REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E067 OF 2025

MARA WEST CAMP…….....APPELLANT

VERSUS

PETERSON CHUPIRE ARUPALEM…….....RESPONDENT

(Being an Appeal from the Ruling and Orders of the Hon. P.A. Olengo (SPM) delivered on 21st February, 2025 in MCELRC No. E595/2024)

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Ruling and Orders of the Hon. P. Olengo (SPM) delivered on 21st February, 2025 in MCELRC No. E595/2024 between the parties filed a memorandum of appeal dated the 28th of February 2025 seeking the following orders:-

a) **The appeal herein be allowed and Ruling and Orders of Honourable Patrick Olengo delivered on 21st February 2025 in MCELRC No. E595/2024 (Peterson Chupire Arupalem Versus West Camp) be set aside with costs to the Appellants.**

GROUNDS OF THE APPEAL

1. The Honourable Trial Magistrate erred in law and fact by failing to find that the claim by the Respondent is time-barred.

2. The Honourable Trial Magistrate erred in law and fact by relying on the wrong principle in finding that the claim had been filed within time.

3. The Honourable Trial Magistrate erred in law and fact by failing to find that the claim by the Respondent is filed in a court without geographical jurisdiction.

4. The Honourable Trial Magistrate erred in law and fact by relying on the wrong principle in finding that the trial court has geographical jurisdiction to try the claim.

BACKGROUND TO THE APPEAL

14. The Respondent filed a suit against the Respondent vide a memorandum of claim dated the 1st of March 2024 seeking the following orders:-

    a. The sum of Kshs. 2,157,500/- as set out in paragraph 18 above.
    b. Certificate of Service.

c. Costs of this suit and interests at court rates from the time of filing the suit until payment in full.

d. Any other order and/or relief as this Court may deem just and fit to grant.

(pages 3-7 of Appellant's ROA dated 12th June 2025).

15. The Respondent filed his list of witnesses dated 1st March 2024; list of documents dated 1st March 2024; and witness statement dated 3rd April 2024 (see pages 9-20 of ROA).

16. The suit was opposed by the Appellant who entered appearance and filed a notice of preliminary objection dated 26th October 2024 challenging the jurisdiction of the court to entertain the matter on the premise that the same is time barred pursuant to Section 90 of the Employment Act 2007; and that the court lacks territorial jurisdiction over the matter (pages 23-24 of ROA).

17. The court issued directions that the preliminary objection be disposed of by way of written submissions. The parties complied (pages 25-36 of ROA)

18. The Trial Magistrate Court delivered its ruling on the 21st of February 2025, dismissing the Appellant's challenge on its jurisdiction (ruling at pages 40-42 of ROA).

DETERMINATION

19. The appeal was canvassed by way of written submissions. Both parties filed.

20. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:-

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

21. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.''

Issues for determination

22. In their submissions dated the 6th of October 2025, the Appellant identified the following issues for determination: -

i. Whether the trial court erred in holding that the claim was not time barred.
ii. Whether the trial court erred in holding that the trial court has geographical jurisdiction.
iii. Who should bear the cost of the appeal.

23. On his part, the Respondent identified the following issues for determination in his submissions dated the 27th of October 2025.

i. Whether the learned magistrate erred in law and fact in finding that the Claim was not time barred (Ground (a) and (b) of the Memorandum of Appeal).
ii. Whether the learned magistrate erred in law and fact in finding that the trial court has geographical jurisdiction (Ground (c) and (d) of the Memorandum of Appeal).
iii. Whether the preliminary objection filed in the trial court is proper in law.
iv. Who should bear the costs of this Appeal.

24. The court on perusal of the grounds of appeal was of the considered opinion that the issues placed before the court for determination in the appeal were-

a. ***Whether the learned magistrate erred in law and fact in finding that the Claim was not time barred (Ground (a) and (b) of the Memorandum of Appeal).***

b. ***Whether the learned magistrate erred in law and fact in finding that the trial court has geographical jurisdiction (Ground (c) and (d) of the Memorandum of Appeal).***

Whether the learned magistrate erred in law and fact in finding that the Claim was not time barred (Ground (a) and (b) of the Memorandum of Appeal).

The Appellant's submissions

25. Whether the trial court erred in holding that the claim was not time barred? The Respondent herein filed his claim on 5th April 2024. The claim is based on the grounds that he was when he was allegedly constructively dismissed around September 2020 when he resigned. His resignation was acknowledged by the appellant on 1st September 2022. The pertinent question for determination is therefore when did separation take place; is it when the respondent resigned or when the appellant acknowledged the appellant's resignation. Section 89 of the Employment Act, 2007 stipulate timelines for filing employment claims and it provides as follows; "89. Limitations Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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. To buttress this assertion, we wish to rely on the

case of Njunge v Muasya (Appeal E040 of 2023) [2024] KEELRC 265 (KLR) (9 February 2024) (Judgment) where it was held that; “33.Section 90 of the Employment Act provides: Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or 4 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.” A plain reading of the above section clearly shows that it is couched in mandatory terms. That is to say “no..action shall lie” which implies that once the three year period lapses, no civil action shall lie on a claim based on the Act or contract of employment. Further, it is important to note that an action arising out of a contract of employment is an action based on contract. Therefore under the Limitation of Actions Act which previously governed contracts generally including contracts of employment, no extension was permissible once the limitation period lapsed.” It is indeed a trite of law that Resignation is a unilateral act which terminates an employment relationship between employer and an employee. We wish to rely Apudo v Azure Hotel Limited (Cause 816 of 2018) [2024] KEELRC 321 (KLR) (22 February 2024) (Judgment) where the court cited with approval the case of 82 the case of Ayonga V Falcon Signs Ltd (Supra) at paragraph 82 and stated as follows; “Resignation is one of the modes of terminating the employer employee relationship. It is a tool that is available to an employee to trigger his separation from the employer. Being a unilateral act, the employee who wishes to sever the employer-employee relation can elect to serve the employer with a resignation. The resignation may be expressed to take effect either immediately or at a

later date as indicated by the employee. Once an employee communicates the decision to resign from employment, the contract of employment is effectively terminated. The validity of the resignation is not dependent on the employer accepting it." (See Herbert Wafula Waswa V Kenya Wildlife Services (2020) eKLR.) The trial court proceeded to hold as follows; "85 The emerging jurisprudence of the Employment and Labour Relations Court is that a resignation by an employee does not require acceptance by the employer. Being a unilateral act and available to the employee 5 at all times without any limitation save for notice, it becomes effective as soon as it is handed over to the employer who has no mandate to reject it. 86.The employment relationship comes to an abrupt end and the decision is irrevocable at the instigation of the employee. 87.An employer may however take back an employee who has tendered a resignation on its volition and terms. It is our very humble submission that in deed the trial court relied on the wrong principle in holding that separation took place at the time when the respondent's resignation was acknowledged. Consequently, the trial court arrived at an erroneous finding in holding that the cause of action arose on 1st September 2022 and that's when time began running as opposed to 28th September 2020 when the respondent tendered his resignation. An employee's resignation doesn't require the employer's approval to be valid. Since resignation is a personal and independent decision, the employment contract ends immediately once it is communicated. The employer has no power to reject the resignation, which becomes final and binding as soon as it's issued by the employee and delivered to the employer. The employer has no obligation to accept a resignation as the same is unilateral and can only be tendered by an employee. The respondent had delivered the resignation letter to the appellant. This

is evidenced by the resignation acceptance dated 1st September 2022 as the appellant computed terminal dues up to 8th October 2020. It is our submission that time stated running on 28th September 2020. The suit was filed on 5th April 2024. A period of 3 years, 6 months and 8 days had since lapsed. This is way beyond the 3-year period provided for in the Limitation of Actions Act and the Employment Act. Consequently, the respondent's case as filed in the lower court is bad in law, time barred and the same is only fit for dismissal with cost. In the case of Gikuhi v Nderitu (Civil Case E162 of 2020) [2024] KEHC 266 (KLR) (Civ) (25 January 2024) (Judgment) the case of Iga v. Makerere University [1972] EA62 was cited where it was held that: -"The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief…. The effect then it that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are drawn in the plaint, the plaint must be rejected. Consequently, unless a litigant in case had put himself within the limitation period or by filing an application for extension of time and showing grounds upon which, he could claim exemption, the Court is obligated to reject his claim. The Court cannot grant the remedy or relief sought when a claim is statute barred as the same would be tantamount to arrogating itself powers and hence an abuse of the court process. Finally, on this limp, it is our very humble submission that the instant claim is time barred and entertaining it would be an abuse of the rule of law. No application for extension of time has ever been filed. Additionally, no plausible explanation has been given to explain the inordinate delay on the part of the respondent herein.

The Respondent's submissions

26. Section 89 of the Employment Act states as follows; "Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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." The import of the above provision is that any claim arising out of an employment relationship must be instituted within three (3) years from the date the cause of action arose. In order to establish whether the suit filed in the trial court was filed within the time stipulated under section 89 of the Employment Act, we must first determine and/or establish when the cause of action arose and when time started running. It is the Respondent's/Claimant's submission that the cause of action arose and time started running after the Respondent/Claimant received the Appellant's acknowledgement letter dated 1st September, 2022 when the Appellant acknowledged receipt of the resignation letter and accepted the resignation of the Respondent/Claimant effective immediately. It is the Appellant's letter dated 1st September, 2022 that acknowledged Respondent's/Claimant's resignation and therefore formalised the resignation and it through this acknowledgement letter that the Appellant tabulated the Respondent's terminal dues. The Respondent/Claimant in the suit filed in the trial court sought payment of his terminal dues and opposed the tabulation done by the Appellant done via the letter dated 1s September, 2022. The courts have acknowledged that the effective date of resignation may depend on the terms of the employment contract and

whether the employer has acknowledged or accepted the resignation. The same was highlighted in the case of Omache v National Bank of Kenya Limited [2025] KEELRC 32 (KLR) under paragraph 15 and 16 where the employer's acceptance letter of 3rd June, 2021 (which specified the employee's last date of service) was treated by the court as determinative of the end date and of the employer's obligations thereafter. Further in Deloraine Estates Limited v Shikuku [2025] KEELRC 342 (KLR) under paragraph 16, the employee's resignation letter dated 16thJuly, 2017 was acknowledged by the employer on 20th July, 2017 and the employer expressly stated that the resignation would take effect on 20 July 2017. It is the Respondent's/Claimant's submission that the above two precedents establish that where the terms of the contract, the resignation letter or subsequent correspondence require or provide for formal acceptance and/or acknowledgment, the resignation shall properly be held to take effect only upon such acceptance and/or acknowledgment. In the instant case the Appellant in its acknowledgment letter dated 1t September,2022 expressly stated as follows: "This is to let you know that we are in receipt of your resignation letter dated 28th September, 2020 and accept your resignation EFFECTIVE IMMEDIATELY" The correspondence, clearly demonstrates that in the foregoing circumstances resignation took effect on 1st September, 2022 [As is evidenced at page 17 of the Record of Appeal]. It is the Respondent's/Claimant's submission that time started running once the Appellant acknowledged the Respondent's/Claimant's resignation and proceeded to thereafter erroneously tabulate his terminal dues via the letter dated 1t September, 2022. The bone of contention for the Respondent/Claimant, therefore, was not limited to the issue of constructive dismissal which culminated in his resignation, but also extended to the

erroneous computation of his terminal dues which was issued to him attached to the letter dated 1st September, 2022. The Respondent/Claimant contends that despite tendering his resignation, the Appellant failed, neglected, and/or refused to compute and settle his dues in accordance with the law and the terms of his employment contract. It was only after two years, following several requests, that the Appellant purported to respond and tabulate the Respondent's/Claimant's dues, an exercise which was both belated and fundamentally flawed. This inordinate delay in computation and payment, coupled with the erroneous figures provided, gave rise to a distinct and continuing cause of action, separate from the resignation itself. Indeed, without the tabulation and communication of his dues, the Respondent/Claimant would not have known whether there existed any sums due to him or any breach to be redressed. Consequently, the Appellant's letter dated 1st September 2022, which acknowledged and tabulated the dues, became the definitive point at which the cause of action crystallised.

Decision

27. The appeal arose from a ruling of the trial court on Notice of Preliminary Objection dated 26th October 2024, which stated the claim was time-barred and offended the provisions of section 90 of the Employment Act . (page 24 of ROA). The Act was amended to read Section 89 to wit- '*89. **Limitations***

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), 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.''*The trial court held – 'Around September 2020, the Claimant's condition worsened forcing him to resign from his employment via a resignation letter dated 28th September 2020 which resignation the Respondent acknowledged via a letter dated 1st September 2022 and accepted the same stating that it should take effect immediately. In my view the separation of the Claimant and the Respondent occurred on 1st September 2022 and that is when the cause of action arose and the Claimant had to file this suit within 3years after the said date. According to CTS, the case was filed on or about 4th April 2024 which is within the 3 years' time frame. About territorial time jurisdiction, there is evidence that the Respondent has offices in Nairobi and there are its official documents with portal address in Nairobi which in my view is conclusive evidence that the respondent has offices in Nairobi. For the above reasons I find no merit in Preliminary Objection and the same is hereby dismissed with cost.''(Page141 of ROA) It is trite parties are bound by their pleadings and a preliminary objection can only be decided from the pleadings without going into evidence as espoused in **Mukisa Biscuit Manufacturers limited vs West end Distributors Limited (1969) E.A 696** that;

"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."

28. The respondent pleaded that he resigned from the employment of the appellant on the 1st September 2022. He then stated his advocate issued a demand letter dated 30th August 2022, and on receipt of the demand vide letter dated 28th September 2020, the appellant accepted the resignation with immediate effect. (paragraphs 10 and 11 of the claim at pages 4 and 5 of the ROA). The claimant had filed the letter of request for early retirement on medical grounds dated 28th September 2020(page 14 of the claim). The demand letter by his advocate dated 5th September 2022 was filed, and the court noted it concerned dues following registration. The letter by the respondent dated 1st September 2022 was produced and was titled 'resignation notice' and stated that they had received his resignation letter dated 28th September 2020 and "accept your resignation effective immediately'' The letter further stated the employment was terminated on 8th October 2020.

29. The court finds that the respondent was aware his employment terminated on the issuance of the resignation notice, but the letter by the employer dated 1st September 2022 gave him impetus to file a claim for constructive dismissal . The demand letter was just on terminal dues but the employer motivated the suit vide their response titled 'resignation acceptance'. Section 89 of the Employment Act(supra) prohibits suits filed more than 3 years after termination or 12 months after cessation of continuous injury which are considered stale. The key question before the court is when the cause of

action arose? Was it upon resignation or the resignation acceptance? The appellant relied on the decision in Apudo v Azure Hotel Limited (Cause 816 of 2018) [2024] KEELRC 321 (KLR) (22 February 2024) (Judgment) where the court cited with approval the case of 82 the case of Ayonga V Falcon Signs Ltd (Supra) at paragraph 82 and stated as follows; "*Resignation is one of the modes of terminating the employeremployee relationship. It is a tool that is available to an employee to trigger his separation from the employer. Being a unilateral act, the employee who wishes to sever the employer-employee relation can elect to serve the employer with a resignation. The resignation may be expressed to take effect either immediately or at a later date as indicated by the employee. Once an employee communicates the decision to resign from employment, the contract of employment is effectively terminated. The validity of the resignation is not dependent on the employer accepting it."* (See Herbert Wafula Waswa V Kenya Wildlife Services (2020) eKLR.) The trial court proceeded to hold as follows; "85 The emerging jurisprudence of the Employment and Labour Relations Court is that a resignation by an employee does not require acceptance by the employer. Being a unilateral act and available to the employee 5 at all times without any limitation save for notice, it becomes effective as soon as it is handed over to the employer who has no mandate to reject it. 86.The employment relationship comes to an abrupt end and the decision is irrevocable at the instigation of the employee. 87.An employer may however take back an employee who has tendered a resignation on its volition and terms.'' The respondent submitted that the courts have acknowledged that the effective date of resignation may depend on the terms of the employment contract and whether the employer has acknowledged or accepted the resignation. The same was

highlighted in the case of Omache v National Bank of Kenya Limited [2025] KEELRC 32 (KLR) under paragraph 15 and 16 where the employer's acceptance letter of 3rd June, 2021 (which specified the employee's last date of service) was treated by the court as determinative of the end date and of the employer's obligations thereafter. Further in Deloraine Estates Limited v Shikuku [2025] KEELRC 342 (KLR) under paragraph 16, the employee's resignation letter dated 16thJuly, 2017 was acknowledged by the employer on 20th July, 2017 and the employer expressly stated that the resignation would take effect on 20 July 2017. Conversely, It is the Respondent's/Claimant's submission that the above two precedents establish that where the terms of the contract, the resignation letter or subsequent correspondence require or provide for formal acceptance and/or acknowledgment, the resignation shall properly be held to take effect only upon such acceptance and/or acknowledgment. In the instant case the Appellant in its acknowledgment letter dated 1t September,2022 expressly stated as follows: "This is to let you know that we are in receipt of your resignation letter dated 28th September, 2020 and accept your resignation EFFECTIVE IMMEDIATELY" The correspondence, clearly demonstrates that in the foregoing circumstances resignation took effect on 1st September, 2022.

30. The court noted that the demand letter which elicited the response by the employer of resignation acceptance had not questioned the failure to accept the resignation but was about terminal dues. The authorities by the respondent are distinguished as in those cases the employer had responded and given a date of termination. The court holds that resignation is a unilateral decision of employee to terminate contract of service. In

Kenya an employer cannot legally refuse to accept a resignation. Resignation is considered a unilateral act by the employee to terminate the employment contract. Once the employee clearly communicates intention to resign, the employment relationship is effectively terminated (pending the required notice period).To force an employee to stay in a job they wish to leave would be tantamount to servitude, which is unconstitutional as prohibited under Article 30 of the Constitution '30*(1)A person shall not be held in slavery or servitude.(2)A person shall not be required to perform forced labour.''* The court consequently upholds the decision in Apudo v Azure Hotel Limited (Cause 816 of 2018) [2024] KEELRC 321 (KLR) (22 February 2024) (Judgment) where the court cited with approval the case of Ayonga V Falcon Signs Ltd (Supra) at paragraph 82 and stated as follows; "*Resignation is one of the modes of terminating the employer employee relationship. It is a tool that is available to an employee to trigger his separation from the employer. Being a unilateral act, the employee who wishes to sever the employer-employee relation can elect to serve the employer with a resignation. The resignation may be expressed to take effect either immediately or at a later date as indicated by the employee. Once an employee communicates the decision to resign from employment, the contract of employment is effectively terminated. The validity of the resignation is not dependent on the employer accepting it."* The letter of the employer dated 1st September 2022 was mistaken on the law and could not breathe life into the claim, which had expired within 3 years of the termination of the employment . The resignation letter was dated 28th September 2020, and the termination was effective after the 2-week notice under the letter; thus, any claim ought to have been filed on or before 11th October 2023 or thereabout. The claim was time-

barred. The trial court is held to have erred in the interpretation and application of the law.

Whether the learned magistrate erred in law and fact in finding that the trial court has geographical jurisdiction (Ground (c) and (d) of the Memorandum of Appeal).

The Appellant's submissions

31. Whether the trial court erred in holding that the trial court has geographical jurisdiction? The cause of action arose in Narok County where the respondent herein is based. This is beyond the geographical limits of this honourable court. Moreover, no plausible explanation has been provided by the Respondent on why he chose to file the instant claim in a court in Nairobi court. On this basis alone, it is our very humble submission that the suit against the respondent should be struck out with cost. The spirit of the law had no objective to set up judicial body traps for unsuspecting litigants where matters against them are filed in the wrong fora in bad faith as it is in the case herein. Instead, it intended to give parties a fair chance to have their cases determined on merit. We wish to rely on the case of AVC Management Limited v Emmanuel Mwamunye Jilani [2022] eKLR where the Honourable court held that, "I have considered the rival positions by the parties. I do not doubt that one of the cardinal principles that guide the handling of judicial disputes is the need to ensure the fair, just and expeditious disposal of cases. In this regard, the argument that the Kaloleni court may be better placed to expeditiously handle the current causes could, if the caseload data of the two stations was availed, have merit. However, it must also be remembered that justice is two way. The party that has been dragged to court is

entitled to be handled (just as the claimant) in a manner that encourages his confidence in the concept of fairness.It is unjust to haul a defendant to court in a geographical location that is well outside his way when there is a court next door where he resides or undertakes business. There must be compelling reasons that justify the claimant's decision to avoid the court in close proximity of the defendant for the decision to move to a court that is stationed further to be justified." The lower court had no jurisdiction to entertain this suit from the onset. The best it would have done is to down its tools. Having submitted as such, we wish to rely on the case of The Owners of Motor Vessel Lillian "S" V Caltex Oil Kenya Limited 1989 KLR 1653 cited in In the Environment and Land Court at Kericho, ELC Case No. 89 Of 2017 Joel Kipkosgei Versus Thomas Kiprop. where the Court of Appeal held as follows: "Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction"

The Respondent's submissions

32. Section 9(b) of the Magistrates' Court Act states as follows; "...in the exercise of the jurisdiction conferred upon it under section 29 of the Employment and Labour Relations Court Act (Cap.8E) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations." Section 15 of the Civil Procedure Act states as follows; "...Subject to the limitations aforesaid every

suit shall be instituted in a court within the local limits of whose jurisdiction the defendant or each of the defendants at the time of the commencement of the suit actually and voluntarily resides or carries on business,or personally works for gain; or b. Any of the defendants at the time of the commencement of the suit actually and voluntarily resides or carries on business,or personally works for gain, provided either the leave of the court is given,or the defendants .who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or c. The cause of action, wholly or in part arises." It is evident that the Appellant herein carries on its business within the jurisdiction of this court. This is a fact evidenced in the Appellant's address that appears on all the official communication from the Appellant including the letter dated 1 September, 2022. The address that appears on the Appellant's letterhead is conclusive evidence that the Appellant conducts its business and/or has its offices in Nairobi that is within the preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial..." The court went ahead to quote the case of Oruta & Another vs. Nyamato [1998] KLR 590, where the court held that limitation of action:- "...could only be queried at the trial but not by...a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial" Also in the case of Divecon Ltd vs Shirinkhanu S.Samani Civil Appeal No.1420f 1997, the court quoted with approval the words of Gachuhi,J.A.,the leading judge in the Oruta case (ibid) that: It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The

raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act.''

Decision

33. The trial court established that the appellant carried out business within the jurisdiction of the court. The letterhead of the appellant indicates Nairobi, and I have no basis to fault the trial court.

Conclusion

34. The appeal is allowed. The Ruling and Orders of the Hon. P.A. Olengo (SPM) delivered on 21st February, 2025 in MCELRC No. E595/2024 is set aside and substituted with a ruling that the Notice of Preliminary Objection dated 26th October 2024 is upheld with costs to the respondent . The claim dated 1st March 2024 is held as statute time-barred and offends the mandatory provisions of section 89 of the Employment Act and is dismissed with costs to the respondent.

35. The court noted that the appellant delayed settlement of the terminal dues as indicated in the letter dated 1st September 2022. For that reason, the court will not award costs in the appeal; thus, each party will bear their own costs in the appeal.

36. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF DECEMBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ms. Muthee

Respondent: Ms. Ouno