



**Hantoosh v Postal Corporation of Kenya (Civil Appeal 137 of 2019)
[2021] KECA 191 (KLR) (5 November 2021) (Judgment)**

Neutral citation: [2021] KECA 191 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 137 OF 2019
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA
NOVEMBER 5, 2021**

BETWEEN

KHALID S. HANTOOSH APPELLANT

AND

POSTAL CORPORATION OF KENYA RESPONDENT

(Being an appeal against the Ruling /Orders of the Linet Ndolo, J dated 28th February, 2019 in Mombasa ELRC 280 of 2014 (Formerly HCCC 175 of 2006))

Limitation of Action provisions in Acts of Parliament that establish parastatals was not applicable to contracts of employment between the parastatals and their employees.

Reported by Ribia John

***Limitation of Actions** - limitations of actions provisions under the Postal Corporation of Kenya Act - scope of applicability - where a claim by a former employee of the Postal Corporations of Kenya was allegedly time barred - whether the provisions of the Postal Corporation of Kenya Act on limitation of actions were applicable to contracts of employment between the Postal Corporation of Kenya and its employees - Postal Corporations of Kenya Act, No. 3 of 2008, preamble and sections 5, 13 and 24.*

***Labour Law** - employment - employment contracts - limitation of actions - limitation of actions in employment disputes between parastatals and their employers - where the establishing Act of a parastatal had a limitation of actions provision - whether the limitation of actions provisions in Acts that established parastatals were applicable to contracts of employment between the parastatals and their employees - whether the legal provisions envisioned under the Postal Corporations of Kenya Act applied to contracts of employment between the corporation and its employees - Postal Corporations of Kenya Act, Act No. 3 of 2008, preamble and sections 5, 13 and 24.*

Brief facts

The appellant was an employee of the Postal Corporation of Kenya. The appellant was aggrieved with the manner in which he was dismissed from service. He filed suit at the Employment and Labour Relations Court (ELRC) against the respondent where he sought Kshs. 328,185; being 3 months' salary *in lieu* of notice and gratuity and a declaration that he was entitled to a monthly pension.



At the ELRC, the respondent filed a preliminary objection in which the respondent objected to the suit being filed as it was time-barred pursuant to section 24 of the Kenya Postal Corporations Act (the Act) which provided that suits against the respondent were to be filed within one year. The ELRC allowed the objection and dismissed the suit. Aggrieved the appellant filed the instant appeal on grounds that the court had erred in fact in its calculation of time and on the ground that the limitation period of one year envisaged under section 24 of the Act did not apply to employment contracts.

Issues

- i. Whether limitation of actions provisions in Acts of Parliament that established parastatals were applicable to contracts of employment between the parastatals and their employees.
- ii. Whether the legal provisions on limitation of actions envisioned under the Postal Corporations of Kenya Act applied to contracts of employment between the corporation and its employees.
- iii. Whether under the circumstances, the appellant's case was time-barred.

Relevant provisions of the Law

Postal Corporations of Kenya Act, No. 3 of 2008

Preamble

An Act of Parliament to provide for the establishment of the Postal Corporation of Kenya, to provide for its powers and functions, and for connected purposes.

Section 24 - Limitation of actions

Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or the Kenya Communications Act, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act, or the Kenya Communications Act, 1998 or of any such duty or authority, the following provisions shall have effect—

- (a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the Postmaster General by the plaintiff or his agent;*
- (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.*

Held

1. Being a first appeal, the mandate of the court as set out in rule 29 (1) of the Court of Appeal Rules was to re-appraise the evidence and to draw its own inferences of fact. A Court of Appeal would not normally interfere with a finding of fact by the trial court unless it was based on a misapprehension of the evidence or the judge was shown demonstrably to have acted on a wrong principle in reaching the finding.
2. The legal proceedings envisaged under the Postal Corporations of Kenya Act, and for which the specific provisions in the Act applied, including section 24 of the Act (limitation of actions provision), had to do with the statutory functions of the Corporation. Those were the functions set out under section 5 as postal services, incidental services related thereto; postal financial services, and incidental services related thereto, and; registration for delivery of newspapers and periodicals. Section 24 was clear that the legal proceedings envisaged were those commenced against the Corporation in the exercise of its statutory power under the Act, and related to its powers and functions, specifically for services provided or operated by the Postal Corporation under the Act and/or under the Kenya Communications Act, 1998. Nowhere did the section refer to matters relating to contracts of employment between the corporation and its employees, or employer/employee relationship.
3. Section 13 of the Act provided for the appointment of staff and officers. The Act mandated the board established under section 3 of the Act, not only to appoint officers and staff for the discharge of the functions of the Corporation but to also determine their terms and conditions of service. That



- meant that the contractual terms and conditions of service of employees of the Corporation, including limitation of actions brought against the Corporation relating to their employment, were to be settled by the board. The natural meaning of section 13 was that terms and conditions of service of employees of the Corporation could not be found within the body of the Act.
4. For purposes of entering into a contract of employment, a parastatal was just like any other employer and there could not be any legal basis for creating a distinction between contracts of service entered into by private companies with their employees and those entered into between parastatals and their employees. Section 24 of the Act, which delimited the time for presenting a case against the respondent to 12 months, did not apply to contracts of employment.
 5. Since section 24 of the Act was not applicable to employment disputes, then the applicable law at the time in question to the instant appeal was the Employment Act, Cap. 226, (since repealed by the Employment Act of 2007). The Employment Act, Cap. 226 (repealed) did not contain a period of limitation to file causes of action. The Employment Act of 2007 had a provision on that but it did not apply to the instant case as it could not operate retrospectively, the cause of action having occurred in 2004. The applicable law as the Limitation of Actions Act of 1967, which was a statute that provided generally for periods of limitation for actions in tort, contract and certain other actions as six (6) years.
 6. The appellant's employment was terminated on October 19, 2004. The appellant commenced the proceedings in August 2005. By that time the appellant's claim had not been overtaken by limitation. Therefore, at the time the appellant filed its claim, the same was not time-barred. Having so found.

Appeal allowed.

Orders

- i. *The ruling of the Employment and Labour Relations Court, dated February 28, 2019 upholding the preliminary objection by the respondent was set aside and substituted with an order dismissing the preliminary objection.*
- ii. *The respondent was to meet the costs of the appeal, while the costs of the trial court would abide the outcome of the claim.*

Citations

Cases

1. AG & Another v Andrew Maina Githinji & Another ([2018] eKLR) — Explained
2. Attorney General & Another vs Andrew Maina Githinji & another ([2016] eKLR) — Explained
3. Kenya Ports Authority v Cyrus Maina Njoroge ([2018] eKLR) — Explained
4. Kenya Ports Authority v Timberland (K) Limited ([2017] eKLR) — Explained
5. Kenya Revenue Authority v Menginya Salim Murgani ([2010] eKLR) — Explained
6. Kenya Revenue Authority vs Menginya Salim Murgan (Civil Appeal 108 of 2009,) — Explained
7. Maersk Kenya Limited vs Murabu Chaka Tsuma ([2017] eKLR) — Explained
8. Mudhari T. Anwar v Kenya Ports Authority ([2017] eKLR) — Explained
9. Postal Corporation of Kenya v Peter Achar & another — Explained
10. Postal Corporation of Kenya vs Athuman Tsama ([2012] eKLR) — Explained
11. Sumaria & Another V Allied Industries Ltd ([2007] KLR 1) — Explained

Statutes

1. Employment Act (No. 11 of 2007) — section 90 — Interpreted
2. Employment Act (Cap. 226) — Cited
3. Kenya Information and Communications Act — section 50, 13 — Interpreted
4. Kenya Ports Authority Act (Cap. 391) — section 66 — Interpreted
5. Limitation of Actions Act (Cap. 22) — section 4 (1) — Interpreted
6. Postal Corporation of Kenya Act (No. 3 of 1998) — section 24 (b), 5 — Interpreted



Advocates

Mr. Mwakishe appeared for the Appellant

Mr. Mutugi appeared for the Respondent

JUDGMENT

1. Before us is an interlocutory appeal against a ruling of the Employment and Labour Relations Court (Linnet Ndolo, J) dated February 28, 2019 in which the respondent's preliminary objection challenging the competency of the appellant's claim was upheld.
2. A brief background of the matter is that the appellant sued the Respondent, who was his employer, after he was dismissed from service, seeking Kshs. 328,185.00 being 3 months' salary in lieu of notice and gratuity, a declaration that he was entitled to monthly pension dues in accordance with the respondent's pension scheme and damages for defamation.
3. The respondent filed their defence and also raised a preliminary objection on 3 points of law as follows:
 1. That the suit was barred pursuant to section 24 of the *Postal Corporation of Kenya Act* No. 3 of 1998 and was therefore unsustainable and ought to be struck out with costs.
 2. By dint of the mandatory provisions of section 24(b) of the *Postal Corporation of Kenya Act* No. 3 of 1998, the court lacked the jurisdiction to hear and determine the suit.
 3. The suit was bad in law, a nullity and ought to be struck off with costs.
4. Both parties filed written submissions in the superior court in support of their arguments and Linnet Ndolo, J. delivered a ruling dated February 28th, 2019 disagreeing with the appellant's submissions that time did not begin to run against him until completion of the internal grievance handling processes were fully exhausted, stating that the view was against settled jurisprudence on the issue. The learned judge relied on the authority of *Attorney General & Another vs Andrew Maina Gitinji & Another* [2016]eKLR where this court, differently constituted, held that in a claim arising out of termination of employment, the cause of action arises at the date of termination, and held that the claim was filed out of statutory time hence the court had no jurisdiction to entertain it.
5. The appellant was aggrieved by the trial court's ruling and raised the following three (3) grounds of appeal:
 1. That the learned judge of the superior court erred in law in striking out the appellant's action on a preliminary objection when the totality of the pleadings, and documents before it, bespoke the fact that the 12 months following the appellant's dismissal had been the subject of an appellate process as provided within the respondent's internal disciplinary mechanism, a final decision whereon was only rendered on October 5, 2005 whilst the suit was filed, on August 3, 2006 and that the effectual date of accrual of a cause of action would run from the date of the final decision on appeal as to hold otherwise would create an absurdity insofar as it forced an aggrieved party to pursue parallel remedies that would potentially prejudice his right to a fair hearing before the employer.



2. That in the circumstances the superior court erred in reaching a determination whose purport was that the one (1) year period for bringing action as contemplated by section 24 of the Postal Corporation Act was absolute and extended to matters contractual or labour disputes to which the 3 year limitation courtesy of section 90 of the *Employment Act*, 2007 should apply or erred in law in not considering that section 90 aforesaid while ousting the provisions of section 4 (1) of the *Limitation of Actions Act* did not subjugate itself to the limitation obtaining under the *Postal Corporation of Kenya Act* or any of the related prior statutes with regards to the right of action arising in respect of the matters specified under the said section 90.
3. That the learned judge erred in not considering that the 12-month (1 year) insulation envisaged by section 24 of the *Postal Corporation of Kenya Act* does not extend to labour disputes between entities in the nature of the respondent and their employees qua employees and that the limitation period for such disputes must be reckoned under the *Employment Act*, 2007.
6. At the plenary hearing, Mr Mwakishe appeared for the appellant while Mr Mutugi appeared for the respondent. The appeal was canvassed by way of written submissions. The appellant filed his submissions and list of authorities on 19th May 2021, while the respondent filed written submissions on 8th July 2021. The respondent did not file their list of authorities.
7. In their submissions, the appellant abandoned ground 2 of the memorandum of appeal leaving only 2 grounds of appeal for this court's determination.

The Appellant's submissions

8. On the first ground of appeal, the appellant submitted that assuming the applicable statute on computing time in this matter was the *Postal Corporation of Kenya Act* (PCK Act) as the respondent contends, then the trial judge was in error in striking out the claim on the basis of being filed outside the one-year period prescribed by section 24 of the Act. It was submitted that the factual material before the learned judge showed that after the Appellant's dismissal on October 19th, 2004, he had been pursuing an Appellate process within the respondent's internal mechanisms until a final decision thereon was made on the October 5th, 2005.
9. The appellant contended that if section 24 of the PCK Act is held to be the operative statutory provision with regard to time, making the time for filing an action against termination one year, then the time ought to be reckoned from the date when the final decision on the appeal is made, which would leave the appellant with October 4th, 2006 as the last date for filing his action. That hence the suit in the ELRC Court filed on August 3rd, 2006 was filed 2 months prior to the 12 months' period prescribed by the law. The appellant urged us to consider the above submissions as being the most logical, practical and best aligned to the principle of access to justice as engraved in article 48 of the Constitution of Kenya, 2010. According to the Appellant, time for purposes of limitation must be reckoned from the date the dismissal becomes final upon a decision on the internal mechanism being made, unless no internal appeal has been preferred.
10. The appellant submitted that this position was desirable, first to avoid parties filing two parallel processes, by filing an action in the courts, while an internal appellate process is pending, which may be termed abuse of process. The appellant urged that adopting that kind of approach would also



- jeopardize the employee's prospects in the pending appellate process through possible antagonism with the employer, leaving the employee in a disadvantaged position.
11. The second reason advanced by the appellant was that while it may be urged that the employee has the election to pursue either course, the courts or the internal appellate process, that would mean that an employee who elects to first pursue an internal process, the progress and length of which he has little or no control over, necessarily forfeits his rights to seek justice through the courts should the internal process overrun the time delimited by statute. It was submitted that most employees are likely to prefer an internal process being that it may lead to reinstatement, unlike the court process which prefers separation to imposing an employee on an employer.
 12. It was submitted that taking the view that time should be reckoned from the date of first dismissal rather than from the date when a final verdict on the internal appeal mechanism is rendered, would be promoting denial of justice.
 13. The appellant faulted the trial court for following the decision in *Kenya Ports Authority v Cyrus Maina Njoroge* [2018] eKLR after distinguishing the authorities cited by the respondent. The appellant urged that unlike in the instant case where there were two dismissal letters, the court in the cited authority had to determine the effective date when the cause of action occurred where only one disciplinary process had resulted in the dismissal therein. The appellant therefore contended that the trial judge erred by taking the accrual of the cause of action as October 19th, 2004 the date of the first dismissal letter, rather than the October 5th, 2005 when the last dismissal was communicated to the appellant.
 14. The appellant urged that the trial judge referred to and held herself bound by the decision in *AG & another v Andrew Maina Gitbinji & another* [2016] eKLR, and sought to distinguish it from this appeal on grounds that in the former, the issue was whether the cause of action could be said to accrue on the date of acquittal of criminal charges facing the employee on the matters that gave rise to his termination, and where there was no issue of internal mechanism in progress in the intervening period.
 15. The Appellant urged us to import the spirit in *Kenya Ports Authority vs Timberland (K) Ltd* [2017] eKLR and find that time must run from the date of the last communication of rejection of the internal appeal process.
 16. On ground 3 of the appeal, the appellant submitted that the limitation period of one year in section 24 of the KPC Act did not extend to matters of employment, and that the applicable law was the *Employment Act*, cap 226 which limited the period for presenting an action based on contract to 6 years, or the *Employment Act*, 2007 which limits the period to 3 years under Section 90 thereof. It was submitted that in the event the court was not persuaded by the appellant's submissions, to consider whether section 24 of the PCK Act is discriminatory in comparison to the *Employment Act*, by retracting the rights of the employees to bring disputes against their employer hence violating article 27 of the Constitution.

The Respondent's Submissions

17. The respondent's brief submissions were that the 12 months started to run from October 19th, 2004 when the appellant was issued with the dismissal letter, and not October 5th, 2005 when the appellate process was finalised. The respondent contended that nothing prevented the appellant from filing his claim in court within 12 months. The respondent relied on the authority of *Kenya Ports Authority vs Cyrus Maina Njoroge* [2018] eKLR in support of their submissions, and urged that section 24 of the PCK Act is a replica of section 66 of the *Kenya Ports Authority Act*, and therefore the cited decision is aptly applicable to the instant case.



18. It was the respondent's case that the attempt to distinguish the cited authority of *Cyrus Maina Njoroge case, (supra)* with the instant case was vague as there is no distinction. They urged the court to dismiss the appeal on that ground specifically submitting that the effective date of dismissal was October 19th, 2004, and 12 months lapsed on October 19th, 2005 hence the case filed by the appellant on August 8th, 2006 was filed 2 years from the date of dismissal.
19. On ground 3 of the appeal, the respondent contended that section 24 of the PCK Act is applicable on employment matters as it would be absurd for the Act to provide for other issues and leave out the employees' affairs to the dictates of a general Act of Parliament being the *Employment Act*. It was submitted that the cause of action in this case arose on October 19th, 2004 way before the *Employment Act* 2007 came into effect and that the said Act cannot be applied retrospectively. That hence the Appellant's attempts to wriggle in section 4(1) of the repealed *Employment Act* cap 226 which provided for 6 years in contract cases should not succeed.
20. The respondent submitted that the appellant misapplied the interpretational principle that "the specific overrides the general", and that the "general" in the instant case is the issue of employment generally, whereas the "specific" is employment by the Postal Corporation of Kenya. The respondent urged that the applicable statute is the PCK Act and not the *Employment Act* 2007 or the repealed cap 226.
21. The respondent contended that Parliament was aware of the relevant provisions in the parastatal statutes like the KPC Act relating to Employment matters, and deliberately steered clear of them when it passed the *Employment Act* of 2007 as it deemed it fit to maintain the provisions therein, hence this court should not be moved to create judge-made law.
22. The respondent distinguished cases cited by the appellant and submitted that the 3 authorities of *Postal Corporation of Kenya vs Athuman Tsama* [2012] eKLR; *Mudhari T. Anwar V Kenya Ports Authority* [2017] eKLR and *Postal Corporation of Kenya vs Peter Achar & another* were High Court decisions hence not binding to this court.
23. It was contended that there was therefore no conflict of interpretation by this court or the superior court relating to the application of the parastatal statutes and the *Employment Act* and the decision in the *Cyrus Maina Njoroge case (supra)* remains the authority on the issue.

Analysis and Determination

24. Our role as the first appellate court is well settled. This being a first appeal, our mandate as spelt out in rule 29 (1) of the rules of court which is to re-appraise the evidence and to draw our own inferences of fact. The case of *Sumaria & Another v Allied Industries Ltd* [2007] KLR 1 also guides us on the extent of our mandate and states:

Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did.

25. Having carefully perused the said record, and considered the submissions made and authorities cited before us, we think that the following limited issues are wholly dispositive of the appeal.
 - i. Whether section 24 of the Postal Corporation Act cap 411 extended to Employment disputes, and if yes,



- ii. Whether the 12 months' period for bringing action contemplated under the section begins to run from the date of dismissal or the date of determination of the final internal Appellate process under the Postal Corporation Act cap 411 in cases where such internal process was initiated by the employee like the instant case.
- iii. Whether based on the decision in (ii) above the appellant's claim in the superior court was time barred or not.
- iv. What orders to make in the circumstances.

26. In determining the first issue, we begin by restating the content of section 24 of KPC Act which is:

“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or the Kenya Communication Act, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act, or the Kenya Communications Act, 1998 or of any duty or authority, the following provisions shall have effect-

- a. the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the Postmaster General by the plaintiff or his agent;
- b. the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.”

27. Further, section 5 of the [PCK Act](#) states the functions of the Corporation as follows:

“The Corporation shall, in accordance with the provisions of section 50 of the Kenya Communications Act, 1998-

- a. provide and operate-
 - i. postal services, and perform incidental services relating to the receiving, collecting, sending, dispatching and delivering of postal articles and electronic mail;
 - ii. postal financial services, and perform incidental services relating to the issuing, receiving and paying of money and postal orders, postal drafts, postal cheques, postal travellers' cheques, giro, cash-on-delivery, collection of bills, savings service and registration for delivery of newspapers and periodicals;
- b. perform such other functions or duties as the Minister may, from time to time assign to it.”



28. In order to answer the question whether section 24 of the PCK Act extends to labour disputes or not, one needs to refer to the preamble to the Act, and section 5 of the [PCK Act](#), which provides purpose for the Act, and the functions of the corporation as “An Act of Parliament to provide for the establishment of the Postal Corporation of Kenya, to provide for its powers and functions, and for connected purposes.”
29. The legal proceedings envisaged under the Act, and for which the specific provisions in the Act apply, including section 24 of the Act, have to do with the statutory functions of the Corporation. These are the functions set out under section 5 as postal services, incidental services related thereto; postal financial services, and incidental services related thereto, and; registration for delivery of newspapers and periodicals.
30. Section 24 is very clear that the legal proceedings envisaged are those commenced against the Corporation in exercise of its statutory power under the Act, and related to its powers and functions, specifically for services provided or operated by the Postal Corporation under the Act and/or under the Kenya Communications Act, 1998. Nowhere does the section refer to matters relating to contracts of employment between the corporation and its employees, or employer/employee relationship.
31. The Act does provide for appointment of staff and officers under section 13 of the Act, which provides:
- “The Board may appoint such officers or staff as are necessary for the proper discharge of the functions of the Corporation under this Act or any other written law, upon such terms and conditions of service as the Board may determine”
32. The Act mandates the Board established under section 3 of the Act, not only to appoint officers and staff for the discharge of the functions of the Corporation, but to also determine their terms and the conditions. This means that the contractual terms and conditions of service of employees of the Corporation, including limitation of actions brought against the Corporation relating to their employment, were to be settled by the Board. The natural meaning of the section 13 therefore is that terms and conditions of service of employees of the Corporation cannot be found within the body of the Act.
33. We looked into the Schedule made under the Act and found no provisions made on terms and conditions of service of officers and staff. Where then can the limitation period applicable be found? We shall revert back to this point later in this judgment.
34. The position we have reached on this issue of applicability of section 24 to actions by employees is similar to that reached by this Court in [Kenya Revenue Authority vs Menginya Salim Mugani](#) (2010) eKLR, Nairobi Civil Appeal no. 108 of 2010 where it was held *inter-alia* that:
- “It follows therefore that the concept of the destruction of the respondent’s career and the subsequent arbitrary application of the tort of misfeasance in public office just because the appellant was a parastatal had, with respect, no basis in fact or law because whatever powers the appellant was exercising in dismissing the Respondent stemmed from a contract of service between it and its employee and did not with respect spring from the statutory power conferred on the appellant by the statute creating it, which is, the Revenue Authority Act.
- In our view for the purposes of entering into contract of employment a parastatal is just like any other employer and there cannot be any legal basis for creating a distinction between contracts of service entered into by private companies with their employees and those entered into between parastatals and their employees.”



35. Kenya Revenue Authority is a State Corporation as is the Postal Corporation of Kenya. The observations and reasoning in the above case is good law and is in line with our finding in respect to this matter. The conclusion therefore is that section 24 of the Act, which delimits the time for presenting a case against the respondent to 12 months, does not apply to contracts of employment.
36. Since section 24 of the *PCK Act* was not applicable to employment disputes, then the applicable law at the time in question to this appeal was the *Employment Act* cap 226, now repealed by the *Employment Act* of 2007. The *Employment Act* cap 226 did not contain a period of limitation to file causes of action. The *Employment Act* of 2007 has a provision on it but it does not apply to this case as it cannot operate retrospectively, the issue before us having occurred in 2004. That being the case, the applicable law is the *Limitation of Actions Act* of 1967, which is a statute which provides generally for periods of limitation for actions in tort, contract and certain other actions as six (6) years. See *Maersk Kenya Ltd Vs Murabu Chaka Tsuma* (2017) eKLR and *Kenya Revenue Authority V Menginya Salim Murgani* [2010] eKLR.
37. The appellant's employment was terminated on October 19th, 2004. He commenced the proceedings in August 2005. By that time the appellant's claim had not been overtaken by limitation. Therefore, at the time the appellant filed its claim, the same was not time barred. Having so found, we find it unnecessary to answer the second issue of when the 12 months' period for bringing action contemplated under the section begins to run for being superfluous.
38. For the above reasons, the respondent's preliminary objection challenging the Appellant's claim for being time barred had no merit and ought to have been dismissed. Accordingly, we find that the appellant's appeal against the learned trial judge's finding in the interlocutory application has merit and is hereby allowed.
39. In the result, we make the following orders:
1. The ruling of the Employment and Labour Relations Court, of Linnet Ndolo J., dated February 28th, 2019 upholding the preliminary objection by the respondent is hereby set aside and we substitute it with an order dismissing the preliminary objection.
 2. The respondent shall meet the costs of this appeal, while the costs of the trial court will abide the outcome of the claim.**

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021

AGNES K. MURGOR

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JUDGE OF APPEAL

PAULINE NYAMWEYA

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JUDGE OF APPEAL

JESSIE LESIIT

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

