



**Butali Sugar Mills Limited v Musambali & another (Appeal
E023 of 2024) [2026] KEELRC 66 (KLR) (22 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 66 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
APPEAL E023 OF 2024
DN NDERITU, J
JANUARY 22, 2026**

BETWEEN

BUTALI SUGAR MILLS LIMITED APPELLANT

AND

EZEKIEL MBOLO MUSAMBALI 1ST RESPONDENT

FRODAK KENYA LIMITED 2ND RESPONDENT

(Being an appeal from the Ruling/order in Kakamega Chief Magistrate's Court ELRC Cause No.48 of 2020 by Hon. Angeline Odawo (PM) delivered on 11th December 2024)

JUDGMENT

I. Introduction

1. In a ruling delivered on 11th December 2024, the lower trial court dismissed the appellant's preliminary objection (PO) dated 20th July 2024 that sought a declaration that the 1st respondent's claim against the appellant was statute-barred pursuant to Section 90, (now Section 89 of the *Employment Act* (Act)).
2. Dissatisfied with the ruling, the appellant through Mbeka & Associates Advocates commenced this appeal by way of a memorandum of appeal dated 20th December 2024 raising the following grounds of appeal –
 1. That the learned trial magistrate erred in law in dismissing the appellant's preliminary objection dated 20/07/2024, thereby arrived at a decision unsustainable in law.
 2. That the learned magistrate erred in law by failing to consider the fact that the suit against the appellant, Butali Sugar Mills Limited, was instituted beyond the 3-year limitation period as enshrined in Section 90 of the *Employment Act*, 2007 vide amended statement of claim dated



25/8/2021 and filed in court on 13/01/2022 as consequence of which she arrived at a wrong decision in law.

3. That the learned trial magistrate failed to apply herself judicially and to adequately evaluate the appellant's submissions thereto and thereby arrived at a decision unsustainable in law.
4. That the learned trial magistrate misdirected herself in ignoring the written submissions, principles applicable, and the relevant authorities presented and filed by the appellant in its entirety(sic) hence arrived at a wrong decision in law.
3. The appellant is seeking the following reliefs –
 1. The suit against Butali Sugar Mills Limited in the primary suit be struck out.
 2. The ruling delivered on 11/12/2024 together with the consequent orders thereto be set aside.
 3. That the appellant be awarded costs of this appeal.
 4. Any other relief that this Honourable Court may deem fit to grant.
4. The 1st respondent opposed the appeal through V.A. Shibanda & Company Advocates. The 2nd respondent did not file any document.
5. By consent, the appeal was canvassed by way of written submissions. Counsel for the appellant, Mr. Mbeka, filed written submissions on 10th September 2025, and Ms. Shibanda for the 1st respondent, filed on 21st October 2025.

II. Submissions By Counsel

6. On the one hand, counsel for the appellant condensed the grounds of appeal into three issues – Whether the cause of action in the primary suit is statutory time barred by dint of section 89 of the Employment Act 2007; Whether the court can sustain a suit that is statutorily time-barred; and, Which party should bear costs of the suit.
7. On the first issue, it is submitted that the 1st respondent, vide his amended statement of claim dated 25th August 2021 and filed in court on 13th January 2022 enjoined the appellant alleging unfair termination that had occurred in 2017.
8. It is submitted that pursuant to Section 89 of the Act the 1st respondent's cause was statutorily barred by over 1 year as the statutory period lapsed on 31st December 2020.
9. It is submitted that the appellant's PO was premised on the grounds that the cause was statute-barred as the same arose in 2017 while the amended claim was filed on 13th January 2022.
10. Citing a plethora of decisions – James Mugeria Igati v Public Service Commission (2014)eKLR; Attorney General & Another v Andrew Maina Githinji & Another (2016)eKLR; Rift Valley Railways (Kenya)Limited v Hawkins Wagunza Musonye & Another(2016)eKLR; John Kiiru Njiri v University of Nairobi(2021)eKLR and Kepha Ombasa & 54 others v Standard Chartered Bank Limited (2021)eKLR and G4S Security Services (K)Limited v Joseph Kamu & 468 others (2018) eKLR it is submitted that the trial magistrate erred in failing to consider the fact that the suit against the appellant was filed beyond the statutory period of three (3) years, thus arriving at a wrong finding.
11. The court is urged to set aside the trial court's ruling and find that the suit was statute-barred as against the appellant.



12. On the second issue, counsel cited Fredrick Mwiti V chairman and Management Committee Meru Central Dairy Cooperative Union Limited (2018) eKLR; Rift Valley Railways (Kenya) Limited V Hawkins Wagunza Musonye & Another (2016) eKLR; and John Kiiru Njiiri V University of Nairobi (supra), submitting that a suit that is statutorily barred under Section 89 of the Act is dead on arrival and ought to be struck out with costs.
13. Counsel further cited Rawal v Rawal (1990) KLR 275 and Nicholas Kiptoo Arap Salat v IEBC & 6 Others (2013) eKLR, asserting that failure to file a suit on time is not a procedural irregularity which can be remedied under Article 159(2)(d) of *the Constitution* and the court should find merit in the appeal and strike out the suit against the appellant.
14. On the issue of costs, it is submitted that the court should set aside the trial court's ruling and proceed to award the appellant costs in the appeal and in the lower trial court.
15. Based on the foregoing, the court is urged to allow the appeal.
16. On the other hand, counsel for the respondent submitted globally objecting to the appeal, asserting that the original suit before the trial court was filed on 6th December 2019 and it could only have been time-barred had it been filed beyond May 2020.
17. Counsel further submitted that the appellant was only joined via the amendment on 3rd March 2022 to an already filed suit which had been filed within the statutory limits.
18. The court is urged to uphold the decision of the lower court and dismiss the appeal with costs.

III. Issues For Determination

19. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. The following issues commend themselves to the court for determination –
 - a. Did the trial court arrive at the correct decision in regard to the appellant's preliminary objection?
 - b. Who should bear the costs of the appeal?

IV. Statutory Limitation

20. As the first appellate court, this court is obligated to evaluate the evidence and arrive at its own conclusions but bearing in mind that it neither heard nor recorded the evidence in the trial – See *Selle V Associated Motor Boat Co. Ltd* (1968) E.A 123.
21. The background to the present appeal is that the 1st respondent, the claimant in the lower court, had on 18th February 2020 filed cause No. 48 of 2020 in a claim dated 6th December 2019 wherein the 2nd respondent herein was the sole respondent. On 13 January 2022 the 1st respondent filed an amended statement of claim (See Pages 4 to 7 of the record of appeal) joining the appellant herein as the 2nd respondent. The appellant filed the PO dated 20th July 2024 (See Page 20 of the record of appeal).
22. The PO before the trial court had been hinged on Section 90 of the Act (now Section 89) with the appellant asserting that the suit against it was time-barred. The appellant duly filed its submission to the PO (See Pages 21 to 64 of the record of appeal) but none were filed by the two respondents herein.
23. The trial court pronounced its ruling on the PO on 11th December 2024 dismissing the same as being premature on the basis that the issues raised in the PO could not be deciphered, such as the exact date



when the 1st respondent was allegedly dismissed in 2017 (See Pages 71 to 72 of the record of appeal). It is that ruling that is challenged in this appeal.

24. On whether the trial court erred in dismissing the PO, Section 89 of the Act provides thus on time limitation in employment matters –

“Notwithstanding Section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceeding arising out of this Act or a contract of service shall be instituted unless commenced within three years after the alleged act, neglect, or default, or, in the case of ongoing injury or damage, within twelve months after cessation thereof.” (Emphasis added)
25. The appellant’s first appearance in the suit in the trial court is on 13th January 2022. The purported unfair termination of the 1st respondent is alleged to have occurred in 2017. The exact date is not pleaded. The appellant was not a party to the suit filed on 18th February 2020. As at 18th February 2020 it could not be discerned whether three years were to lapse in February or December 2020 in the absence of the exact date when the 1st respondent was allegedly dismissed in 2017. However, as at 13th January 2022 when the appellant was joined as a party in the suit in the trial court, whether the 1st respondent was dismissed in January or December 2017, three years had lapsed by 31st December 2021.
26. Section 89 of the Act is couched in mandatory terms in that no action shall lie once the three-year period lapses, based on the Act or contract of employment.
27. By introducing the appellant to the suit, the action on the appellant commenced on the date it was joined in the suit and not when the initial suit was filed. It cannot be correct that the action against the appellant commenced in 2020. The cause against the appellant commenced when the 1st respondent introduced the appellant as a 2nd respondent.
28. The trial court in dismissing the PO failed to consider the variance in the dates when the appellant and the 2nd respondent were sued by the 1st respondent. The appellant could only be sued within the statutory limit of three years from the date that the action arose.
29. The court notes that the trial court, without considering the jurisdictional implications of joining the appellant in the amended statement of claim, failed to appreciate that indeed the suit against the appellant had been brought outside the limitation period.
30. Under the *Limitation of Actions Act*, no extension is permissible once the limitation period lapses for employment contracts. And, in any event, no such extension is provided for under Section 89 of the Act.
31. The 2nd respondent did not raise a PO on the suit against it and hence the court shall leave the two respondents to fight it out between them.
32. In the premise, the court finds that the trial court erred in failing to analyze the evidence on record and apply the above law and thus arrived at the wrong decision as regards the suit against the appellant.
33. In the circumstances, the ruling of Hon. Angeline Odawo (PM) delivered on 11th December 2024 in Kakamega MCELRC Cause No. 48 of 2020 is hereby set aside.
34. This judgement shall apply, mutatis mutandis, to Kakamega ELRC Appeal Nos. E005 of 2025, E006 of 2025, E007 of 2025 and E008 of 2025.



V. Costs

35. Each party shall meet own costs for this appeal.

VI. Orders

36. Flowing from the foregoing, the court makes the following orders –

- a. The appeal herein is allowed.
- b. The appellant is hereby removed as a respondent in the suit before the trial court on account of the cause against it being statute-barred.
- c. The cause shall proceed in the lower court as between 1st and 2nd respondents.
- d. Each party shall meet own costs for this appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 22ND DAY OF JANUARY, 2026.

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DAVID NDERITU

JUDGE

