

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E868 OF 2024
FORMERLY NAIROBI ELRC CAUSE NO. 1593 OF
2018

MWITA DANIEL MORONGE.....1ST
CLAIMANT

KEVIN COLLINS OTIENO YONGO.....2ND
CLAIMANT

CHARLES MBUTHIA KAMANGU.....3RD
CLAIMANT

JANET ANYANGO OMOLLO.....4TH
CLAIMANT NYANDO VUGUTSA VIOLET.....

.....5TH CLAIMANT STEPHEN MZEE

TUMBO.....6TH CLAIMANT MONICAH

VICKIEY NANGAH RAPANDO.....7TH CLAIMANT

MAUREEN ELEGWA NGUSAALE.....8TH
CLAIMANT

LUCY RUGURU KIMANI.....9TH
CLAIMANT

FATUMA AKUMU MASHAKA.....10TH
CLAIMANT

DANIEL MWAURA GICHUHI.....11TH
CLAIMANT

ANDREW KASERA OKELLO.....12TH
CLAIMANT

ALICE NJERI NGETHE.....13TH
CLAIMANT

ROSELYN NDUTA MWANGI.....14TH
CLAIMANT

LUCY NYAMBURA MWANGI.....15TH
CLAIMANT

DAVID KIHARA WANJOHI.....16TH
CLAIMANT

NANCY NYAWIRA WANGOMBE.....17TH
CLAIMANT

DENNIS MUTHII KARIUKI.....18TH
CLAIMANT

MERCY WAIRIMU GATONYE.....19TH
CLAIMANT

EDDY NYADWA NYANGUN.....20TH
CLAIMANT

GEORGE NYAMU.....21ST
CLAIMANT

JANESTELLA OTUYA
OKUMU.....22ND CLAIMANT

ISAAC SAITOTI KAARE.....23RD
CLAIMANT

FAITH INNOCENT.....24TH
CLAIMANT

PAUL OKOTH MASIN.....25TH
CLAIMANT

SOPHIA WENA EPHELY.....26TH
CLAIMANT

VERSUS

KENYA NATIONAL FARMERS FEDERATION.....
RESPONDENT

RULING

1. This ruling relates to the Respondent’s Notice of Preliminary Objection dated 22nd January, 2025, wherein, it contends firstly, that the suit herein is *Res Judicata* and offends Section 7 of the Civil Procedure Act, in that the claim is directly and substantively the same claim raised in ***Nairobi ELRC Cause No. 1593 of 2018- Charles Mbutia & 45 Others v. Kenya National Farmers Federation & 2 Others***, which suit was determined by this Court (differently constituted) vide a judgment delivered on 14th June, 2024 dismissing the claim with costs.
2. Secondly, the Respondent contends that the Claimants’ suit is statute barred and offends the mandatory provisions of Section 89 of the Employment Act, on the premise that all the Claimants herein left the Respondents’ employ between

January, 2016 and September, 2018, and as such, the suit was filed outside the mandatory period of 3 years.

3. The Respondent aver that the suit is incompetent and an abuse of the Court process and ought to be struck out with costs.
4. Parties' request to canvass the preliminary objection through written submissions was granted. Only the Respondent filed submissions.

The Respondent's Submission

5. It is the Respondent's submission that from the Claims by all the 26 Claimants, it is evident that all the Claimants allege to have left employment between January, 2016 and September, 2018, and as such, the claims have been filed well beyond the mandatory period of three (3) years contrary to the provisions of Section 89 of the Employment Act, and is unsustainable.
6. The Respondent submits that by the Claimants' own admission in their Statement of Claim, they each resigned from employment between January 2016 and October 2018, and as such, the current claim having been filed on 14th October, 2024 was filed over 4 years late and is therefore statute barred.
7. It submits further that Section 89 of the Employment Act is couched in mandatory terms, hence a party must lodge the

claim within 3 years and for a continuing injury, within 12 months from the date of the cause of action, injury or damage accrued. The Respondent had reliance in **Attorney General & Ministry of State for Immigration & Registrar of Persons V Andrew Maina Githinji & Zachary Mugo Kamunjiga [2016] KECA 817 (KLR)** where Nambuye JA (as she then was) cited the case of **Benjamin Wachira Ndiithi vs. Public Service Commission & Another [2014] eKLR** for the holding that:-

"This Court has however taken a different view on this matter in the case Hilarion Mwabolo -vs-Kenya Commercial Bank [2013 eKLR to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal in the instant case, the Claimant's termination from the 1st Respondent's employment took effect on October 2000 as

communicated by letter dated 29~ September 2000. It follows therefore that the cause of action upon which the Claimant's claim is based accrued on pt October 2000 and that is the date when time began to run as against the Claimant's claim."

- 8.** On the assertion that the suit is res judicata, the Respondent submits that the issues brought by the Claimants in this suit have already been decided by this court and the Claimants cannot therefore sustain a new suit with the same issue and between the same parties. It sought to rely in the case of ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) to buttress this assertion.***
- 9.** The Respondent further submits that the claim herein has met the threshold set in the ***Communications Commission of Kenya case (supra)*** and urges the Honourable Court to decline the invitation to revisit the case masked as a different suit, just because it is a different claim with less parties.
- 10.** The Respondent submits that this court lacks jurisdiction to entertain this suit by virtue of Section 89 of the Employment Act and Section 7 of the Civil Procedure Act.

Determination

11. The issues for determination are firstly whether the Claimants' claim is *res judicata*, and secondly, whether the suit is statute barred.

12. The Court in the case of ***Mukisa Biscuit Manufacturing Co. Ltd -vs West End Distributors Ltd (1969) EA 696***, set the threshold for what constitutes a preliminary objection as follows:-

“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 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... 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

13. On the question of whether or not the claim is *res judicata*, the Respondent's assertion is that the claim is directly and substantively the same as ***Nairobi ELRC***

Cause No. 1593 of 2018- Charles Mbutia & 45 Others v. Kenya National Farmers Federation & 2 Others, which was determined by this Court (differently constituted) vide a judgment delivered on 14th June, 2024 that dismissed the claim with costs.

14. The Claimants who did not file submissions on the objection, lodged grounds of opposition wherein, they aver that **Nairobi ELRC Cause No. 1593 of 2018** was declined majorly due to apparent misjoinder of parties attributed to improperly drawn, and undated authority to plead, and that the same was not dismissed as alleged. They further contend that due to the said apparent misjoinder of parties, the issues were not directly and substantially dealt with and/or determined vide the judgment referred to by the Respondent.

15. The principle of res judicata applies in law to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in dispute (**see Mandavia -v- Rattan Singh [1965] EA 118**).

16. Section 7 of the Civil Procedure Act provides thus:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same

parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

17. A glance at the judgment delivered in the matter (*Nairobi ELRC Cause No. 1593 of 2018*) on 14th June, 2024 by Hon. Justice Rika, shows that the suit was declined on the ground that it violated Rule 9(2) of the ELRC (Procedure) Rules, and at its paragraph 58 the Court proceeded to hold thus:-

“In light of the conclusion made above, it is not useful to look into the substantive issues concerning the Claimants’ contracts; whether they were unfairly and unlawfully terminated (emphasis own); and whether the Respondent owes them a total amount of Kshs.134,683, 007...”

18. In *Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others [2017] eKLR*, the Supreme Court spelt out the elements that must be satisfied for a suit to be said to be res judicata as follows: -

(a)The suit or issue was directly and substantially in issue in the former suit.

- b. The former suit was between the same parties or parties under whom they or any of them claim.**
- c. Those parties are litigating under the same title.**
- d. The issue was heard and finally determined in the former suit.**
- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised”.**

19. In my considered view, though the Claimants’ claim herein is all respects substantially the same as **Nairobi ELRC Cause No. 1593 of 2018**, it is clear that the issues in the suit were not heard and finally determined in the former suit, being evident that the former suit was declined on technicality.

20. By reason of the foregoing, I find and hold that the Claimants’ claim is not *Res Judicata*.

21. The second issue from the preliminary objection, is the contention that the Claimants’ suit is time barred. The Respondent’s argument is that the Claimants left the Respondent’s employment between January, 2016 and September, 2018, and as such, the claim herein was filed beyond the mandatory period of three (3) years contrary to the provisions of Section 89 of the Employment Act.

22. The Respondent submits that the Claimants in their own admission state that they resigned from employment between January 2016 and October 2018, and as such, the current claim having been filed on 14th October, 2024 was filed over 4 years late, and is therefore statute barred.

23. On their part, the Claimants assert that the suit herein, initially **Nairobi ELRC Cause No. 1593 of 2018**, was instituted within 3 years after the act, and re-instituted afresh within 12 months after the delivery of the said judgment by Honourable Justice James Rika dated 14th June, 2024, and as such, is not statute barred and does not offend the provisions of Section 90 of the Employment Act, 2007.

24. The question is when the cause of action in the Claimants suit accrue; was it at the time of their resignation or after the dismissal of the initial suit on the matter.

25. Section 89 of the Employment Act 2007 (previously Section 90), provides as follows on filing of employment related claims;

“Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, 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.”

26. From the Memorandum of Claim, and as correctly submitted by the Respondent, the Claimants left the service of the Respondent on various dates between 2015 and 2018. It is not disputed that the Claimants filed suit in 2018, but which was dismissed ostensibly due to misjoinder of parties and an improperly drawn, and undated authority to plead.

27. The question is whether the dismissal of the Claimants' former suit postponed the accrual of the cause of action or if you like, the running of time. The ***Black's Law Dictionary (10th Edition)*** defines the word "accrue" to mean "***to come into existence as an enforceable claim or right.***"

28. The Court of Appeal in the case of ***David Ngugi Waweru v Attorney General & Another (2017) eKLR***, held that the time of dismissal or termination is the time contained in the letter of termination/dismissal and not the time of conclusion of internal disciplinary mechanisms.

29. The Court extensively dealt with this issue in the case of ***Hilarion Mwabolo v Kenya Commercial Bank (2013) eKLR*** where the court held:-

“ .. the cause of action under Section 90 of the Employment Act, 2007 accrues from the

date of termination as stated in the termination letter....”.

30. Further in the case of ***Anne Waithira Kimani v Stephen Ndungu Njenga (2013) eKLR***, the court held that the cause of action arose when the resignation took effect.

31. For reason that the Claimants resigned from the employ of the Respondent, it follows that their date of resignation is the time the cause of action accrued, and not the time when their initial claim was dismissed.

32. The Claimants’ assertion that they filed the earlier suit within time is not disputed, the issue is that suit having been declined, is dead as a dodo, and the instant claim is a veiled attempt to reinstate the claim through the back door.

33. The upshot is that the Claimants’ claim though not *Res Judicata*, is statute barred and this Court lacks jurisdiction to entertain the same.

34. I proceed to strike out the Claimants’ claim dated 20th September, 2024 for being time barred.

35. I make no orders on costs.

36. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 9TH DAY OF OCTOBER, 2025.**

**C. N. BAARI
JUDGE**

Appearance:

Ms. Oyugi present for the Claimants

Ms. Kache present for the Respondent

Ms. Esther S-C/A