

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**MISC APPLICATION NO. E365 OF 2025**

**HELLEN WANGECHI**  
**MAKANGA.....CLAIMANT**  
**VERSUS**  
**ABSA BANK KENYA LIMITED**  
**(FORMERLY BARCLAYS BANK OF KENYA).....**  
**RESPONDENT**

**RULING**

- 1.** This ruling relates to the Respondent’s Notice of Preliminary Objection dated 3<sup>rd</sup> October, 2025, wherein the Respondent contends that the cause of action in this matter arose on 26<sup>th</sup> March, 2013, hence the suit herein is time barred by virtue of Section 89 of the Employment Act, 2007.
  
- 2.** The Respondent further argues that the application, as filed, is fundamentally defective due to the misjoinder and non-joinder of necessary parties, which it contends violates Order 1 Rules 3, 9, and 10 of the Civil Procedure Rules, 2010, which require that all parties necessary for the court to fully and effectively determine and resolve all issues in dispute be properly joined.

3. Parties canvassed the Preliminary Objection by way of written submissions, and both parties filed submissions.

### **The Respondent's Submission**

4. It is the Respondent's submission that there is a proper and valid preliminary objection before the Court, as the issues raised are purely points of law requiring no further evidence. The Respondent contends that the Applicant's application contravenes the provisions of Section 89 of the Employment Act, 2007.
5. The Respondent submits that the present application violates Section 89 of the Employment Act, 2007, which requires that any claim arising from an employment relationship be filed within three years from the date the cause of action arose. It submits further that the Court has no discretion to extend or enlarge this statutory limitation period.
6. It is the Respondent's submission that the cause of action herein arose in March 2013 when the Applicant voluntarily exited the Respondent's employment under a Voluntary Exit Scheme, and the suit ought to have been filed by 31<sup>st</sup> March 2016 at the latest.
7. The Respondent further submits that the Applicant admits in her affidavit that her employment relationship ended on 26<sup>th</sup> March 2013, and the application having been filed more than twelve years later, the present application is statutorily time

barred and contravenes Section 89 of the Employment Act, 2007. The Respondent submits that the Court therefore lacks jurisdiction to extend or enlarge time under this provision. The Respondent placed reliance in **Attorney General & Ministry of State for Immigration & Registrar of Persons V Andrew Maina Githinji & Zachary Mugo Kamunjiga [2016] KECA 817** to buttress this position.

8. The Respondent further sought to rely in **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR**, where the Court of Appeal affirmed the mandatory nature of Section 89 of the Employment Act, 2007. In this matter, the Court held that claims based on contracts of employment must be filed within three years, with no discretion to extend time. Similarly, in **David Ngugi Waweru v Attorney General & Another [2017] eKLR**, the Court confirmed that there is no room for extension of time under Section 89 of the Employment Act.

9. The Respondent submits that Section 89 of the Employment Act, 2007 is couched in mandatory terms and allows no judicial discretion, and therefore, once the statutory limitation period lapses, the right to institute a claim is extinguished and any proceedings filed thereafter are *void ab initio*.

10. It is the Respondent's final submission that the Court lacks jurisdiction to grant leave to file a claim out of time, as doing

so would be contrary to statute, and urges the court to find that it has no jurisdiction to entertain the present application.

### **The Applicant's Submissions**

**11.** The Applicant submits that indeed Section 89 of the Employment Act bars civil actions arising from an employment relationship if filed outside the three-year limitation period. She submits further that the cause of action arose in March 2013 when she sought assistance from BIFU, which reported a trade dispute to the Ministry of Labour and Social Protection under Section 65(1) of the Labour Relations Act, 2007, leading to the appointment of a conciliator on 30<sup>th</sup> April 2015.

**12.** It is her submission that, despite being aware that the matter had been taken up, she disengaged by retreating to her rural home in Nyeri and losing contact with the union.

**13.** The Applicant submits that, under Section 89 of the Employment Act, a preliminary objection can only be raised upon filing of a substantive claim and not at the application stage, as in any event, leave to file the claim has not yet been granted, and therefore the matter is not properly before the Court.

**14.** It is the Applicant's submission that a preliminary objection must raise a pure point of law, with no dispute as to the material facts, which are deemed admitted as presented in the pleadings. She submits that a point of law involves the application and interpretation of legal principles,

distinct from a point of fact, which requires examination of evidence and factual circumstances.

- 15.** It is her submission that where the determination of an issue depends on contested facts or evidentiary evaluation, it cannot properly form the basis of a preliminary objection.

### **Analysis and Determination**

- 16.** The issues that present for determination are:
- i. Whether the Applicant's claim is time barred
  - ii. Whether the court can enlarge time under Section 89 of the Employment Act, 2007.

### **Whether the Applicant's claim is time barred**

- 17.** The legal position regarding Preliminary Objections was well laid down in the case of ***Mukisa Biscuit Manufacturing Co. Ltd -vs West End Distributors Ltd (1969) EA 696***, where the court had this to say:-

***“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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”***

**18.** Section 89 of the Employment Act 2007, states thus on filing of employment related claims;

***“Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, 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 months next after the cessation thereof.”.***

**19.** The Respondent’s objection is anchored on Statutory limitation under Section 89 of the Employment Act, 2007, and Misjoinder and non-joinder of necessary parties under Order 1 Rules 3, 9 and 10 of the Civil Procedure Rules.

**20.** Section 89 of the Employment Act, has become a banal principle in our jurisprudence, reinforcing its mandatory application as a jurisdictional limitation.

**21.** The facts relating to the date of termination of employment are not in dispute. The Applicant expressly admits that her employment relationship with the Respondent ended on 26th March 2013. The objection therefore, no doubt raises a pure point of law, capable of determination at this stage, and satisfies the Mukisa Biscuit threshold.

**22.** Having determined that the objection concerns a point of law, the next question is whether the Applicant's claim is statute barred. For starters, I note that no claim has been filed as yet. What is before court is an application for leave to file a claim out of time, which in itself confirms that the Applicant has acknowledged that her intended claim is out of time and hence the application for leave.

**23.** Section 89 is couched in mandatory terms. The Applicant's cause of action indisputably arose in March 2013 upon her voluntary exit from the Respondent's employ, which goes to say that the statutory limitation period lapsed in March 2016. Further, her explanation that the dispute was reported to the union and later to the Ministry of Labour, does not suspend or extend the statutory limitation period. The law is settled that conciliation or administrative processes do not stop time from running for purposes of Section 89.

24. There is therefore no doubt that the Applicant's intended suit is time barred by so long, and so I hold.

**Whether the court can enlarge time under Section 89 of the Employment Act, 2007**

25. The next issue becomes whether this court can extend time to allow the Applicant leave to file her claim out of time, which really is what she seeks under her application dated 18<sup>th</sup> September, 2025.

26. The Respondent's submission is that claims based on contracts of employment must be filed within three years, and the court has no discretion to extend time.

27. The Applicant on her part asserts that a preliminary objection on limitation can only be raised after a substantive claim is filed, and which is yet to be filed.

28. In my considered view, the Applicant's argument is untenable, on the simple reason that jurisdiction is everything and may be raised at any stage of proceedings. In ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*** it was held that:-

***"Jurisdiction is everything. Without it, a court has no power to make one more step."***

29. The final question then, is whether the court can enlarge time to allow the Applicant file her claim out of time.

30. There are a myriad of decisions affirming the mandatory and inflexible nature of Section 89. In ***Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR***, also cited by the Respondent, the Court of Appeal held that:-

***“The limitation period in Section 89 of the Employment Act is couched in mandatory terms and the Court has no discretion to extend time.”***

31. Similarly, in ***David Ngugi Waweru v Attorney General & Another [2017] eKLR***, the Court reiterated that there is no room to extend time in cases of limitation under Section 89 of the Employment Act. Finally in ***Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & another [2016] eKLR***, the Court of Appeal reaffirmed that once the limitation period lapses, the court’s jurisdiction is extinguished.

32. In light of the foregoing, it follows that once the three-year limitation period elapsed in March 2016, the Applicant’s right to institute a claim was extinguished by operation of law, and any proceedings commenced thereafter are statutorily barred and *void ab initio*.

33. In the final analysis, the Respondent’s Preliminary Objection succeeds, and the Applicant’s motion dated 18<sup>th</sup> September, 2025 is hereby struck out.

**34.** I make no orders on costs.

ORIGINAL

**35.** Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN  
COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF DECEMBER,  
2025.**

**C. N. BAARI  
JUDGE**

**Appearance:**

Mr. Okelloh present for the Applicant

N/A for the Respondent

Ms. Esther S-C/A