

Section 89 of the Employment Act, 2007, which prescribe a limitation period of 3 years.

- 3. THAT the Petition, in so far as it advances claims founded in tort, including malicious prosecution, is likewise statute-barred, the cause of action having accrued upon the Petitioner's acquittal on 18th July 2022, while the Petition was filed on 21st August 2025, outside the limitation period of 3 years stipulated under Section 4(2) of the Limitation of Actions Act (Cap 22).*
- 4. THAT the Petition is incompetent and an abuse of the court process, in that the Petitioner seeks to circumvent clear statutory limitation periods by presenting time-barred employment and tortious claims as a constitutional petition.*
- 5. THAT in the premises, the Petition is incurably defective, discloses no justiciable cause of action against the Respondent, and ought to be struck out with costs.*

Respondent's Submissions

- 2 The Respondent submitted on two issues: whether this Honourable Court possesses the jurisdiction to hear and determine claims that are patently statute-barred; and whether a party may evade statutory limitation periods by framing ordinary employment and tortious grievances as constitutional violations.

- 3 On the first issue, the Respondent submitted that this Court lacks jurisdiction to hear and determine the instant suit or grant the reliefs sought in the Petition dated 10th March 2025, on account that the claims therein are statute-barred. It argued that the claim for unfair termination has been brought more than 6 years after the alleged termination of employment on 4th January 2019, while the claim for malicious prosecution has equally been brought outside the 3-year limitation period prescribed by the Limitations of Actions Act.
- 4 The Respondent submitted that the petition is deemed to have been filed on same the date the requisite court fees were paid. This suit was therefore effectively instituted on 21st August 2025, as evidenced by the receipt issued by the Court on even date.
- 5 It was submitted that matters of limitation of actions are jurisdictional in nature and that no Court has power to extend time where a statute expressly prescribes the limitation period. Section 89 of the Employment Act, 2007 is couched in mandatory terms and provides that:
“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.”

- 6 The Respondent submitted that Section 4(2) of the Limitation of Actions Act similarly provides that actions founded on tort may not be brought after the end of three (3) years from the date on which the cause of action accrued, and that these provisions admit no discretion on the part of the Court.
- 7 It is the Respondent’s submission that where a claim is filed outside the prescribed limitation period, the Court is divested of jurisdiction to hear and determine the matter. In support of this position, it relied on ***Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR***, where it was held: *“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*
- 8 The Respondent argued that jurisdiction is not a procedural technicality but goes to the root of the Court’s authority to adjudicate a dispute, and that without it, the Court has no power to entertain the claim.

- 9 It was further submitted that this court must first determine the issue of jurisdiction before considering any substantive aspects of the Petition. It argued that the present objection has been properly raised in limine and in accordance with the principles set out in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] EA 696***, as endorsed in ***Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR*** where the court opined: “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”
- 10 The Respondent submitted that its objection is founded on undisputed facts appearing on the face of the pleadings, particularly the Petitioner’s own admission that his employment was terminated on 4th January 2019. It submitted that under Section 89 of the Employment Act, the Petition filed on 21st August 2025 is plainly outside the three-year limitation period and is therefore statute-barred.
- 11 It was submitted that equity does not aid the indolent, and that the Petitioner slept on his rights for over six years and cannot revive a cause of action extinguished by statute. The Respondent argued that limitation statutes exist to

ensure certainty, finality, and fairness in litigation, particularly because the passage of time inevitably affects the availability of evidence and the reliability of witness recollection as observed in ***Attorney General & another v Andrew Maina Githinji & another [2016] eKLR***.

- 12 The Respondent submitted that it is entitled to a legitimate expectation that claims arising from the alleged termination would not be brought outside the statutory limitation period.
- 13 On the claim for malicious prosecution, the Respondent submitted that the cause of action for malicious prosecution accrues upon the termination of the criminal proceedings in favor of the accused person, which in this case occurred upon the Petitioner's acquittal on 18th July 2022.
- 14 It is the Respondent's submission that limitation period applicable to claims founded on tort is provided under Section 4(2) of the Limitation of Actions Act (Cap. 22) as 3 years from the date of the cause of action. Therefore, the claim ought to have been filed on or before 18th July 2025 but was instead filed on 21st August 2025, outside the prescribed period.
- 15 The Respondent therefore submitted that the claim for malicious prosecution is equally statute-barred. It argued that limitation statutes are substantive in nature and once

time lapses, the cause of action is extinguished and unenforceable in law, thereby divesting this Court of jurisdiction.

- 16 On the second issue, the Respondent submitted that the Petitioner cannot circumvent statutory limitation periods by framing the dispute as a constitutional petition.
- 17 It submitted that the Petitioner's reliance on authorities such as **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR**, **Dominic Arony Amolo v Attorney General [2003] eKLR** and **Otieno Mak'onyango V Attorney General & Another[2012]eKLR** is misplaced as they do not establish a blanket proposition that litigants may revive time-barred employment or tort claims by merely framing them as constitutional violations.
- 18 The Respondent argued that the present Petition is fundamentally grounded on two identifiable causes of action: an alleged unlawful termination of employment on 4th January 2019; and an alleged malicious prosecution arising from criminal proceedings that culminated in acquittal on 18th July 2022. Both claims fall squarely within well-defined statutory frameworks.
- 19 It is the Respondent's submission that claims arising from a contract of employment are governed by the Employment Act, 2007, which expressly provides under

Section 89 for a three-year limitation period, while claims founded on tort are governed by Section 4(2) of the Limitation of Actions Act, which similarly prescribes a three-year limitation period. These statutory provisions reflect deliberate legislative choices establishing the temporal limits within which such claims must be brought, and cannot be bypassed through constitutional framing.

- 20 The Respondent submitted that the Petitioner’s grievance arises from an employment relationship and the events surrounding its termination. The alleged criminal proceedings are likewise pleaded in support of a tortious claim for malicious prosecution. It is argued that the invocation of Articles 28, 41, 47, and 50 of the Constitution does not alter the essential nature of the dispute, and that it is the substance rather than the form of the claim that determines the applicable legal framework.
- 21 The Respondent placed reliance on the Supreme Court case ***Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR*** wherein the court held “Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional

litigation.” It further cited ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR*** and ***Kimingi v SMEC International PTY Limited [2021] KEELRC 2122 (KLR)***.

- 22 The Respondent submitted that to permit litigants to evade statutory limitation periods by recasting ordinary claims as constitutional violations would defeat the purpose of limitation statutes and undermine certainty and finality in litigation.
- 23 It is the Respondent’s submission that notwithstanding the constitutional language employed, the claims remain employment and tort claims brought outside the statutory limitation periods, and this Court is consequently divested of jurisdiction to entertain them.

Petitioner’s Submissions

- 24 The Petitioner submitted that the instant matter is, in character, substance and gravamen, a constitutional cause arising from gross and sustained violations of his fundamental rights and freedoms as guaranteed under the Constitution of Kenya. He submitted that the Petition is not a disguised statutory claim but a direct invocation of this Court’s constitutional mandate to enforce and vindicate rights under the Bill of Rights.

- 25 It was submitted that judicial authority is now settled that statutory limitation periods do not apply to causes of action founded upon violations or threatened violations of constitutional rights. He cited the Court of Appeal in **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR**: *“Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act does not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.”*
- 26 He further cited **Dominic Arony Amolo v Attorney General [2003] eKLR** and **Otieno Mak’onyango V Attorney General & Another[2012]eKLR** and submitted that jurisprudence is consistent that constitutional claims are not extinguished by operation of statutory limitation, though delay may be considered on a case-by-case basis.
- 27 The Petitioner submitted that the Petition discloses grave, substantive and particularized constitutional violations. He contends that there was denial of expeditious, lawful and procedurally fair administrative action contrary to Article 47 of the Constitution, violation of his right to a fair hearing under Article 50, infringement of fair labour

practices under Article 41, and violation of his dignity under Article 28 of the Constitution.

- 28 The Petitioner submitted that he was neither subjected to an orderly and procedurally compliant disciplinary process nor accorded an opportunity to be heard prior to the levelling of accusations, termination of his employment, and subsequent reporting to the police culminating in criminal prosecution. He argued that these actions cumulatively affronted and undermined his dignity and constitutional rights.
- 29 The Petitioner submitted that the Respondent's reliance on Section 89 of the Employment Act, 2007 is misconceived as it provides: *"(1) Nothing in this Act shall prevent an employer or employee from enforcing their respective rights and remedies for any breach or non-performance of a lawful contract of service made outside Kenya, but the respective rights of the parties under that contract as well against each other as against third parties invading those rights may be enforced in the same manner as other contracts."*
- 30 It is the Petitioner's argument that a plain reading of the provision demonstrates that it regulates enforcement and attestation of contracts of service made outside Kenya and is concerned with issues of conformity and execution. The provision does not prescribe any limitation period, does

not stipulate timelines for instituting proceedings, and does not extinguish causes of action.

- 31 It is the Petitioner's submission that the Respondent has therefore predicated a jurisdictional objection on a statutory provision that is wholly inapplicable to the question of limitation. A preliminary objection must be anchored on a correct and relevant point of law. Where the statutory foundation relied upon does not support the proposition advanced, the objection collapses for want of legal basis.
- 32 The Petitioner further submitted that a preliminary objection must raise a pure point of law, argued on the assumption that all pleaded facts are correct, and must not invite the Court to ascertain contested facts or exercise judicial discretion as discussed in ***Mukisa Biscuit Manufacturers Ltd v West End Distributors Ltd (1969) E.A. 696 page 700.***
- 33 It was submitted that the Respondent's objection invites this Court to interrogate the circumstances of termination, prosecution, acquittal and alleged continuing violation of constitutional rights, which necessarily calls for factual examination and evidentiary interrogation. Therefore, the Preliminary Objection herein does not meet the legal threshold of a competent preliminary objection and ought not to be sustained.

- 34 He submitted that the gravamen of the claim is that the malicious prosecution complained of was not merely a private wrong in tort, but constituted an affront to, and violation of, the Petitioner's constitutional rights. The question whether the claim is purely tortious or is anchored in constitutional violations and consequently, whether limitation under Section 4(2) is applicable in the manner urged, is not a matter that can be conclusively determined in *limine*. It requires a substantive interrogation of the petition and the evidentiary material placed before the Court
- 35 The Petitioner argued that the Respondent's position that the Petition is based on undisputed facts is contradictory, as it simultaneously invites the Court to make determinations rooted in contested factual circumstances, thereby removing the objection from the realm of a pure point of law.
- 36 It is the Petitioner's submission that the Petition before this Court is neither an ordinary employment dispute nor a tortious claim disguised as a constitutional proceeding to evade limitation. It is properly grounded in the enforcement of fundamental rights and freedoms under the Constitution. Accordingly, Section 4(2) of the Limitation of Actions Act, Section 90 of the Employment Act, 2007, and certainly Section 89 of the Employment Act, cannot be invoked to defeat or oust a properly

instituted constitutional petition. The Respondent's reliance on those provisions is legally untenable.

- 37 The Petitioner submitted that the Petition is anchored on violations of fundamental rights under Articles 28, 41, 47 and 50 of the Constitution and raises substantive constitutional questions that cannot be determined without a full hearing. The applicability of limitation cannot be determined in isolation from the constitutional substratum of the dispute and the factual matrix surrounding the termination and prosecution.
- 38 He submitted that the Respondent failed to undertake proper, reasonable and good faith investigations before subjecting him to disciplinary processes and prolonged criminal proceedings. It was submitted that this failure constitutes a substantive breach of legal duty and violates Articles 41(1), 28 and 47(1) of the Constitution by undermining fair labour practices, dignity and fair administrative action.
- 39 The Petitioner argued that the failure to investigate, coupled with the institution of proceedings that affected his livelihood, dignity and reputation, elevates the dispute into a constitutional matter.
- 40 The Petitioner submitted that there has been no inordinate or unexplained delay. Following the delivery of judgment in the criminal proceedings and having lost his employment

and suffered violation of his rights, he engaged the Respondent through formal correspondence in 2024, only months prior to filing the Petition. The chronology demonstrates diligence, not indolence. The circumstances do not justify the draconian remedy of striking out.

- 41 I have examined all the averments and submissions of the parties herein. The respondents raised a preliminary objection averring that the petition as framed is a mere claim disguised as a petition as has been filed.
- 42 The respondent applicants contend that the petitioner was terminated in 2019 and therefore the claim is time barred under section 90 of the Employment Act 2007. The applicant however referred to a wrong section of the law because section 90 of the Employment Act 2012 (amended) does not deal with limitation but deals with rules under the Act.
- 43 The application is therefore filed under the wrong provision of law. It is also true that the issues of whether the circumstances under which the petitioner was terminated or prosecuted would need to be interrogated by court in order to determine whether there are breaches of any constitutional provisions or not. This would therefore require this court to delve into factual issues which goes beyond the purview of **Mukisa Biscuit** case as cited.

44 In the circumstances, the matters as raised in the application would require facts to be assessed and not pure points of law and so cannot be determined as a preliminary point of law. I therefore find the preliminary objection cannot stand in the circumstances and is dismissed. The parties to proceed with the petition. Costs in the petition.

**Dated, Signed and Delivered Virtually at Nairobi
this 22nd Day of April, 2026.**

HELLEN WASILWA

JUDGE