

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. E370 OF 2025

PENINAH WANJIRU MUSENGI.....
CLAIMANT

VERSUS

AFRICAN TOUCH SAFARIS.....RESPONDENT

RULING

1. Before this Court for determination is the Respondent’s Notice of Preliminary Objection dated 28th May 2025. The Objection is founded on the assertion that the suit contravenes the express provisions of Section 90 (now Section 89) of the Employment Act, 2007, and is therefore statutorily time-barred.

Submissions

2. The Preliminary Objection was canvassed by way of written submissions. The Court has given due consideration to the written submissions by both parties.

Analysis and Determination

3. Evidently, the singular issue for determination is whether the suit herein is time-barred.

4. The gravamen of the Respondents' Objection is that the present claim contravenes Section 89 (formerly Section 90) of the Employment Act and is therefore statute-barred.
5. In support of the Objection, the Respondent contends that the Claimant's cause of action constitutes a continuing injury, for which the limitation period is 12 months from the date the injury ceased.
6. Conversely, the Claimant submits that her claim does not relate to a continuing injury. She maintains that she is not seeking dues arising during the subsistence of her employment but is instead pursuing her terminal benefits.
7. In light of the parties' rival positions, the central question that arises is whether the Claimant's claim amounts to a continuing injury.
8. A review of the Claimant's Statement of Claim reveals that she seeks payment of her terminal dues following the termination of her employment on 15th July 2022.
9. A continuing injury is one that does not stem from a single, isolated act or breach, but rather persists over a period of time, for example, the continuous

underpayment of an employee's salary, where each pay cycle constitutes a fresh breach.

10. According to **Black's Law Dictionary (9th Edition p.856)**, a continuing injury is defined as: ***“An injury that is still in the process of being committed.”***

11. In addressing the concept of a continuing injury, the Court of Appeal in **The German School Society & another v Ohany & another [2023] KECA 894 (KLR)** held as follows:

“The principles underlying continuing wrongs and recurring/successive wrongs have been applied in employment disputes. A ‘continuing wrong’ refers to a single wrongful act that results in a continuing injury, while ‘recurring or successive wrongs’ are those that occur periodically, with each instance giving rise to a distinct and separate cause of action.”

12. The Learned Judges of Appeal further referenced the decision of the **Supreme Court of India** in **Balakrishna S.P. Waghmare v Shree Dhyaneswar Maharaj Sansthan AIR 1959 SC 798**, where the concept was explained thus:

“If the wrongful act causes an injury that is complete, there is no continuing wrong, even though the resulting damage may persist. However, if the wrongful act is such that the injury itself continues, then it constitutes a continuing wrong. A distinction must therefore be drawn

between the injury caused by the act and the subsequent effects of that injury.”

13. The Court of Appeal also cited with approval the decision in **M.R. Gupta v Union of India (1995) 5 SCC 628**, where it was held as follows:

“The appellant’s grievance that his pay was not fixed in accordance with the rules constituted a continuing wrong, giving rise to a recurring cause of action each time he received a salary that was wrongly computed. So long as the appellant remained in service, a fresh cause of action arose every month when he was paid on the basis of the erroneous computation.”

14. The Court further relied on the case of **M. Siddiq v Suresh Das (2020) 1 SCC**, where the Indian Supreme Court held that:

“A continuing wrong arises where there exists a legal, contractual, or other obligation to act or refrain from acting in a certain manner. The breach of such an obligation extends beyond a single act or omission, giving rise to a legal injury of a continuing nature.”

15.Guided by the foregoing authorities, and considering that the Claimant's claim pertains to the payment of terminal dues, the Court finds that the breach complained of does not amount to a continuing wrong.

16.The right to terminal dues accrues at the point of termination, and an employer's failure to pay such dues at that point in time constitutes a single, complete wrong or omission, not a continuing one. Differently expressed, the breach is fully realized when the employer fails to remit the dues as required.

17.Section 89 (formerly Section 90) of the Employment Act prescribes a twelve-month limitation period for claims founded on a continuing injury, calculated from the date the injury ceases, that is, when the wrongful act or omission comes to an end.

18.Accordingly, when the Respondent's argument is evaluated against Section 89, the question that arises is at what point would the alleged injury be deemed to have ceased for purposes of computing the twelve months? This ambiguity itself reinforces the conclusion that the present claim does not constitute a continuing injury.

19.In this case, the Court finds that the cause of action arose on 15th July 2022, the date the Claimant's employment was terminated and her entitlement to terminal

dues crystallized. Therefore, any claim for such dues ought to have been brought within three years from that date.

20. Applying Section 89 to the present case, the Court finds that the claim, having been filed on 30th April 2025, falls well within the statutory three-year limitation period and is thus properly before the Court.

21. Consequently, the Court finds no merit in the Respondent's Notice of Preliminary Objection dated 28th May 2025 on grounds of limitation, and the same is hereby overruled.

22. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 1st day of December 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Okoth

For the Respondent No appearance

Court Assistant Mohammed

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE