



**Ikonias Resorts & Hotels Limited v Otieno (Appeal E079 of 2024)  
[2025] KEELRC 3324 (KLR) (25 November 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3324 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E079 OF 2024  
NZIOKI WA MAKAU, J  
NOVEMBER 25, 2025**

**BETWEEN**

**IKONIA RESORTS & HOTELS LIMITED ..... APPELLANT**

**AND**

**JENNIFER ACHIENG OTIENO ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. V. Adhiambo (PM) dated  
20th November 2024 in Kisumu CMCELRC No. E306 of 2023)*

**JUDGMENT**

1. Through a memorandum of claim dated 16<sup>th</sup> December 2023, the Respondent instituted proceedings before the Magistrate’s Court at Kisumu alleging unlawful termination. The Appellant, by way of an application dated 10<sup>th</sup> September 2024, sought to strike out the suit on the grounds that it was time-barred and res judicata.
2. In a ruling delivered on 20<sup>th</sup> November 2024, the Learned Trial Magistrate dismissed the application, directed the parties to comply with Order 11 of the Civil Procedure Rules, and fixed the matter for mention for pre-trial directions on 28<sup>th</sup> January 2024. The Learned Magistrate found that the cause of action arose on 17<sup>th</sup> December 2020, while the suit was filed on 17<sup>th</sup> December 2023, and therefore the claim was within the statutory period prescribed under section 90 of the *akn ke act 2007 11 Employment Act*. On the question of res judicata, the Court held that the doctrine was inapplicable since Kisumu ELRC No. E032 of 2020 had been struck out and had not been heard and determined on its merits.
3. Aggrieved by the ruling, the Appellant lodged the present appeal through a memorandum of appeal dated 26<sup>th</sup> November 2024, raising the following grounds:



- a. The Learned Magistrate erred in law and fact in otherwise failing to exercise her discretion in the proper manner resulting in making the wrong conclusion.
  - b. The Trial Court did not take into account the Appellant’s submissions and uncontested facts.
  - c. The learned magistrate erred in law and in fact in failing to find that the suit was filed out of time.
4. Consequently, the Appellant prayed that the appeal be allowed, the Ruling of 20<sup>th</sup> November 2024 be set aside, the memorandum of claim dated 16<sup>th</sup> December 2023 be dismissed, and the application dated 10<sup>th</sup> September 2024 be allowed. The Appellant further sought costs of the appeal and any other orders the Court may deem just.
  5. In accordance with directions issued by the Court, the appeal was canvassed by way of written submissions.

### **Appellant’s Submissions**

6. The Appellant maintained that the suit was time-barred. It asserted that since the Respondent’s employment was terminated on 17<sup>th</sup> December 2020, the limitation period expired on 16<sup>th</sup> December 2023, and therefore filing the claim on 17<sup>th</sup> December 2023 required prior leave of the court. It further contended that the Respondent had pleaded continuing injuries dating back to 1<sup>st</sup> June 2016, yet such claims must be brought within 12 months.
7. On the issue of continuing injury, the Appellant relied on the case of Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR, where the Court held that under section 90 of the *akn ke act 2007 11 Employment Act*, a continuing injury must be shown to have ceased within 12 months preceding the filing of suit. To reinforce its position on limitation, the Appellant cited Iga v Makerere University [1972] EA 65, where it was held:
 

“A plaint which is barred by limitation is a plaint barred by law”. A reading of the provision of sections B and 4 of the Limitation Act together with Order 7 Rule 6 of the Civil Procedure Rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “shall reject” his claim.. The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief.”
8. The Appellant further submitted that, in the absence of leave, the Court lacked jurisdiction to entertain the suit after the expiry of the statutory period, relying on the decision in G4S Security Services (K) Ltd v Joseph Kamau & 468 others [2018] eKLR. It also submitted that the Limitation Act, being substantive law, supersedes the provisions of sections 1A and 1B of the *akn ke act 1924 3 Civil Procedure Act* or Article 159(2)(d) of *akn ke act 2010 constitution the Constitution*, citing the decision in Republic v Principal Magistrate P. Ngare Gesora & 2 others Ex-Parte Nation Media Group Limited [2013] eKLR. On the basis of the foregoing, the Appellant urged the Court to allow the appeal.

### **Respondent’s Submissions**

9. The Respondent submitted that the Trial Court did not err in finding that the suit was filed within the statutory limitation period. She referred to Section 90 of the *akn ke act 2007 11 Employment Act*, asserting that the three-year period for filing her claim ran from the date of the unlawful termination



on 17<sup>th</sup> December 2020, and therefore lapsed at midnight on 17<sup>th</sup> December 2023. She submitted that the claim was filed on 17<sup>th</sup> December 2023 at 12:12 pm, which was still within time. With respect to the assertion that the suit was time barred on account of continuing injuries the Respondent submitted that the twelve-month limitation relates only to continuing injuries, which did not apply to the instant case since the cause of action arose upon termination, citing the decision in the case of *Joram Osire Malit & 199 others v Municipal Council of Kisumu & another* [2015] KEELRC 951 (KLR).

10. On the assertion that the suit was res judicata, the Respondent submitted that Kisumu ELRC NO. E032 of 2022 was struck out hence was not decided on its merits. She submitted that in those circumstances the doctrine of res judicata did not apply. To buttress her position, she cited section 7 of the *akn ke act 1924 3 Civil Procedure Act* and the decision in the case of the Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR, in emphasizing that that the res judicata doctrine requires, among other things, that the earlier matter be heard and finally determined by a court of competent jurisdiction. Further reliance was placed on the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songo* [2020] eKLR, where the Court of Appeal held that proceedings conducted without jurisdiction are a nullity and cannot trigger the application of the doctrine of res judicata.
11. On the question of costs, the Respondent invoked the general principle that costs follow the event. She cited the case of *Morgan Air Cargo Ltd v Evrest Enterprises Ltd* [2014] eKLR which in citing *Orix Oil (Kenya) Ltd v Paul Kabeu & 2 others* [2014] eKLR, stated that:

“...the court should have been guided by the law that costs follow the event.”
12. In conclusion, the Respondent urged the Court to dismiss the appeal with costs and uphold the Trial Court’s Ruling.

### Disposition

13. The issue for determination is whether the suit is time-barred and res judicata. The issue of limitation of action is about reckoning of days. Limitation is set at 3 years in terms of section 90 of the *akn ke act 2007 11 Employment Act*. The suit in the Magistrates Court was filed on 17<sup>th</sup> December 2023 while the cause of action in the suit accrued on 17<sup>th</sup> December 2020. By filing the suit on 17<sup>th</sup> December 2023, the Respondent before me was cutting it extremely close as she filed the suit on the last possible day when the 3 years were about to lapse. Had she filed the suit on 18<sup>th</sup> December 2023 or a put another way, a second after midnight on the night of 17<sup>th</sup> December 2023 she would have been out of time. The suit was filed on time as the expiry of 3 years from 17<sup>th</sup> December 2020 was 17<sup>th</sup> December 2023 and not 16<sup>th</sup> December 2023 as reckoned by the Appellant. That disposes of the first issue in favour of the Respondent.
14. On the second issue, the question of res judicata is one that requires an understanding of the phrase in order to unpack whether the suit before the Hon. V. Adhiambo was res judicata. The expression Res judicata is from Latin and means literally, “a matter judged.” This principle of law holds that there can be no re-litigation of a cause of action once there has been a final judgment on the merits. The operative words are on the merits. When the case before the court being Kisumu ELRC No. E032 of 2020 was struck out, the case had not been heard and determined on its merits. In my considered view, there was therefore no capability for the suit to be within the realm of matters res judicata. The Learned Magistrate was spot on – she did not misapprehend the law nor apply any incorrect legal principle. Her decision was sound. Therefore, having found the suit was filed on time, and the doctrine of res judicata does not apply to the matter, I dismiss this appeal with costs to the Respondent.



Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF NOVEMBER 2025**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

