



**Mbatha v Ismax Security Limited (Appeal E324 of 2024)
[2025] KEELRC 1827 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1827 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E324 OF 2024**

**JW KELI, J
JUNE 20, 2025**

BETWEEN

LILIAN MUTIO MBATHA APPELLANT

AND

ISMAX SECURITY LIMITED RESPONDENT

(Being an Appeal from part of the Ruling and Order of the Honourable C.K. Mwaniki (SRM) delivered at Ruiru on the 31st of October, 2024 in MCELRC No. E033 of 2024)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Ruling and Order of the Honourable C.K. Mwaniki (SRM) delivered at Ruiru on the 31st of October, 2024 in MCELRC No. E033 of 2024 between the parties filed a memorandum of appeal dated the 7th of November 2024 seeking the following orders:-
 - a. This Appeal be allowed.
 - b. The Ruling and Orders issued on 31st October 2024 be set aside and be substituted with an Order dismissing the Respondent's Notice of Preliminary Objection dated 3rd August 2024.
 - c. The MCELRC NO. E033 OF 2024- Lilian Mutio Mbatha Vs Ismax Securitylimited, Mcelrc No. 032 Of 2024-robert Ombaye Onsongo Vs Ismax Security Limited, Mcelrc No. 034 Of 2024-vitalis Otieno Omollo Vs Ismax Security Limited, Mcelrc No.e035 Of 2024-marita Kerubo Omunde Vs Ismax Security Limited, Mcelrc No. E036 Of 2024-zachary Omae Miruka Vs Ismax Security Limited And Mcelrc No. E037 Of 2024-josphat Njoroge Ndungu Vs Ismax Security Limited be remitted to another Magistrate for purposes of hearing and determination of the main suit.
 - d. The Respondent to bear the costs of the appeal.



- e. Any other Order and relief that this Honourable Court may deem fit and just to grant.

Grounds Of The Appeal

2. The Honourable Magistrate erred in law and in fact by exercising his judicial discretion capriciously, whimsically and on unknown legal principles.
3. The Honourable Magistrate misdirected himself, failed to give due consideration to the legal principles applicable where an order has been made allowing a matter to proceed undefended and/or an interlocutory judgment has been entered against a party for failure to enter appearance and file their response to a suit within stipulated timelines, and thus arrived at a wrong conclusion.
4. The Honourable Magistrate erred and misdirected himself by failing to appreciate that Rule 13 (1-5) of the Employment and Labour Relations Court (Procedure) Rules, 2016 required the Respondent to enter appearance, file and serve their response to the suits within 21 days from the date of service failure to which he was allowed to order that the matters proceed for formal proof hearing upon application by the Appellant as per the provisions of Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
5. The Honourable Magistrate erred and misdirected himself by failing to appreciate his own orders of 10th July, 2024 where he had directed that the matters proceed undefended due to lack of representation from the Respondent as per the provisions of Rule 15 (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
6. The Honourable Magistrate erred and misdirected himself by failing to find and appreciate that the Respondent was engaging in an abuse of Court process by filing a Notice of Preliminary Objection after the close of pleadings without first putting an application to vary and/or set aside the orders made against them on 10th July, 2024 as required by Order 10 Rule 11 of the Civil Procedure Rules, 2010.
7. The Honourable Magistrate erred and misdirected himself by failing to find and appreciate that where the Employment and Labour Relations Court (Procedure) Rules, 2016 were silent, the Civil Procedure Rules, 2010 automatically applied in which this case they applied.
8. The Honourable Magistrate erred in law and fact by finding that indeed he had ordered the matters to proceed undefended on 10th July, 2024 but went ahead to vary and /or set aside those orders stating that they were irregular without having been moved to do so by a formal application.
9. The Honourable Magistrate erred in law and fact and misdirected himself by allowing a Notice of Preliminary Objection that was filed by a Respondent who had no audience before Court having not put in an application seeking for leave for their pleadings including the Notice of Preliminary Objection dated 3rd August, 2024 to be allowed as having been duly and/or properly filed the same having been filed after pleadings had closed and an order made that the suits proceed undefended.
10. The Honourable Magistrate erred in law and fact by failing to appreciate that the Preliminary Objection dated 3rd August, 2024 was not properly on record there being no variance of the orders made on 10th July, 2024 and /or leave for the said pleadings to be allowed as duly filed.
11. The Honourable Magistrate erred in law and fact by failing to appreciate the Respondent had no locus standi in the above matters there being no any Application having been filed by them seeking to vary and or set aside the orders made against them on 10th July, 2024 as per the provisions of Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 10 Rule 11 of the Civil Procedure Rule, 2010.



12. The Honourable Magistrate erred in law and fact by finding that any person can file pleadings in court without first varying and/or setting aside orders made against them allowing the matters to proceed as undefended there being no Defence.
13. The Honourable Magistrate erred and misdirected himself by failing to find and appreciate that Section 90 of the *Employment Act* No.11 of 2007 required the Appellant to institute their claim for unlawful termination against the Respondent within 3 years from the date of termination and that the Appellant's suit was brought within the stipulated timelines.
14. The Honourable Magistrate erred in law and fact by failing to find that in order for him to ascertain whether the Appellant's suit was time barred, he had to delve into the evidence filed by her in her claim which could only be possible through hearing the main suit.
15. The Honourable Magistrate erred in law and fact by failing to find that the Appellant's claim was for unlawful termination and not a continuing injury.
16. The Honourable Magistrate erred in law and fact by failing to find that the evidence tendered by the Appellant was in relation to the issue of Respondent's audience before Court as well as the factual nature of their Preliminary Objection dated 3rd August,2024 and not whether her claim was for a continuing injury and /or time barred.
17. The Honourable Magistrate erred and misdirected himself by striking out the Appellant's suit in its entirety at the preliminary stage without considering the Appellant's evidence and filed pleadings on whether her claim was for a continuing injury.
18. The Honourable Magistrate erred in law and fact by failing to find that striking out the Claimant's suit at the preliminary stage without hearing the main suit and considering the pleadings and evidence filed in court was highly prejudicial to the Appellant's right to a just and fair hearing.
19. The Honourable Magistrate erred in law and fact by disregarding the Appellant's evidence, pleadings filed in court, submissions and judicial authorities cited.
20. The Honourable Magistrate erred in law and fact by considering extraneous issues that were neither pleaded, canvassed or proven by the Respondent during the hearing of the Preliminary Objection
21. The Honourable Magistrate failed to appreciate that the prejudice occasioned to the Appellant by striking her entire claim without taking into account her evidence could not be cured by an award of costs.
22. The Honourable Magistrate erred in law and misdirected himself by failing to exercise judicial authority on known legal principles and judiciously thus rendering a biased, unfair, unjust and inconsistent decision/Ruling.

Background To The Appeal

23. The Appellant filed a claim against the Respondent vide a memorandum of claim dated the 8th of March 2024 seeking the following orders:-
 - a. A declaration that there was unfair labour practice, the termination was unlawful, untimely and an order that the Claimant be paid his dues and benefits of Kshs. 834,501.70 as aforesaid.
 - b. Costs of the claim plus interest therein.(see pages 7-11 of the ROA dated the 10th of December 2024)



24. The Appellant also filed her verifying affidavit, list of documents, list of witnesses, and witness statement all dated the 8th of March 2024 (pages 12-34 of ROA).
25. The claim was opposed by the Respondent who entered an appearance and filed a Notice of Preliminary Objection dated the 3rd of August 2024 challenging the Court's jurisdiction to hear the suit on the basis that it offended Section 90 of the Employment Act No. 11 of 2007 (pages 46-47 of ROA).
26. The Trial Court issued directions that the Preliminary Objection dated the 3rd of August 2024 be handled first and be disposed of by way of written submissions. Both parties complied.
27. The Trial Magistrate Court delivered the impugned ruling on the 31st of October 2024 allowing the Preliminary Objection and dismissing the entirety of the Appellant's suit, after finding that the Appellant's claim constituted a continuing injury whose limitation is twelve months under the Employment Act 2007 (Ruling on pages 60-62).

Determination

28. The appeal was canvassed by way of written submissions. The Appellants filed, but the Respondent elected not to file any submissions.
29. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-
"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."
30. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

31. In her submissions dated 27th March 2025, the Appellant identified the following issues for determination:
 - i. Whether the learned trial Magistrate erred in fact and law by finding that the Civil Procedure Act and Rules do not apply to proceedings before the Employment and Labour Relations Court.
 - ii. Whether the learned trial Magistrate erred in fact and law by finding that the Respondent had audience before the court.
 - iii. Whether the learned trial Magistrate erred in fact and law by finding that the Appellant's claim was time barred leading to want of jurisdiction.



- iv. Whether the learned trial Magistrate erred in fact and law by striking out the Appellant's claim in its entirety.
32. On their part, the Respondent informed the court on 8th May 2025 that they would not be filing any written submissions.
33. The court having perused the undefended appeal found the issues for determination in the appeal were:-
 1. Whether the trial court erred in allowing the preliminary objection without setting aside the interlocutory judgment the suit being undefended.
 2. Whether the trial court erred in striking out the suit for being time barred.

Whether the trial court erred in allowing the preliminary objection without setting aside the interlocutory judgment the suit being undefended.

34. The trial court on the 10th July 2024 having found the claim was undefended made the following orders- 'matters certified ready for hearing. Interlocutory judgment entered. HEARING ON 5/8/2024'(page 65 of the ROA). On 5th August 2024 when the matter was scheduled for formal proof the respondent had advocate Okoth who told the court it had filed a preliminary objection and had served. Counsel for the claimant informed court there was an interlocutory judgment that needed to be set aside first. Counsel for the respondent stated the preliminary objection was on jurisdiction. The trial court ordered the preliminary objection be canvassed first by way of written submissions.
35. The court finds that it is trite law that the issue of jurisdiction of the court can be raised at any stage of the proceedings. I borrow from the citations by Justice Mrima in *Jeremiah Memba Ocharo v Evangeline Njoka, Kenya National Commission For Unesco, Cabinet Secretary Educatio & Attorney General* [2022] KEHC 2130 (KLR) where the Judge held the question of jurisdiction can be raised at any time and observed: '13. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -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... Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016* [2018] eKLR stated as follows: -Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;
 1.
 2. The jurisdiction either exists or does not ab initio ...
 3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
 4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal."(emphasis mine)
36. The court then finds that the trial court, despite having entered the interlocutory judgment and the matter scheduled for a formal proof, rightly held that the preliminary objection touching on the jurisdiction of the court on basis of the claim being time barred be canvassed first.



Whether the trial court erred in striking out the suit for being time barred.

37. The Trial Magistrate Court delivered the impugned ruling on the 31st of October 2024 allowing the Preliminary Objection and dismissing the entirety of the Appellant’s suit, after finding that the Appellant’s claim constituted a continuing injury whose limitation is twelve months under the Employment Act 2007 (Ruling on pages 60-62).The preliminary objection was as follows:-‘that this honourable court lacks jurisdiction to hear this matter pursuant to section 90 of the Employment Act(No. 11 of 2007).’
38. The trial court found the claims were of continuing injury hence time barred under section 90 of the Employment Act the appellant’s services having been terminated on the 1st July 2022 and the claim filed in march 2024. The appellant stated that this was in error as her claim was for unfair termination which is within 3 years of termination hence valid.
39. The prayer in the claim was – a declaration that there was unfair labour practice , the termination was unlawful; , untimely and an order that the claimant be paid his dues and benefits of Kshs. 834,501.70 which were itemised at paragraph 10 of the claim as notice, compensation for future earnings 12 months, service pay , severance pay , unpaid accrued leave for 3 years, overtime payment, unpaid rest days and underpayment . The court agreed this was a claim for unfair termination. Only some prayers were under continuing injury. In *Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd* [1969] E.A.696 the court defined a preliminary objection as; -
- “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 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 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”
- The court found that the preliminary objection before the trial court did not meet the threshold set in the foregoing authority as the claim was for unfair termination falling under the 3 years limitation and had to be determined. Even if some of prayers sought were under continuing injury the claim for unfair termination was valid.
40. The issue of continuing injury is now settled by the Court of Appeal in *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) which considered cases of continuing injury and observed citing authorities:- “There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. This position was upheld by this Court in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* [2018] eKLR. The contestation before this Court is whether the claims in question fall within the ambit of “a continuing injury” as contemplated by section 90. The essential question for determination before the High Court was the maintainability of the complaint due to the limitation period prescribed by the above section. Central to this question is the meaning of the phrase “a continuing injury” and whether the respondent’s claims fell within the said definition. Before the High Court and this Court, the parties did not attempt to define what constitutes “a continuing injury.” From the record, we note that the respondent’s counsel only cited the definition of ‘back pay’ in the *Black’s Law Dictionary* 9th Edition at page 159 which defines it as “the wage or salary that an employee should have received but did not because of an employer’s unlawful action as setting or paying the wages or salary” to support her claim that back pay was a continuing state of affairs.” The Court adopted with approval the elaborate



definition of continuing injury claims in *M. R. Gupta v Union of India*, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of “continuing wrong” and “recurring wrongs” and reversed the decision. It held: “The appellant’s grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant’s claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant’s claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred....” The court applying the foregoing then finds that the trial court erred in determining the case in limine as the issue of unfair termination had not been settled. The continuing injury covered back pay claims on wages. The preliminary objection did not raise a point of law to determine the claim in entirety hence was improper (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 the suit- *Mukisa Biscuits- supra*).

41. Consequently, the appeal is allowed on the ground that the preliminary objection was improperly raised as the claim was of unfair termination and the various prayers, many of which were not continuing injury claims.
42. The appeal is allowed. The Ruling and Order of the Honourable C.K. Mwaniki (SRM) delivered at Ruiru on the 31st of October, 2024 in MCELRC No. E033 of 2024 is set aside and substituted with an order the preliminary objection dated 3rd August 2024 was not properly raised and is dismissed with costs in the cause.
43. The court orders that the Ruling and Orders issued on 31st October 2024 be and are hereby set aside and be substituted with an Order dismissing the Respondent’s Notice of Preliminary Objection dated 3rd August 2024. The MCELRC NO. E033 OF 2024- Lilian Mutio Mbatha Vs Ismax Security Limited, Mcelrc No. 032 Of 2024- robert Ombaye Onsongo Vs Ismax Security Limited, Mcelrc No. 034 Of 2024- vitalis Otieno Omollo Vs Ismax Security Limited, Mcelrc No. e035 Of 2024- marita Kerubo Omunde Vs Ismax Security Limited, Mcelrc No. E036 Of 2024- zachary Omae Miruka Vs Ismax Security Limited And Mcelrc No. E037 Of 2024- josphat Njoroge Ndungu Vs Ismax Security Limited are hereby remitted to the trial court and to another Magistrate for purposes of hearing and determination of the main suit on merits.
44. Costs of the appeal to the appellant.
45. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF JUNE 2025.

J.W. KELI,



JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Omolo(Ms) h/b Ochogo

Respondent: absent

