

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

ELRC CAUSE NO E593 OF 2025

EVEREST TANGAI MWALUNDI.....
.....CLAIMANT

VERSUS

USAFI SERVICES LIMITED.....
.....RESPONDENT

RULING

Background

1. The Claimant instituted suit against the Respondent before the Chief Magistrate's Court in 2023 claiming that the latter had constructively terminated his services on 15th July 2021. He subsequently filed Miscellaneous Application No. E128 of 2025 before this court (differently constituted) seeking to transfer the matter to the court.
2. The application was heard on 28th May 2025 whereupon the court issued the following orders:-
 - a) The application dated 8th May 2025 is allowed and the matter filed as Milimani MCELRC No. E2218 of 2023 be and is hereby transferred to the Employment and Labour Relations Court Milimani.
 - b) The Claimant to serve the Respondent with pleadings.

3. Following the aforesaid order, the cause at the Chief Magistrate's Court was transferred to this court on 24th June 2025 and assigned the current cause number. The record shows that the Respondent filed a defense to the cause on 28th August 2025.
4. The Respondent also filed a Notice of Preliminary Objection dated 25th August 2025. In the objection, it contends that the suit is time barred by dint of section 90 of *the Employment Act* and ought to be dismissed.
5. The Respondent contends that the Claimant ought to have filed suit within three years of 15th July 2021, the date of accrual of the cause of action. It contends that the instant suit was filed in 2025 which is more than three years after the cause of action accrued.
6. The Respondent contends that the initial suit which the Claimant filed before the Chief Magistrate's Court was filed in a court which had no jurisdiction to entertain the matter. He thus implies that the suit was a non-suit and incapable of transfer to this court.
7. Based on the foregoing, the Respondent contends that the Claimant presented to this court the proper suit in 2025. However, he contends that by this time, the suit was already time barred in terms of section 90 (now section 89) of *the Employment Act*.
8. The Claimant has opposed the objection. He contends that he filed the suit before the Chief Magistrate's Court within

the time which the law provides. He contends that it is this suit which was transferred to this court. He therefore denies that he instituted fresh proceedings before this court. As such, he contends that the suit is not statute barred as contended by the defense.

Analysis

9. It is not in dispute that the Claimant filed suit before the Chief Magistrate's Court before the expiry of three years from the date of accrual of the cause of action. It is also not in dispute that the Chief Magistrate's Court did not have jurisdiction to determine the matter as it exceeded the court's monetary jurisdiction having regard to the directions by the Chief Justice in Gazette Notice No. 6024 of 2018.
10. However, the Claimant approached this court (differently constituted) vide Miscellaneous Cause No. E128 of 2025 to transfer the cause to the court. As the record shows, that request was granted.
11. As such, there is an order which transferred the suit from the Chief Magistrate's Court to this court. That order has not been set aside and remains in force to date.
12. The Respondent contends that the suit before the Chief Magistrate's Court was a non-suit for want of jurisdiction. As such, it implies that it (the cause) could not be transferred to this court.
13. However, irrespective of the Respondent's opinion about the validity of the suit before the Chief Magistrate's Court, it is a

fact that it was transferred to this court through a court order. That order was never challenged. As such, notwithstanding whether the transfer was irregular, the fact of the matter is that by the said order, the Chief Magistrate's suit was transferred to this court.

14. A court order remains valid until it is set aside. Even if the order is perceived as a nullity, it cannot be overlooked until it is set aside by either the court which issued it or the appellate court. As such, the directions in the order are deemed as valid until the order is vacated.
15. Speaking to this reality in the case of ***Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni (CCT 45/21) [2022] ZACC 3; [2022] 5 BLLR 393 (CC); (2022) 43 ILJ 1019 (CC); 2022 (10) BCLR 1254 (CC); 2023 (4) SA 421 (CC) (14 February 2022)***, the Constitutional Court of South Africa stated as follows:-

“This Court in State Capture reaffirmed that irrespective of their validity... court orders are binding until set aside.”
16. The net effect of the foregoing is that MCELRC No. 2218 of 2023 was transferred to this court on 28th May 2025 pursuant to a subsisting court order which was issued through Miscellaneous Cause No. E128 of 2025 where-after the matter was assigned a new number. As such, the Claimant did not file a fresh suit before this court. Therefore, the

Respondent's contention that this suit was instituted a fresh in 2025 out of time is erroneous.

17. According to the court record, MCELRC No. E2218 of 2023 was presented to the Chief Magistrate's Court within three years of accrual of the cause of action. As such, it was not time barred when it was filed before that court. Consequently and absent nullification of the transfer orders which issued vide Miscellaneous Cause No. E128 of 2025, transfer of the suit to this court in 2025 cannot be said to have resulted in the institution of a new suit outside the time prescribed by section 89 of *the Employment Act*.
18. The Respondent ought to have first moved the court through Miscellaneous Cause No. E128 of 2025 to vacate the orders which sanctioned the transfer of MCELRC No. 2218 of 2023 or appealed against those orders with a view to having them set aside before it could mount the instant challenge on the validity of this suit on account of jurisdiction and limitation of time. It is otherwise impermissible to indirectly attack the said orders through these proceeding as to do so is tantamount to inviting this court to sit on appeal against orders which were issued by a court of concurrent jurisdiction.

Determination

19. The upshot is that the court finds that the Respondent's preliminary objection, in so far as it was filed before setting aside the orders for transfer of MCELRC No. 2218 of 2023

which issued through Miscellaneous Cause No. E128 of 2025,
is bad in law.

20. As such, the objection is dismissed.
21. Costs of the objection shall be in the cause.

**Dated, signed and delivered on the 26th day of February,
2026**

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

**In light of the directions issued on 12th July 2022 by her
Ladyship, the Chief Justice with respect to online court
proceedings, this decision has been delivered to the
parties online with their consent, the parties having
waived compliance with Rule 28 (3) of the ELRC
Procedure Rules which requires that all judgments and
rulings shall be dated, signed and delivered in the open
court.**

B. O. M MANANI

