



**Ndiga v Aquavita Limited (Cause E689 of 2024)
[2025] KEELRC 2195 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2195 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E689 OF 2024**

**L NDOLO, J
JULY 24, 2025**

BETWEEN

HILLARY NDIGA CLAIMANT

AND

AQUAVITA LIMITED RESPONDENT

RULING

1. The Claimant filed a Statement of Claim dated 28th August 2024, seeking the following reliefs:
 - a. A declaration that the Claimant was constructively dismissed
 - b. A declaration that the alteration of the Claimant’s terms and conditions of employment vide a letter dated 1st March 2023, is illegal, null and void for want of consultation and due process of law
 - c. Unpaid leave.....Kshs. 512,159
 - d. House allowance.....816,458
 - e. Sales Commission.....104,636
 - f. Damages for constructive dismissal
 - g. Certificate of service
 - h. Costs plus interest

2. The Respondent filed a Statement of Response dated 25th November 2024, denying the Claimant’s entire claim. At paragraph 11 of the Response, the Respondent states that the Claimant’s claims for leave pay, house allowance and sales commissions are statute barred.



3. Subsequently, the Respondent filed a Notice of Preliminary Objection dated 10th March 2025, stating that the claims for unpaid leave, house allowance and sales commission are time barred by dint of Section 89 of the *Employment Act*. It is this Objection that is the subject of this ruling.
4. The gist of the Respondent's Objection is that the Claimant's claims for unpaid leave, house allowance and sales commission are in the nature of a continuing injury or damage, and therefore ought to have been brought within twelve (12) months from the date the Claimant left employment.
5. In their respective submissions on the Objection, the parties relied on the well-known decision in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where a Preliminary Objection was defined as one that raises a pure point of law and is premised on the assumption that all the facts pleaded by the other side are not in contest.
6. The parties also cited the decision in *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) where the Court of Appeal, referring to the limitation period for continuing injury, as provided in the latter part of Section 89 of the *Employment Act*, stated the following:

“The principles underlying continuing injury or wrongs and recurring/successive wrongs have been applied to service law disputes. ‘A continuing wrong’ refers to a single wrongful act which causes a continuing injury. ‘Recurring/successive wrongs’ are those which occur periodically, each wrong giving rise to a distinct and separate cause of action.”
7. The Court of Appeal itself relied on the following explanation by the Supreme Court of India in *Balakrishna S.P. Waghmare v Shree Dhyaneswar Maharaj Sansthan* AIR 1959 SC 798:

“It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such character that the injury caused by itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.”
8. In his own submissions dated 1st May 2025, the Claimant further cited the decision in *Oraro v Mbaja* [2005] KEHC 3182 (KLR) where Ojwang J (as he then was) held that a legal issue that is entangled with contested facts, loses the character of pure point of law and cannot therefore sustain a Preliminary Objection.
9. In its submissions dated 21st March 2025, the Respondent cites a long list of decisions of this Court (variously constituted) where it was held that service related claims such as; house allowance, leave pay and commissions fall within the definition of continuing wrongs as contemplated in the latter part of Section 89 of the *Employment Act* (see *Chimera Chimoyo Alfan v Steel Makers Limited* [2021] KEELRC 1018 (KLR); *Magdalene Kiboi & 17 others v Engen Kenya Limited* [2020] KEELRC 1060 (KLR); and *Peter Mwangi Gitonga v Desert Oasis Residents Empowerment Program (Derep)* [2017] eKLR)
10. There is no dispute regarding the effective date of the Claimant's resignation from the Respondent's employment. There is also no argument that this was the accrual date of the Claimant's claims for leave pay, house allowance and sales commissions.



11. The Claimant's case having been filed after the expiry of the twelve months' period for continuing wrongs, the claims for leave pay, house allowance and sales commissions are statute barred and the Court has no jurisdiction to entertain them.
12. That said, these specific claims are struck out with costs in the cause.
13. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JULY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Okonjo for the Claimant

Mr. Wachira for the Respondent

