

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT ELDORET**

**ELRC APPEAL NO. E038 OF 2024**

*(Before Hon. Lady Justice Maureen Onyango)*

**MAJI MAZURI FARM.....**

**APPELLANT**

**VERSUS**

**GLADYS NANYAMA.....**

**RESPONDENT**

*(Being an appeal against the Ruling arising from Eldoret Chief Magistrate's Court, ELRC Cause No. 258 of 2019 delivered by Honourable R. Odenyo (SPM) on the 21<sup>st</sup> December 2023)*

**JUDGMENT**

1. This Appeal arises from the ruling of the trial court in Eldoret CMELRC No. 258 of 2019 delivered on 21<sup>st</sup> December 2023.
2. By way of brief background, the Respondent instituted the suit before the trial court vide a Statement of Claim dated 4<sup>th</sup> September 2019, seeking compensation for alleged unlawful termination of her employment. The Appellant entered appearance on 26<sup>th</sup> September 2019 and subsequently filed

a Response to the Memorandum of Claim dated 14<sup>th</sup> October 2019.

3. Prior to the hearing of the suit, the Appellant raised a Preliminary Objection dated 14<sup>th</sup> September 2023 on the following grounds: -

i. That the Honourable Court lacked jurisdiction to hear and determine the matter as the claim was statute-barred, having been filed outside the three-year limitation period prescribed under section 90 of the Employment Act.

ii. That the suit was frivolous, vexatious, an abuse of the court process, and untenable in law, and ought to be struck out with costs.

4. The trial court directed that the Preliminary objection be disposed of by way of written submissions. Upon considering the parties' submissions, the court, in its ruling delivered on 21<sup>st</sup> December 2023, held that the claim had been filed within time and consequently dismissed the Preliminary objection.

5. Aggrieved by the said decision, the Appellant lodged this Appeal vide a Memorandum of Appeal dated 25<sup>th</sup> November 2024, raising the following grounds: -

- i. That the learned trial magistrate erred in law and fact in holding that claims relating to unpaid overtime, leave dues, public holidays, rest days, house allowance and underpayment constituted continuing injuries not subject to the one-year limitation period after cessation, contrary to section 90 of the Employment Act
- ii. That the learned trial magistrate erred in law and fact in dismissing the Preliminary objection dated 14<sup>th</sup> September 2023 without due consideration of the issues raised therein.

6. The Appellant seeks the following reliefs: -

- a. That the Appeal be allowed
- b. That the ruling dismissing the Preliminary objection be set aside
- c. That the Appellant be awarded the costs of the Appeal.

7. The Appeal was canvassed by way of written submissions. The Appellant's submissions are dated 17<sup>th</sup> December 2025 while the Respondent's submissions are dated 16<sup>th</sup> January 2026.

### **The Appellant's Submissions**

8. In its submissions, the Appellant, citing section 90 of the Employment Act, contended that the provision is couched in mandatory terms, barring the institution of claims after the lapse of three years from the date the cause of action arose.
9. According to the Appellant, the cause of action in the suit herein arose on 1<sup>st</sup> June 2016, while the suit was filed on 6<sup>th</sup> September 2019, approximately three years and three months after the expiry of the limitation period. On this basis, the Appellant contended that the entire claim was statute-barred and ought to have been struck out. In support of this position, reliance was placed on ***G4S Security Services (K) Limited v Joseph Kamau & 468 others (2018) eKLR.***

10. In addition, the Appellant submitted that the claims for unpaid overtime, leave dues, public holidays, rest days, house allowance and underpayment constituted continuing injuries which, under section 90 of the Employment Act, ought to have been filed within twelve months of cessation.
11. The Appellant therefore argued that since the Respondent left employment in June 2016 and only filed suit in September 2019, the claims fell outside both the three-year limitation period and the one-year period applicable to continuing injuries. In support of this position, reliance was placed on ***John Kiiru Njiiri v University of Nairobi (2021) eKLR, Elkana Jumba Kenyolwa v NEL Enterprises Limited (2019) eKLR, Johnson Kazungu v Kenya Marine & Fisheries Research Institute (2021) eKLR and Peter O. Magero v Board of Governors and St Augustine Soysambu Secondary School & Another (2017) eKLR.***
12. In the end, the Appellant urged the Court to find that the Respondent's entire claim was statute-barred and that the alleged continuing injuries ceased upon termination of employment in 2016.

## **The Respondent's Submissions**

13. The Respondent in her submissions maintained that the claim was filed within the statutory period and that, at the time of filing, she still had approximately four months before the limitation period lapsed. She submitted that in her Statement of Claim, she pleaded that her employment was terminated in December 2016 and not in June 2016 as alleged by the Appellant.
14. Regarding the issue of continuing injury, the Respondent submitted that she promptly initiated conciliation through her union following termination, and that the dispute was referred to the Cabinet Secretary for Labour for resolution. She submitted that she was within the time limit considering the fact that conciliations proceeded immediately after the Respondent was unfairly terminated from employment.
15. Consequently, the Respondent urged the Court to find that the claim was properly before the court and to dismiss the Appeal with costs.

## **Analysis and Determination**

16. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See ***Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123.***

17. Having considered the Record of Appeal and the submissions by the parties, the issues that fall for this court's determination are: -

- i. Whether the Respondent's claim before the trial court was statute-barred under section 90 of the Employment Act
- ii. Whether the claims for unpaid overtime, leave dues, public holidays, rest days, house allowance and underpayment constituted continuing injuries and whether they were filed within the prescribed time
- iii. What orders should issue

*Whether the Respondent's claim before the trial court was statute-barred*

18. The Appellant contends that the cause of action arose on 1<sup>st</sup> June 2016, while the Respondent maintains that her

employment terminated at the end of 2016. The suit was filed on 6<sup>th</sup> September 2019.

19. Section 90 of the Employment Act provides: -

*“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 shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of... Provided that in the case of a continuing injury or damage, the action may be brought within twelve months next after the cessation thereof.”*

20. The Preliminary objection before the trial court was on the ground that the Respondent’s claim was statute barred.

21. The nature and scope of a “preliminary issue” was cogently defined in the case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 at 700** is as follows:-

*“So far as I am aware, 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 or to refer the dispute to litigation.”*

22. From the above definition, it is clear that when determining a preliminary objection, the court is required to confine itself to pure points of law. Further, a Preliminary Objection can only be raised where there are no contested facts. In the instant case the facts as to the date of termination, are contested. A preliminary objection can therefore not applicable to this case as the parties have to adduce evidence for determination of the date the cause of action arose.
23. There is contestation as to whether the Respondent’s employment terminated in June 2016 as alleged by the Appellant, or in December 2016 as asserted by the Respondent. That question cannot be determined without the benefit of a full hearing.
24. In the circumstances, the learned trial magistrate cannot be faulted for declining to uphold the Preliminary Objection.

*Whether the claims for unpaid overtime, leave dues, public holidays, rest days, house allowance and underpayment constituted continuing injuries and whether they were filed within the prescribed time*

25. The Appellant argued that the Respondent's claims for overtime, leave dues, public holidays, rest days, house allowance and underpayment constitute continuing injuries, which ought to have been filed within twelve months after cessation as stipulated by part 2 of section 90 of the Employment Act.
26. Having found that the date on which the cause of action arose is contested, all the facts of the case must be subjected to evidence and cannot be determined by way of preliminary objection. The issue whether or not each of the heads of claim is a continuing wrong or not is also a matter for evidentiary proof.
27. Be that as it may, the existence and timeline of the conciliation process are factual matters which equally require evidentiary interrogation and cannot be conclusively determined at the preliminary stage.

28. Accordingly, the Court finds that the issues raised in the Preliminary Objection were not pure points of law, but were intertwined with disputed facts requiring proof. The preliminary objection therefore does not meet the threshold set in *Mukisa Biscuit* case.
29. In the premises, this Court is satisfied that the learned trial magistrate properly exercised her discretion in dismissing the Preliminary Objection and allowing the matter to proceed to hearing on the merits.

*What orders should issue*

30. In the upshot, the Appeal is devoid of merit and is hereby dismissed.
31. The ruling of the trial court delivered on 21<sup>st</sup> December 2023 dismissing the Preliminary Objection is hereby upheld.
32. The costs of this Appeal shall be borne by the Appellant.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON  
THIS 7<sup>TH</sup> DAY OF MAY, 2026**

**MAUREEN ONYANGO**

# JUDGE