



REPUBLIC OF KENYA



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**Abdulatif v Kitui Flour Mills Limited (Appeal E138 of 2025)
[2025] KEELRC 3545 (KLR) (11 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3545 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E138 OF 2025
M MBARŪ, J
DECEMBER 11, 2025**

BETWEEN

ABDULRAHMAN MOHAMED ABDULATIF APPELLANT

AND

KITUI FLOUR MILLS LIMITED RESPONDENT

*(Being an appeal from the ruling of Hon. D. W. Nyambu delivered
on 20 June 2025 in Mombasa MCELRC No. E393 of 2024)*

JUDGMENT

1. The appeal arises from the ruling delivered on 20 June 2025 in Mombasa MCELRC No. E393 of 2024. The appellant seeks that the ruling be set aside and that its preliminary objections to jurisdiction be allowed.
2. The grounds of appeal are that:
 1. The trial court erred in law and fact by failing to treat a counterclaim as a separate and distinct suit, thereby leading to a wrong determination.
 2. The trial court erred in law and fact by treating a separate and distinct claim for Ksh. 41,471,993 in the counterclaim as an employment claim, whilst it was based on a tort.
 3. The trial court misdirected itself by finding that it had the pecuniary jurisdiction to hear and determine a tortious claim for ksh. 41,471,993, while its jurisdiction is currently capped at Ksh. 20,000,000.
 4. The trial magistrate erred in law and fact by failing to distinguish the claimant's claim from the respondent's counterclaim and therefore based its reasoning on the Gazette Notice No. 6024 of 22 June 2018.



5. The trial court rightly stated that the counterclaim related to a tort and the subject amount was twice the jurisdiction of the court, but misdirected itself by treating it as an employment dispute, whilst it was a claim to recover money allegedly stolen, which ought not to have been filed in an Employment and Labour Relations Court in the first instance.
 6. The trial court erred in law and fact in failing to make a finding whether or not the counterclaim was filed out of time, contrary to section 4(2) of the *Limitation of Actions Act*.
 7. The trial court made a contradictory finding, ultimately leading to a wrong determination.
3. The subject ruling by the learned magistrate on 20 June 2025 followed a Notice of Preliminary Objections by the appellant dated 26 September 2024 on the grounds that the trial court lacked jurisdiction to hear and determine the counterclaim:
- a. That the Chief magistrate's Court is devoid of pecuniary jurisdiction to hear and determine a claim of Ksh. 41, 471,933, which is inclusive of costs and interests.
4. Wherefore, the court lacks jurisdiction to hear and determine this counterclaim and the claimant prays that the entire counterclaim be struck out with costs.
 5. The learned magistrate dismissed the objections by the appellant on the grounds that the court had jurisdiction under Gazette Notice No. 6024 of 22 June 2018 to hear employment disputes for persons earning less than Ksh. 80,000. That the Gazette Notice was silent on the total award given or on a counterclaim and unrelated employment matters.
 6. The appellant is therefore seeking that the trial court erred in law and fact in failing to treat a counterclaim as a separate and distinct suit, thereby leading to a wrong determination. The appellant counterclaimed for Ksh. 41,471,993, which is a separate employment claim against the respondent, while the court jurisdiction is capped at ksh. 20, 000,000.
 7. The appellant submitted that a counterclaim is a separate suit and, in this case, exceeds the trial court's pecuniary jurisdiction. Gazette Notice No. 6024 of 22 June 2018 capped the pecuniary jurisdiction of the trial court at an employee's wage of less than Ksh.80, 000 and in this case, the appellant was earning KSh. 25,000 per month. The counterclaim is alleged to have arisen out of the alleged theft of funds, hence a tort which should be addressed as an unrelated employment dispute.
 8. For other claims, the trial court's pecuniary jurisdiction is capped at Ksh. 20 million. It therefore has no jurisdiction to hear the counterclaim of over Ksh. 41 million.
 9. The appellant submitted that the counterclaim was filed on 21 August 2024, more than 5 years after the alleged tort occurred. Under section 4(2) of the *Limitation of Actions Act*, the time to file tort claims is 3 years, which has lapsed. To qualify under section 27 thereof, leave should be sought, which the respondent failed to address. In the case of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011, the Supreme Court of Kenya held that a court's jurisdiction must flow from *the constitution*, the law, or both. In this case, the trial court had no jurisdiction to hear the counterclaim.
 10. The respondent submitted that on 11 July 2024, the appellant filed his statement of claim, and on 21 August 2024, the respondent filed a reply and counterclaim for KSh. 41,471,993 is the amount of money lost due to acts of fraud and theft while employed. On 18 September 2024, the respondent filed an Amended Response, and the appellant filed a reply. On 26 September 2024, the appellant filed a Notice of Preliminary Objections regarding the real court ruling that is the subject of the appeal.



11. The respondent submitted that, within the employment context, employees acquire rights and benefits. In *Kennedy Mwangi v Cooperative Bank of Kenya Limited* [2025] eKLR, the court has jurisdiction to determine loan disputes. These are facilities advanced in employment.
12. In this case, the appellant was earning KSh. 25,000, which places him before the lower court in an employment claim. In reply to the counterclaim, the respondent was justified in stating its case before the same court as held in *Abraham Nyambane Atsago v Barclays Bank of Kenya* [2013] eKLR. The trial court addressed the objections well and dismissed them because it had the requisite jurisdiction.

Determination

13. The key issue for determination is the trial court's jurisdiction to hear the counterclaim above Ksh. 41 million, and whether the trial court erred in dismissing the objections dated 26 September 2024.
14. The background to the appeal is a claim filed by the appellant, alleging that the respondent employed him as a salesman at the Kilifi branch, earning KSh. 25,000 per month. However, on 6 August 2019, the respondent made a malicious and false report to the police that he had stolen Ksh. 12 million, which led to his arrest in Mombasa on 7 August 2019 in Criminal Case No. 1301 of 2019. He was released on bond, but the respondent denied him access to the workplace and stopped paying salaries, leading to his suffering mental anguish and distress and hospitalisation at Port Reitz Mental Unit.
15. The appellant also claimed that on 11 April 2024, he was acquitted under section 215 of the Criminal Procedure Code. He was not subjected to any disciplinary action by the appellant, leading to the unfair termination of his employment. He also suffered special damages.
 - a. Transport to Mombasa for the hearing of the criminal case, Ksh. 43,200.
 - b. Salary arrears from 6 August 2019 to 11 April 2024 for 57 months Ksh. 1,425,000.
 - c. Legal fees ksh. 200,000.
16. The appellant also claimed general damages for the report, arrest and malicious prosecution, being remanded in police custody, and injury to credit, reputation and character. He claimed the following:
 - a. Exemplary damages for malicious prosecution.
 - b. Salary arrears from 6 June 2019.
 - c. Legal fees of ksh. 200,000.
 - d. Resignation or re-engagement to his position and, in the alternative, 12 months' compensation.
 - e. Costs of the suit and interests.
17. The response was that the appellant was employed as a store clerk in August 2018, earning KSh. 25,000 per month. In August 2019, the accountant, while verifying bank deposits at the Kilifi depot, noted that the appellant, together with others, had fraudulently altered various bank deposit slips, resulting in embezzlement and theft of funds from the respondent's bank accounts. On 8 August 2019, the appellant summoned the respondent to explain the missing funds amounting to KSh. 41,471,993, but he declined to give satisfactory responses. The respondent filed criminal charges with the police, who investigated and arrested the appellant. He was charged with stealing by a servant under sections 268 and 275 of the Penal Code.



18. The response also stated that on 9 August 2019, under section 44(4) (g) of the *Employment Act*, the respondent summarily dismissed the appellant on suspicion of having committed a criminal offence against the appellant, resulting in substantial loss. Under section 44(4) of the *Employment Act*, the respondent is allowed to terminate employment without notice for gross misconduct.
19. The respondent, hence, counterclaimed the sum of Ksh. 41 million that was lost due to the appellant's alleged fraud and theft.
20. Indeed, a counterclaim is a fresh suit against the party noted as the respondent. Under Rule 29 of the Employment and Labour Relations Court (Procedure) Rules, a respondent is allowed to respond to the Memorandum of Claim and counterclaim. This is to enable the court to hear fully and effectually all matters between the parties.
21. The magistrates' court is allowed under Gazette Notice No. 6024 of 22 June 2018 to hear claims where the employee was earning less than Ksh. 80,000 per month.
22. The foundation of a claim before the Employment and Labour Relations Courts, and for this purpose, the magistrates' court, conferred with a mandate to hear employment disputes under Gazette Notice No. 6024 of 22 June 2018, the core relations must be employment. It would therefore be chaotic to remove a claim relating to employment before the magistrates' court and then file a counterclaim before a superior court while the foundation of the matter is the employment relations regulated under section 12 of the *Employment and Labour Relations Court Act*.
23. In this case, the trial court is addressing objections dated 26 September 2024, properly focusing on the core foundation of the relationship: the appellant's employment by the respondent. The appellant commenced his proceedings on 11 July 2024. In reply, the respondent was justified in raising its counterclaim rather than filing multiple suits for recovery of monies allegedly lost due to fraud and theft by the appellant.
24. Under section 44(4) (g) of the *Employment Act*, read with sections 17 and 19 of the Act, the employer is allowed to recover any monies and property left in the hands of the employee. Even where there is no counterclaim, the Act allows the recovery of property lost due to the employee's negligence, misconduct, or gross misconduct.
25. In the case of *Synergy Limited v Murigi* (Cause E538 of 2024) [2025] KEELRC, the court held that where an employee misappropriated the employer's funds, the employer is entitled to restitution of the precise sums lost.
26. In the case of *Macharia Mwangi Maina & 87 others -vs- David son Mwangi Kagiri* [2014] eKLR, the court held that a party should not be unjustly enriched at the expense of another, and no person should benefit from his own wrongdoing.
27. In principle, the employer has the legal right to recover from the employee what is lost through negligence, fraud or theft if this is proved.
28. However, employment claims before the magistrates' court or this court are regulated by section 90 of the *Employment Act* (the Act). Such a claim must be filed within 3 years from the date the cause of action arose or within 12 months where there is a continuing injury. This applies to a claim or a counterclaim.
29. The appellant was last on the shop floor on 8 August 2019.



30. Upon being charged in the Mombasa Criminal Case No. 1301 of 2019, he did not resume his duties. He alleged in his claim that he was not issued any notice terminating his employment, yet his salaries and benefits ceased. On 11 April 2014, the criminal charges were terminated and hence he filed his claim before the trial court.
31. The lockout from the shop floor was sufficient cause to file his claim.
3. The stoppage of payment of due wages and benefits was a sufficient cause to file a claim.
32. Any claims arising out of employment, any injuries or continuing injuries for non-payment of wages became regulated under section 90 of the Act.
33. These should have been addressed within 3 years from the date of stoppage or 12 months with regard to the continuing injury of non-payment of wages and benefits.
34. In *Beatrice Kahai Adagala v Postal Corporation of Kenya* [2015] eKLR the court in addressing the provisions of section 90 of the Act held that;

Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the *Employment Act* 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of *Divecon Limited -vs- Samani* [1995-1998] 1 EA P.48, ... in *Josephat Ndirangu - vs – Henkel Chemicals (EA) Limited*, [2013] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the *Limitation of Actions Act*.
35. In this regard, the cause of action accrued on 8 August 2019 when the appellant was not allowed back to his workplace. He should have filed his claim within the meaning of section 90 of the Act.
36. Even where there was no notice terminating employment as alleged, stoppage of employment dues and benefits became an employment injury within the meaning of the Act. Waiting for over 5 years to address it became time-barred under section 90 of the Act.
37. Equally, the counterclaim for alleged monies lost in fraud or theft is a separate claim against the appellant; this ought to have been addressed within the employment relationship pursuant to section 90 of the Act. The respondent asserts that it issued the appellant with notice of summary dismissal on 9 August 2019 on the basis that the appellant had committed acts of gross misconduct under section 44(4) (g) of the Act, and hence notice was not necessary.
38. Termination of employment under the provisions of Section 44 of the Act is regulated under Section 41(2) of the Act. A notice must be issued to the employee, even where the allegations against the employee relate to gross misconduct. Equally, where the employer seeks to recover any monies lost within employment, such claims are regulated under section 90 of the Act.
39. In *Attorney General & another v Andrew Maina Githinji & another* [2016] KECA 817 (KLR), the court emphasized that there is a distinction between internal disciplinary proceedings of an employer and criminal proceedings for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required. The employer who finds an employee guilty of gross misconduct must apply internal disciplinary procedures before invoking notice, terminating employment by summary dismissal. Any recovery of funds lost due to employment misconduct can



only be recovered from the employee pursuant to section 90 of the Act. To sit back and wait for over 5 years after a claim is filed before initiating a counterclaim would entrench unfair labour practices.

40. The claim before the trial court was filed out of time and contrary to section 90 of the Act. The counterclaim cannot rest on a time-barred claim. This denied the trial court the requisite jurisdiction to hear and determine the matter, including the ruling delivered on 20 June 2025.

41. The appeal addressed herein, the claim before the trial court in Mombasa, MCELRC No. 393 of 2024, is time-barred and hereby struck out. Each party is to bear its costs for this appeal and the trial court.

DELIVERED IN OPEN COURT AT MALINDI, THIS 11TH DAY OF DECEMBER 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Davis Wekesa

..... and

