



Nyakerario & 5 others v Professional Clean Care Limited (Civil Appeal 466 of 2019) [2025] KECA 2036 (KLR) (28 November 2025) (Judgment)

Neutral citation: [2025] KECA 2036 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 466 OF 2019
DK MUSINGA, K M'INOTI & GV ODUNGA, JJA
NOVEMBER 28, 2025**

BETWEEN

**EVERLINE NYAKERARIO 1ST APPELLANT
FLORENCE NDOTI KAMUYA 2ND APPELLANT
PATRICIA MULEI RICHARD 3RD APPELLANT
SOPHIE MUKULU MUTHIANI 4TH APPELLANT
ELIZABETH WAMBURA NJIRU 5TH APPELLANT
HELLEN MAKOJO KUPARA 6TH APPELLANT**

AND

PROFESSIONAL CLEAN CARE LIMITED RESPONDENT

(Being an Appeal from the Ruling and Order of the Employment and Labour Relations Court at Nairobi (O. Makau, J.) delivered on 12th October 2018 in Employment and Labour Relations Cause No. 2381 of 2017 consolidated with 2382 of 2017, 2380 of 2017, 2379 of 2017, 2378 of 2017 and 2377 of 2017)

JUDGMENT

1. This appeal arises from the ruling and order of Onesmus Makau J. delivered on 12th October 2018.
2. By way of a brief background, the appellants lodged separate claims on 1st December 2017, seeking terminal dues plus compensation for unfair termination of their contracts of service by the respondent on 30th November 2014. In their reply, the Civil Appeal No Nai 466 of 2019^{Page 1 of 39} respondent pleaded that the dismissal was lawful and that the suit was statute-barred. On 4th June 2018, the respondent filed a notice of preliminary objection to the suit praying for it to be struck out on the grounds that



the suit was statute-barred by dint of Section 90 of the *akn ke act 2007 11 Employment Act* and that, as drawn, the suit was incompetent, fatally defective and unsustainable in law.

3. In his ruling, the learned Judge found that, under section 90 of the *akn ke act 2007 11 Employment Act*, the last date for filing the suit was 30th November 2017 based on the fact that pursuant to section 2 of the *akn ke act 1956 39 Interpretation and General Provisions Act*, a year means 365 days, thus the 3 years started to run from 1st December 2014 and ended on 30th November 2017. According to the learned Judge, under section 57(1)(b) of the *akn ke act 1956 39 Interpretation and General Provisions Act*, the suit, which was filed out of time by one day, was statute-barred. Based on the aforesaid finding, the learned Judge upheld the Preliminary Objection and struck out the consolidated suits with costs.
4. Dissatisfied with the ruling, the appellants filed this appeal in which they contend that:
 1. The Learned Judge erred in law and in fact by finding that the suits herein were filed out of time by one day and that they are statute- barred within the meaning of Section 90 of the *akn ke act 2007 11 Employment Act* as read with Section 57 of the *akn ke act 1956 39 Interpretation and General Provisions Act*;
 2. The Learned Judge erred in law and in fact by finding that a year under Section 2 of the *akn ke act 1956 39 Interpretation and General Provisions Act* is defined to mean a period of 365 days;
 3. The Learned Judge erred in fact and in law by failing to take judicial notice that the year 2016 was a leap year, and consequently had 365 days; (a leap year has 366 days. Please confirm)
 4. The Learned Judge erred in fact and in law by failing to find that the entire limitation period in question had 1096 days commencing on 1st December 2014, and ending on 1st December 2017, the date of filing the claims;
 5. The Learned Judge erred in law by failing to find that the Respondent’s Preliminary Objection did not meet the threshold set in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696*.
5. In this appeal the appellants seek orders that the ruling and order delivered on 12th October 2018 be set aside; the respondent’s preliminary objection dated 4th June 2018 be dismissed; and the appellants’ claims be heard and determined on their merits. They also pray for the costs of the appeal.
6. We heard the appeal on the Court’s virtual platform on 15th July 2024 when learned counsel, Mr Mungai, appeared for the appellants while learned counsel, Mr Kamau, appeared for the respondent. Both counsel substantially relied on their written submissions.
7. On behalf of the appellants, it was submitted that in computing when the three-year period commenced, the day of termination of the appellants’ employment, which was 30th November 2014, is excluded from the computation, thus the three-year period commenced on 1st December 2014. Support for this line of submission was sought from the cases of *Kenya Power & Lighting Co. Ltd v Brookfield Academy Limited & Another [2007] eKLR* and *Simba Corporation Limited v Director General National Environment Management Authority (NEMA) & Another [2017] eKLR*. In the appellants’ contention, a year means a year reckoned according to the British Calendar, which is the 365-day calendar in use in Kenya and the case of *John Musembi Mutisya v Mash Bus Services Limited [2018] eKLR* was cited as supporting this position.
8. It was submitted that the second year, on account of the leap year, had an extra day, while the first year that ran from 1st December 2014 to 30th November 2015, had 365 days. The second year, on account of the fact that it had 366 years, ran from 1st December 2015 to 30th November 2016. The third and



last year, according to the appellants, ran from 1st December 2016 to 30th November 2017 since it had 365 days. It was therefore submitted that the entire limitation period had 1096 days and therefore the last day was 1st December 2017.

9. It was urged, on the part of the appellants, that since the commencement and the lapsing of the limitation period was a contested matter, the preliminary objection ought to have been dismissed, on the test set out in the case of *Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd.* [1969] EA 696, which test was applied in this Court's decision in the case of *Attorney General & Another v Andrew Maina Githinji & Another* [2016] eKLR. The appellants urged this Court to allow their appeal.
10. On the other hand, the respondent urged us to uphold the decision of the trial court. According to the respondent the limitation period commenced on 1st December 2014 since the termination took place on 30th November 2014. In the respondent's view, the three-year limitation period lapsed as follows: 1st December 2014 to 30th November 2015, had 365 days; 1st December 2015 to 30th November 2016, had 365 days; and 1st December 2016 to 30th November 2017, had 365 days, totalling 1095 days. The respondent submitted that under section 3 of the *akn ke act 1956 39 Interpretation and General Provisions Act*, a year means 365-day calendar in use in Kenya. Accordingly, the suits were barred by one day.
11. On whether the Preliminary Objection was merited, the respondent submitted that its objection was based on section 90 of the *akn ke act 2007 11 Employment Act* and it was not in dispute that the alleged cause of action arose on 30th November 2014. According to the respondent, the learned Judge rightly held that the Court had no jurisdiction to hear and determine the claims lodged out of time. The respondent urged this Court to dismiss the appeal with costs.
12. We have considered the ruling of the trial court impugned in this appeal and the submissions made before us. Two issues arise for our determination in this appeal and these are: whether the preliminary objection was properly taken up; and whether the preliminary objection was merited.
13. The test for the reception of preliminary objections was set by the predecessor of this Court in *Mukisa Biscuits Manufacturing Ltd. v West End Distributors Ltd* (supra). In that case Law, JA was of the following view:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a 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.”
14. As for Newbold, P:

“A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded 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 issues, and this improper practice should stop”.
15. The essential elements of a preliminary objection are: it must be pleaded or must arise from a clear implication out of pleadings; it must be an objection which, if argued as a preliminary point, may dispose of the suit; and since it is based on the assumption that all the facts pleaded are correct, it



cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Examples of instances where preliminary objections may be raised are identified as 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, as long as the facts relied upon in arguing them are not in dispute.

16. In the case before us the objection was based on limitation which is one of the instances where a preliminary objection may be raised. That point was pleaded. Limitation is a point which, if successful, may dispose of the suit. The appellants however submit that the facts surrounding that objection were contested. That the cause of action arose on 30th November 2014 is however, not in dispute. The computation of time, it is agreed, is on the basis of *akn ke act 1968 21 Limitation of Actions Act*. The appellants seem to be of the view that since they are in disagreement as regards the last day of the limitation, that constitutes a factual dispute in terms of the above decision.
17. With due respect to the appellants that position is incorrect. The fact that the parties disagree on the end result of the application of the law to a set of agreed facts does not raise a dispute on the facts for the purposes of a preliminary objection. It is exactly because parties have failed to agree on the end result of the legal position on the agreed facts that the court is called upon to determine the preliminary objection. In this case we find that the preliminary objection, based on limitation, was properly taken up.
18. Section 2 of the *akn ke act 1956 39 Interpretation and General Provisions Act* provides that:

“year” means a year reckoned according to the British calendar
19. It is not in dispute that British standard calendar year is 365 days although leap years have an extra day. It is true that 2016 was a leap year due to the addition of the intercalary day in February. What this means is that, discounting the day the cause of action arose, the first year which commenced from 1st December 2014 to 30th November 2015, had 365 days; the second year which commenced from 1st December 2015 to 30th November 2016, had 366 days (since there was an extra day in February 2016); and the third year which commenced from 1st December 2016 to 30th November 2017, had 365 days. It is clear that the last day for filing the suit was 30th November 2017 and it matters not whether the year 2016 was a leap year. It only means that the appellants had the benefit of an extra day whose benefit they did not make use of. The leap year does not mean that the limitation period is carried forward to the next day.
20. Consequently, we have no reason to fault the learned Judge in finding that the suit was statutorily time barred by one day by virtue of section 90 of the *akn ke act 2007 11 Employment Act*. This appeal therefore, fails and is dismissed but with no order as to costs, taking into account the fact that the appellants’ case was based on employment dispute between them and the respondent.
21. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

Deputy Registrar

