



**Wanyembi v Mount Kenya University (Cause E003 of 2025)
[2025] KEELRC 3303 (KLR) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3303 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE E003 OF 2025
MA ONYANGO, J
NOVEMBER 20, 2025**

BETWEEN

GREGORY NYONGESA WANYEMBI CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

RULING

1. Vide a Notice of Preliminary Objection dated 7th April, 2025, the Respondent prays as follows:
 - a. That the Claimant's employment contract with the Respondent terminated on the 31st December 2021 pursuant to his own six (6) months Retirement Notice dated and given on the 25th May 2021.
 - b. That Section 89 of the *kenya act 2007 11 Employment Act* provides that;
 - a. "Notwithstanding the provisions of Section 4(1) of the *kenya act 1968 21 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 (12) months next after the cessation thereof." Emphasis ours.
 - c. That the Claimant should therefore have filed his claim by the 30th of December 2024, being three years next after the termination of his contract pursuant to his Retirement Notice on the 31st of December, 2021.
 - d. That the Claimant however filed his claim on the 28th January 2025, well outside the mandatory statutory period provided under Section 89 of the *kenya act 2007 11 Employment Act*.



- e. That it is trite that a court's jurisdiction can neither be implied nor conferred by agreement of the parties or by judicial craft or legal sophistry but must instead be expressly provided for in *akn ke act 2010 constitution the constitution* or statute or both. (See Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012)eKLR and Elias Muturi Njiru Vs Nawiri Sacco Society & Another (2020)eKLR.
 - f. That this court therefore lacks the jurisdiction under Section 89 of the *akn ke act 2007 11 Employment Act* to hear and determine this suit and must in law down its tools (See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) eKLR.
 - g. That the claim herein is therefore irresponsible, fatally defective, an abuse of the court process and is therefore liable to be struck out in limine.
2. The Preliminary Objection was disposed of by way of written submissions.
 3. In its submissions dated 16th June, 2025 the Respondent states that the gist of the Claimant's prayers in the claim is that his employment was terminated by the Respondent before its expiry date and was therefore wrongful and unlawful. The Respondent submits that in its response it has demonstrated that the Claimant, by his own admission, was employed vide letter dated 13th January, 2014 and upon expiry the Respondent extended the contract by letter dated 13th February, 2018 for a further term of five years. That the Claimant demands unpaid salary from 1st February, 2022 to 31st January, 2023 at Kshs. 250,000 per month from the Respondent.
 4. The Respondent submits that the Claimant's employment contract was terminated on 31st December, 2021 pursuant to his own six months Retirement Notice issued to the Respondent on 25th May, 2021.
 5. The Respondent submits that it is not therefore in dispute that the subject matter of the claim arose between 2018 and 2021 and under the provisions of section 89 of the *akn ke act 2007 11 Employment Act*, the Claimant ought to have filed his claim by 31st December, 2024. That the Claim having been filed on in 2025, the claim is statute barred.
 6. In support of its preliminary objection the Respondent relied on the following decisions:

Shitoshe v Shivanga Secondary School & another (Cause No. E023 of 2024) [2024] KEELRC 2222 (KLR) where the court stated

“The claimant alleged he was not paid his salary or house allowance for 60 months which is the entire period of his engagement as a teacher from 2010 to 2014. Nonetheless, even if the Claimant's claim for back pay and house allowance was to qualify as a continuing injury under Section 89 of the *akn ke act 2007 11 Employment Act*, the termination having occurred in December 2017, for claim of continuing injury as relates withheld pay and house allowances, the same cause of action was to be filed within 12 months after his employment was terminated. The Claimant did not file his suit within the said statutory period and his claim became statute time barred.”

Monicah Wanjiku Kanyingi v Our Lady Of Mercy Secondary School [2018] eKLR where the court stated:

“To file a claim in August 2023 following a cause of action which arose in April 2020 is outside the limitation period, both for claims under continuing injury or a claim arising out of an employment contract. This is a matter addressed



in the law, on the facts presented, the objections by the respondents are with good foundation, and the claim herein is time barred and filed contrary to the provisions of section 90 of the *Kenya Employment Act, 2007*. The court is denied the requisite jurisdiction to proceed further.”

Mukisa Biscuit Manufacturing co. Ltd v West End Distributors (1969) EA 696 where the court held:

“...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...” Sir Charles Newbold, P at Page 701

proceeded as follows;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the 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...”

7. For the Claimant it was submitted that section 89 relied upon by the Respondent in raising the preliminary objection does not support its preliminary objection as the section provides:

89. Savings of contracts of service made abroad

- (1) Nothing in this Act shall prevent an employer or employee from enforcing their respective rights and remedies for any breach or non-performance of a lawful contract of service made outside Kenya, but the respective rights of the parties under that contract as well against each other as against third parties invading those rights may be enforced in the same manner as other contracts.
- (2) Where a contract has been executed in conformity with this Part, it shall be enforced in the same manner as a contract entered into under this Act, but no written contract, tenor and execution of which are not in conformity with this Act shall be enforced as against an employee who is unable to read and understand the contract and any such contract shall be deemed to be executed in conformity with this Act if it is signed by the names or marks of the contracting parties and bears, as concerns any illiterate parties, an attestation to the like effect as if prescribed by this Act.
- (3) Where a contract is made in a foreign country, the contract shall be attested by a judge or magistrate, and shall be authenticated by the official seal of the court to which the judge or magistrate is attached.”

8. It was the submission of the Claimant that where a preliminary objection relied on an incorrect or inapplicable legal provision it invites interpretation or discretion and is thus improperly raised and fatally defective. It is submitted that a preliminary objection must always be precise, correct in law and capable of disposing off the matter. That an objection based on the wrong provision of the law or facts is not sustainable. That the discrepancy of relying on the wrong provision of the law cannot be presumed to be an error for reason that the same has been repeated in the Respondent’s submissions.



The Claimant submitted that in the case of *Kyule v Gitaari* (Civil Appeal No. 217 of 2023) (2024) KEHA 5819 (KLR) 23 May 2024 the court held that-

Evidently, a preliminary objection must be founded upon a settled and crisp point of law, the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with the point of law.

9. The Claimant further submitted that the allegation that its suit is statute barred cannot hold as a ground of preliminary objection as it calls for ascertainment by way of evidence. It is submitted that the grounds of the Respondent's preliminary objection do not meet the threshold in the celebrated case of *Mukisa Biscuit Manufacturing co. Ltd v West End Distributors*

Analysis and determination

10. The only issues that present themselves for this court's determination are whether the preliminary objection is merited and if the reliance on the wrong section of the law would invalidate a preliminary objection and render the same fatally defective.

11. The import of a preliminary objection was stated in *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (supra) thus:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

12. The material phrase is that a preliminary objection-

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 has to be ascertained or if what is sought is the exercise of judicial discretion.

13. In the pleadings the Claimant avers that his contract was unfairly and unlawfully terminated while the Respondent insists that the Claimant voluntarily retired. These are the facts as pleaded by the parties. A preliminary objection, according to *Mukisa Biscuits Manufacturing*, can only be raised where all the facts pleaded by the other side are correct. Where parties disagree on the facts, as herein, a preliminary objection is not appropriate.

14. The second issue is whether the section under which the preliminary objection has been brought is material. The court finds this to be a material argument. Section 89 relied upon by the Respondent in raising the preliminary objection reads:

89. Savings of contracts of service made abroad

- (1) Nothing in this Act shall prevent an employer or employee from enforcing their respective rights and remedies for any breach or non-performance of a lawful contract of service made outside Kenya, but the respective rights of the parties under that contract as well against each other as against third parties invading those rights may be enforced in the same manner as other contracts.



- (2) Where a contract has been executed in conformity with this Part, it shall be enforced in the same manner as a contract entered into under this Act, but no written contract, tenor and execution of which are not in conformity with this Act shall be enforced as attains an employee who is unable to read and understand the contract and any such contract shall be deemed to be executed in conformity with this Act if it is signed by the names or marks of the contracting parties and bears, as concerns any illiterate parties, an attestation to the like effect as if prescribed by this Act.
- (3) Where a contract is made in a foreign country, the contract shall be attested by a judge or magistrate, and shall be authenticated by the official seal of the court to which the judge or magistrate is attached.
15. It is a wonder that the Respondent did not realize it had quoted the wrong section even after reproducing the correct wording of the section and relying on authorities making reference to the correct section.
16. Notably, the Respondent reproduced the wording of the correct section even though the reference was to the wrong section. While the section was wrongly stated, the wording of the section relied upon by the Respondent are correct and are those of section 90 of the *akn ke act 2007 11 Employment Act*. The court notes that the Claimant could not have been prejudiced by this very outrageous error on the part of the Respondent which in the court's opinion borders on recklessness.
17. In conclusion, I find the Preliminary Objection dated 7th April, 2025 to be inappropriate as the facts of the case are not agreed upon by the parties. The same is accordingly dismissed. There shall be no order as to costs.

DATED, DELIVERED AND SIGNED

THIS 20TH DAY OF NOVEMBER, 2025.

M. ONYANGO

JUDGE

