

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: W. KARANJA, MUCHELULE & JOEL NGUGI,

JJ.A.) CIVIL APPEAL NO. 582 OF 2019

BETWEEN

JUDD MURIGI KIARIE.....APPELLANT

AND

**SBG SECURITIES LIMITED (Formerly known as
CFC FINANCIAL SERVICE LIMITED).....RESPONDENT**

*(An application for leave to appeal to the Supreme Court of Kenya from the
Judgment of the Court of Appeal at Kisumu (Asike-Makhandia,
Nyamweya & Kimaru, JJ.A.) dated 21st March 2025*

in
**Civil Appeal No. E246 OF
2022)**

JUDGMENT OF THE COURT

1. In a memorandum of claim dated 2nd July 2014, and amended on 25th July 2015, Judd Murigi Kiarie, the appellant, stated that he was offered employment as the Head of Research by the respondent, SGB Securities (formerly known as CFC Financial Service Limited), through an agreement dated 12th June 2009. He claimed that on 7th September 2010, the respondent, without warning, terminated his employment for the purported redundancy, and yet subsequently replaced him for the position. His claim was that the respondent breached the contract of employment, and sought judgment for unlawful termination.

2. The respondent filed a response, stating that the appellant's employment had been lawfully terminated. Subsequently, the respondent filed a notice of preliminary objection dated 22nd May 2017 on several grounds, one of which was that the claim was statutorily time-barred in view of **section 90** of the **Employment Act, 2007**.
3. In a ruling dated 25th August 2017, the Employment and Labour Relations Court (ELRC) (M.N. Nduma, J.) dismissed the respondent's preliminary objection based on the finding that the cause of action arose on 11th July 2011, when the appellant discovered that the redundancy he had accepted had been stage-managed; that, therefore, the suit had been filed within the statutory limitation period of three years, and was not time barred. The learned Judge further held that any dispute regarding the exact date when the cause of action arose was not a pure point of law, and this could not be determined at the preliminary stage. The decision in **Mukisa Biscuits Manufacturers Ltd -vs- West End Distributors Ltd [1969]** **E.A 696** was cited.
4. The dispute was eventually heard by the learned B. Ongaya, J. who dismissed it on the basis that it had been filed out of time. This is what the learned Judge found: -

"The respondent's case is that the claimant's suit is time barred because it was filed long after lapsing of 3 years of limitation prescribed in section 90 of the

Employment Act, 2007. The

section provides that no civil action based on or arising out of the Act or a contract of service shall lie or 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. The Court finds that the termination by redundancy having been on 7th September, the cause of action accrued on that date and the three years of limitation lapsed on or about 7th September 2013. The court returns that as submitted for the respondent, the suit was time barred when it was filed on 2nd July 2014 and is liable to dismissal. The preliminary objection filed in that regard for the respondent on 25th August 2017 had been dismissed on 25th August 2017 on the ground that the date the cause of action accrued was not a pure point of law to be determined at a preliminary stage. Having taken all the evidence at the hearing, the court returns that no other date of the cause of action has been established other than 7th September 2010 and the suit was indeed time barred. As submitted for the respondent the issue of time of limitation goes to jurisdiction and the court will not therefore delve into the merits of the other matters in dispute.....” (Emphasis ours).

5. The appellant was aggrieved by this decision and appealed to this Court complaining that the learned B. Ongoya, J. had erred by revisiting the question whether or not the suit was time barred after the learned M.N. Nduma, J. had found that the suit was not time barred.
6. When the appeal came before us for hearing, learned

counsel Mr. Maruti was present for the appellant while learned counsel

Mr. Lundi was present for the respondent. Both counsel relied on their written submissions.

7. Learned counsel Mr. Maruti submitted that the date on which a cause of action arises is a jurisdictional question as was held in ***Mukisa Biscuits*** (supra), and that after the question having been conclusively determined by a court of competent jurisdiction it could not be revisited by the parties, unless on appeal. Reference was made to the decision in ***Njue Ngai -vs- Ephantus Njiri Ngai [2015]eKLR***. We were urged that since the issue of limitation had been conclusively determined, the learned B. Ongaya, J. should have proceeded to decide the substantive issue of whether or not the termination was lawful. Counsel argued that the redundancy process had in itself not been lawful, given the principles set out in ***Kenya Airways Ltd -vs- Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR***.
8. In opposing the appeal, learned counsel for the respondent submitted that the central question in the appeal was limitation under **section 90** of the **Employment Act, 2007** which required that claims for unfair termination be filed within three years from the date the cause of action arose. In this case, it was submitted, there was no dispute that the cause of action arose on 7th September 2010 when the appellant's employment was terminated. The claim having been filed on 2nd July 2014, the same was time barred, and, therefore, the learned B.

Ongaya, J. had properly found that the court lacked jurisdiction to entertain it.

9. On the contention by the appellant that, in revisiting the question of limitation, the learned Judge had, as it were, sat on appeal in regard to the decision of the learned M. N. Nduma, J., the learned counsel for the respondent urged that the learned B. Ongaya, J. had evaluated the evidence independently before concluding that the suit was time-barred.
10. Regarding the claim by the appellant that he had not been accorded a fair hearing, it was countered that he had been allowed to testify and the submissions on his behalf had been filed. All that had been taken into consideration by the court.
11. Learned counsel Mr. Maruti acknowledged the observation by the learned M.N. Nduma, J. on the dispute with respect to the date on which the cause of action arose, and referred us the decision in **German School Society and Another -vs- Helga Ohany & Another, Civil Appeal No. NAI 325 & 342 of 2018 [2023] KECA 894 (KLR)** wherein it was held that a decision is only an authority for what is actually decided; and that not every observation by the court is material.
12. Having considered the record of appeal, the grounds of appeal and the rival submissions, the question for our

determination is whether the learned B. Ongaya, J. revisited the question which the learned M. N. Nduma, J. had conclusively

determined, both Judges being of concurrent jurisdiction. In other words, had the question of limitation been determined by a court of concurrent jurisdiction?

13. When the preliminary objection on the question of statutory limitation was raised before the learned M. N. Nduma, J., he received rival arguments and this is how he determined it:-

“3) The suit was brought by a memorandum of claim on 2nd July 2014.

4) The cause of action as per paragraph 6 of the memorandum of claim arose on 7th September 2010 when the employment of the claimant was terminated for reasons of redundancy.

5) The claimant further avers that on or about 11th July 2011, despite declaring the position he held of Head of Research redundant, the claimant learnt that the respondent had proceeded to hire a new Head of “Equity Research”, whose duties and or job description were similar or substantially similar to the claimant’s former duties and or job description.

6) The claimant thus became aggrieved by the conduct of the respondent hence proceeded to file the suit.

7) From the facts of the case, the cause of action arose on 11th July 2011 when the claimant discovered that the redundancy which he had hitherto accepted was stage managed as described in the particulars of mischief, malice and/or breach.

8) The suit was thus filed within three (3) years from the date the cause of action arose and it is not statutory barred.

9) In any event, if there is a dispute as to the date the cause of action arose, the objection raised is not a pure point of law and cannot in that

event, which is denied, be determined at this preliminary stage. See Mukisa Biscuits Manufacturers Ltd -vs- West End Distributors Ltd [1969] EA 696).

14. The preliminary objection was dismissed with costs in the cause.
15. It is common ground that no appeal was preferred against the dismissal of the preliminary objection.
16. When the claim was heard by the learned B. Ongaya, J., the appellant testified and was cross-examined by counsel for the respondent. The respondent did not call any witnesses, but instead its counsel M. Wambugu addressed the court as follows:-

“I wish to apply challenging evidence of the court based on claimant’s evidence. I say, suit is time barred.”

Learned counsel Mr. Maruti for the appellant then responded:-

“Is a date for hearing. Issue is res judicata. He should have appealed.”

The Court directed as follows:-

“Hearing to proceed. Parties to proceed with hearing.”

The learned counsel Mr. Wambugu reiterated that the court lacked jurisdiction because the suit was statute barred. With that, he closed the defence case.

17. The court asked either side to file written submissions, which was done.
18. We note that in their written submissions, both sides addressed the issue whether or not the suit was time barred had been conclusively determined, and was therefore *res-judicata*. According to the appellant, the learned M.N. Nduma, J. had dismissed the preliminary objection, having determined that time had begun to run when it was discovered that the redundancy was stage managed; not on the day his employment was terminated on account of redundancy. Citing **section 7** of the **Civil Procedure Act** and a number of decided cases, the appellant maintained that, as long as the decision by the learned M. N. Nduma, J. had not been appealed against, or otherwise set aside, the issue could not be revisited by the court of concurrent jurisdiction.
19. According to the respondent's submissions, it was contended that it had been found that the issue of when the cause of action had arisen was not a pure point of law that could have been determined at that preliminary stage. This was a question that had to await evidence. The issue had, therefore, not been conclusively determined at the preliminary stage. When evidence was given by the appellant, it was submitted, it became quite clear that he was aggrieved by the decision of 7th September 2010 that declared him redundant, and that was when the cause of action arose. So that, when the suit was filed

on 2nd July 2014, that was way beyond the three years required under **section 90** of the **Employment Act, 2007**.

20. We are of the considered opinion that, the issue whether or not the learned M. N. Nduma, J. had conclusively determined the question whether or not the suit was statute barred ought to have been determined by the learned B. Ongaya, J. This was because he had been extensively addressed on it, and each party took a diametrically different position on it.
21. Our own reading of the ruling by the learned M. N. Nduma, J. reveals that he considered that time, for the purpose of **section 90**, had begun to run, not when the appellant was terminated on 7th September 2010 but when he discovered on 11th July 2011 that the redundancy had been stage managed. In which case, he did not agree that the suit was statute barred by limitation, and dismissed the preliminary objection.
22. It did not matter that the learned B. Ongaya, J. may have held a different view, given the evidence, on the question when time begun to run for the purpose of **section 90**. He may have believed that time begun to run from the date that the appellant's employment was terminated, which was on 7th September 2010. The issue had been determined by the learned
M. N. Nduma, J.
23. **Section 7** of the **Civil Procedure Act** provides that:-

“7. 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.”

24. In ***Njue Ngai -vs- Ephantus Njiru Ngai*** (supra), this Court was confronted with a litigant who was seeking to re-canvass an issue that have been heard and determined by the Land Disputes Appeal Tribunal. In reiterating what this Court had determined in ***Uhuru Highway Development Ltd -vs- Central Bank & Another, Civil Appeal No. 36 of 1996,*** the Court stated as follows;

“There must be an end to applications of similar nature, that is to say, further wider principles of res judicata apply to applications within the suit..... there must be an end to interlocutory applications as much as there ought to be an end to litigation..... We have no hesitation in saying that the general principles of res judicata cannot be limited by section 7 of the Civil Procedure Act and that the section is not exhaustive.”

25. In conclusion, the learned M. N. Nderi, J., having found that the appellant’s suit was not time barred, the learned B. Ongaya, J. fell into error when he reopened it and found that the suit was statute barred by limitation. This was a matter best left for the Court of Appeal, if it aggrieved the respondent.

26. Consequently, we allow the appeal with costs to the appellant. We order that **ELRC Cause No. 1166 of 2014** at Nairobi be heard afresh by a Judge other than B. Ongaya, J.

Dated and delivered at Nairobi this 21st day of November 2025.

W. KARANJA

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JUDGE OF APPEAL

A.O. MUCHELULE

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**JUDGE OF
APPEAL JOEL**

NGUGI

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·
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY

REGISTRAR.