 of the Constitution of Kenya and was claiming aggravated damages for the violations, the action was not merely contractual and the provisions of Section 90 of the Employment Act could not extinguish her right to sue.
7. Reliance was placed on the decision in *Divecon Ltd V Samani* (1995 – 1998) IEA 48, to urge that the issue whether an action was statute barred required production of evidence and in any event Article 159(2)(d) of the Constitution of the Kenya enjoined courts to administer justice without undue regard to procedural technicalities and promote access to justice.
8. Reliance was also placed on the sentiments of the court in *Kenya Plantation and Agricultural Workers Union V Maji Mazuri Flowers Ltd* [2012] eKLR and *Josephat Ndirangu V Henkel Chemicals (EA) Ltd* [2013] eKLR on allegations of discrimination and constitutional violations to argue that the instant case was an exception to the provisions of Section 90 of the Employment Act.
9. As to whether the court had jurisdiction to hear and determine the suit, counsel submitted that the criminal proceedings suspended the employment relationship formally or constructively and the claimant could not have filed a suit during the pendency of criminal proceedings and the acquittal gave rise to a cause of action.
10. Finally, with regard to acknowledgment of a debt by the employer, counsel submitted that the matter was under consideration until after conclusion of the criminal case and non-payment of salary was a continuing injury as held in *G4S Security Services (K) Ltd V Joseph Kamau & 468 Others* [2018] eKLR.
11. Counsel submitted that the respondent's preliminary objection was premature, misplaced and designed to defeat substantive justice.

Respondent's submissions

12. As to whether the court had jurisdiction to entertain the instant suit, counsel for the respondent placed reliance on the sentiments of Waki JA in *Attorney General & another V Andrew Maina Githinji & another* [2016] KECA 817 (KLR) and Law JA in *Mukisa Biscuit Manufacturing Co. Ltd West End Distributors Ltd* [1969] EA 696 on the essentials of a Preliminary Objection, as well as the provisions of Section 89 of the Employment Act and the decision in *Thuranira Karauri V Agnes Ncheche* Civil Appeal No. 19, to urge that limitation of actions goes to the jurisdiction of the court and the claimant's suit was statute barred as it was filed 4 years and 1 month after the cause of action arose and the court had no discretion in the matter.
13. On malicious prosecution, reliance was placed on the sentiments of the court in *Otieno V Butali Sugar Mills Ltd* [2023] KEELRC 1619 (KLR) to urge that while in a termination of employment the cause of action accrued on termination, an action in malicious prosecution arose on the date of acquittal in the criminal case and in the case of the latter, the Employment and Labour Relations Court was not the proper forum by virtue of the provisions of Section 12 of the Employment and Labour Relations Court Act.



14. Counsel further submitted that a criminal process did not automatically render an employee immune from disciplinary process as held in *Kibe V Attorney General* (Civil Appeal No.164 of 2000 and *Attorney General & Others V Andrew Maina Githinji* (supra).
15. Reliance was also placed on the sentiments of the Court of Appeal in *G4S Security Services (K) Ltd V Joseph Kamau & 468 others* [2018] KECA 827 (KLR), to urge that the court had no jurisdiction to entertain the instant suit as it was statute barred.

Analysis

16. It is trite that when a Preliminary Objection is raised, it ought to be disposed of at the earliest possible instance because of its potential to terminate the case at that stage. It also ensures judicious use of judicial time.
17. Needless to emphasize, a Preliminary Objection raises a threshold question and its expeditious disposal is essential.
18. The respondent contends that the claimant's suit is statute barred by dint of Section 90 of the *Employment Act* 2007, which implicates the court's jurisdiction to hear and determine the instant suit. Limitation of actions is a jurisdictional issue and can be raised at any stage of the proceedings by the parties to the suit or the court suo motu. This is because "Jurisdiction is everything and without it a court has no power to make one more step, as exquisitely captured by Nyarangi JA in *Owners of Motor Vessel "Lilian S" V Caltex Oil Kenya Ltd* [1989] eKLR.
19. As to whether the respondent's Notice of Preliminary Objection meets the threshold, the court is guided by the sentiments of the Court of Appeal in its celebrated sentiments in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] EA 696 as follows:

"...A Preliminary Objection consists of a pure 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 a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".
20. Similarly, in *G4S Security Services (K) Ltd V Joseph Kamau & 468 others* [2018] eKLR, the Court of Appeal stated;

"The test to be applied in determining whether the Preliminary Objection met the threshold as in the Mukisa Case (supra) which are whether the Preliminary Objection raises a pure point of law that there is a demonstration that all facts pleaded by the other side are correct and that there is no fact that needs to be ascertained".
21. The court is guided by these sentiments and from which it is discernible that the respondent's Notice of Preliminary Objection dated 16th July, 2025 meets the threshold prescribed in the Mukisa Case (supra).
22. The only issue for determination is whether the instant suit is statute barred.

Section 89 of the *Employment Act* provides:
23. 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. In the instant case, the original Memorandum of Claim stated that the claimant was employed by the respondent as a Chief Accountant in the year 2020 under a written contract of service until 29th May, 2021 when the contract was unlawfully and constructively terminated, an averment the Amended Memorandum of Claim rehashed without modification.
25. Similarly, the claimants written witness statement dated 30th June, 2025 confirms that indeed the claimant received a letter of termination of employment dated 26th May, 2021, a fact the respondent admitted in its response dated 16th July, 2025.
26. The respondent avers that it exercised its contractual right under clause 11 of the employment contract dated 1st December, 2020. The claimant's statement acknowledges that the claimant and the respondent entered into a contract of service dated 1st December, 2020.
27. To ascertain whether the suit is statute barred, it is essential to determine when the claimant's cause of action accrued and in making the determination, the court is guided by the sentiment of the Court of Appeal in *G4S Security Services (K) Ltd V Joseph Kamau & 468 Others (supra)* as follows:

“In the circumstances of this case we find that the contracts of 464 respondents were terminated in 2008, 2009, and 2010 and the claim was filed in 2014. Pursuant to Section 90 of the *Employment Act*, the claims should have been within three years of the termination of employment. The claims in respect of the 464 respondents were therefore time barred”.
28. Clearly, time starts running from the date of termination of employment as it is the date on which the cause of action accrues and the earliest date the employee could have contested the termination of his/her employment in court.
29. It is trite law that when time starts running under Section 89 of the *Employment Act* not even engagement in negotiations out of court, conciliation, mediation or arbitration can postpone its running.
30. See in this regard *Rift Valley Railways (Kenya) Ltd V Hawkins Wagunza Musonye & another [2016] eKLR* and *G4S Security Services (K) Ltd V Joseph Kamau & 468 Others (supra)*.
31. Since the claimant's cause of action arose on 26th May, 2021, and the suit was filed on 30th June, 2025, by simple arithmetic the three-year limitation period ended on 25th May, 2024 and the suit was filed more than one year later and was clearly statute barred and the court has no jurisdiction to hear or determine it and hereby downs its tools.
32. The upshot of the foregoing is that the claimants suit dated 30th June, 2025 and amended on 18th July, 2025 is hereby struck out for want of jurisdiction.

Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30TH 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 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 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

