



**Onziga v Mara Leisure Camp (Employment and Labour Relations Cause E028 of 2024) [2025] KEELRC 319 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 319 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E028 OF 2024  
AN MWAURE, J  
FEBRUARY 12, 2025**

**BETWEEN**

**NELSON ONZIGA ..... CLAIMANT**

**AND**

**MARA LEISURE CAMP ..... RESPONDENT**

**RULING**

**Introduction**

1. The Respondent filed a Notice of Preliminary Objection dated 13<sup>th</sup> June 2024 in opposition to the Claimant’s memorandum of claim dated 6<sup>th</sup> May 2024 on the following grounds:
  1. The suit is statute-barred according to the provision of section 89 of the *Employment Act*. Hence, this court lacks jurisdiction to entertain the suit.
  2. In the circumstances, the suit ought to be dismissed and/or struck out with costs to the Respondent.

**Respondent’s submissions**

2. The Respondent relied on the case of Joseph V Automobile Association of Kenya and 4 others [2024] KEELRC 1691 (KLR) where the court cited the case of Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors (1969) EA 696 set out the meaning of Preliminary objections as follows:

“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 to refer the dispute to arbitration.... a preliminary objection is in the nature of what used to be a



demurrer. It raises a pure point of law which is argued on the assumption that all the fact pleaded by the other side are correct. It cannot be raised if any fact has been ascertained or if what is sought is the exercise of judicial discretion.”

3. The Respondent submitted that the suit is statute-barred and therefore this Honourable Court lacks jurisdiction to entertain it. The Respondent relied on Section 89 of the [Employment Act](#) which stipulates as follows:

“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.”

4. The Respondent submitted that the suit was filed on 6<sup>th</sup> May, 2024, seeking payment of unpaid allowance from 2016 to 2023 totaling Kshs.1,253,403.17. The Respondent also submitted that the cause of action arose on 6<sup>th</sup> March 2024, which contradicts section 89 of the [Employment Act](#), as it is 7 years after the cause of action arose therefore it is statute-barred.
5. The Respondent relied on the case of MWK V PKI (2021) eKLR which cited the case of Owners of the Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd (1989) KLR 1, the court stated as follows:

“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 continuation of proceedings pending other evidence. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

6. The Respondent submitted that since the suit is statute-barred therefore this Honourable court has no jurisdiction to entertain the same.
7. The Respondent relied on the case of Gathoni V Kenya Creamies Ltd [1982] eKLR where the court stated that the purpose of the law of limitation is to protect defendants from unreasonable delay in bringing cases against them. The Respondent also relied on the case of Mutuku V Multichoice Kenya Limited & Another [2024] KEELRC 1028 (KLR) where the court upheld that the Preliminary objection as the Claimant’s suit was time-barred.
8. The Respondent urges this Honourable Court to allow the Preliminary Objection by striking out the Claimant’s suit with costs.

### **Claimant’s submissions**

9. The Claimant submitted that Section 89 of the [Employment Act](#) deals with saving of contract of service made abroad which reads as follows:

“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.

- (2) Where a contract has been executed in conformity with this Part, it shall be enforced in the same manner as a contract entered into under this Act, but



no written contract, tenor and execution of which are not in conformity with this Act shall be enforced as attains an employee who is unable to read and understand the contract and any such contract shall be deemed to be executed in conformity with this Act if it is signed by the names or marks of the contracting parties and bears, as concerns any illiterate parties, an attestation to the like effect as if prescribed by this Act.

(3) Where a contract is made in a foreign country, the contract shall be attested by a judge or magistrate, and shall be authenticated by the official seal of the court to which the judge or magistrate is attached.”

10. The Claimant submitted that a preliminary objection deals with only point of law as reiterated in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors (1969) EA 696*.

11. The Claimant relied on the case of *International Centre of Insect Physiology and Ecology (ICIPE) V Nancy McNally (2018) eKLR* the Court of Appeal held as follows:

“There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of *United States International University (USIU) vs Attorney General (2012) eKLR* which was upheld by this court in *Daniel N. Mugendi vs University & 3 others (2013) eKLR*.

12. The Claimant relied on section 12 of the *Employment and Labour Relations Court Act* which deals with the employment matters that fall within its jurisdiction. In *Nick Githinji Ndichu V Clerk Kiambu Assembly and another (2014) eKLR* the court held that to access the ELRC jurisdiction a party needs to prove there is an existence of an employer-employee relationship or there is an oral or written contract of service or the issue falls within the provisions of Section 12 of the ELRC Act.

13. The Claimant submitted that the preliminary objection has no substance and must fail. The Claimant urges this Honourable Court to dismiss the said preliminary objection since this Honourable Court has jurisdiction to hear and determine the matter.

### **Analysis and determination**

14. In *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors (1969) EA 696* the Court of Appeal set out the principle of Preliminary objection as follows:

“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 to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.....



For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law: secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

15. This Honourable Court would like to point out that in 2024, there was the revision of the Laws of Kenya through the 24<sup>th</sup> Annual Supplement. Notably, the *Employment Act* did not have Section 82 which led to the renumbering therefore Section 89 deals with the limitation.
16. Section 89 of the *Employment Act* provides that no civil action or proceedings based on this Act or a contract of service can be initiated unless it is within three years after the act, neglect, or default occurred, or within twelve months after the end of a continuing injury or damage.
17. In Attorney General & Ministry of State for Immigration & Registrar of Persons V Andrew Maina Githinji & Zachary Mugo Kamunjiga [2016] KECA 817 (KLR) Nambuye JA cited the case of Benjamin Wachira Ndiithi vs. Public Service Commission & Another [2014] eKLR where the court stated as follows:

“This Court has however taken a different view on this matter in the case Hilarion Mwabolo –vs- Kenya Commercial Bank [2013 eKLR to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.

In the instant case, the Claimant’s termination from the 1<sup>st</sup> Respondent’s employment took effect on 1<sup>st</sup> October 2000 as communicated by letter dated 29<sup>th</sup> September 2000. It follows therefore that the cause of action upon which the Claimant’s claim is based accrued on 1<sup>st</sup> October 2000 and that is the date when time began to run as against the Claimant’s claim.”

18. In this instant case, the Respondent submitted that the cause of action arose when the respondent failed to pay the allowances from October 2016. But however, the claimant asserts that the preliminary objection raises issues that can only be determined at a full trial. The cause of action actually arose when the respondent failed to pay the aforesaid allowances and the claimant did not raise a demand note until his term was transferred in 2023.

2. Section 12(3) of the *Employment and Labour Relations Court Act* provides as follows:

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

- i. interim preservation orders including injunctions in cases of urgency;
- ii. a prohibitory order;
- iii. an order for specific performance; a declaratory order; an award of compensation in any circumstances contemplated under this Act or any written law;
- iv. an award of damages in any circumstances contemplated under this Act or any written law;



- v. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
- vi. any other appropriate relief as the Court may deem fit to grant.”

19. However this applies as read together with Section 89 of the *Employment Act*.
20. In this case the Claimant is seeking compensation for unpaid allowance owed to him from when he was employed in October 2016. The claim was not as a result of his termination but was part of his contract terms from 2016 when he got his letter of appointment. There is no evidence in court that the claimant demanded his allowances from when he got his contract in 2016. He only demanded it long after when his term with the respondent came to an end.
21. The court finds the suit is filed way after expiry of the cause of action date and so holds the preliminary objection raised by the respondent is merited and is therefore allowed.
22. Each party will meet the costs of the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

