



**Teachers Service Commission v Okumu (Civil Appeal E790 of 2021)
[2024] KEHC 1413 (KLR) (Civ) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E790 OF 2021

AN ONGERI, J

FEBRUARY 16, 2024

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

WILLIAM OLOO OKUMU RESPONDENT

*(Being an appeal from the ruling of Hon. D. M. KIVUTI (P.M)
in Milimani CMCC No. E7062 of 2020 delivered on 29/10/2021)*

JUDGMENT

1. The respondent filed Milimani CMCC No. E7062 of 2020 seeking special damages of ksh.2,110,659 together with general damages, costs of the suit and future medical expenses of surgical removal of internally fixated orthopedic implants.
2. The suit was filed by plaint dated 27/11/2020 in respect of an accident that occurred on or about 11/12/2017 involving motor vehicle registration no. GKA 811X Nissan in which the respondent was lawful passenger.
3. The appellant filed a preliminary objection dated 22/12/2020 seeking dismissal of the respondent's suit for want of jurisdiction on the basis that the suit was filed out of time as per Section 1 of the [Public Authorities Limitation Act](#) as read with Section 21 of the TSC Act.
4. The trial court found that the preliminary objection had no merit and dismissed it with costs to the respondent.
5. The appellant has appealed against the ruling which dismissed the preliminary objection dated 29/10/2021 on the following grounds;



- i. The learned magistrate erred in law when he failed to correctly interpret Section 21 of the *Teachers Service Commission Act* which provides expressly that proceedings against the appellant ought to be deemed as proceedings against the government.
 - ii. The learned magistrate erred in law by failing to appreciate that the proceedings against the appellant are subject to the *Government Proceedings Act* and the Public Authorities Limitations Act.
 - iii. The learned magistrate erred in law and fact by failing to take into consideration the provisions of Article 260 of *the Constitution* of Kenya which defines public bodies as institutions that draw their funds from the exchequer which definition applies to the legal character of the appellant.
 - iv. The learned magistrate erred in law and fact by finding that suit against the appellant was brought within the provided time limitation.
 - v. The learned magistrate erred in law and fact in arriving at a decision which was contrary to the law, facts, submissions and judicial precedent.
6. The parties filed written submissions as follows; the appellant submitted that it is a state organ and as a government entity, receives financial resources from parliament in order to fulfil its responsibilities as indicated in article 249 (3) of *the constitution*. The trial court therefore erred when it found that the *limitation of actions act* applies to the matter instead of the Public Authority Limitations Act.
 7. In support the appellant cited Supreme Court of Kenya Advisory Opinion Reference No. 2 of 2014: matter of the National Land Commission;

“The definition clauses of *the Constitution*, therefore, leave no doubt that commissions are State organs..... This is not to say that commissions and independent offices are excluded from exercising public power. Indeed, as State organs, they are part of Government, and one of their core mandates is to protect the sovereignty of the people; so they ought to protect the sovereign power of the people, from which the Executive, the Judiciary and the Legislature derive their authority: hence the depiction ‘people watchdogs’ or ‘constitutional watchdogs’.”
 8. The appellant submitted that the cause of action in the plaint arose in December 2017. The respondent filed the plaint on 27 November 2020. It then follows that the plaint was hopelessly filed outside the limitation period under section 3 (1) of the *Public Authorities Limitation Act* of 12 months from the time the cause of action arose. The plaint is thus statute barred and the ought to be dismissed. Jurisdiction goes to the core of administration of justice as it is the foundation at which competence of litigation and determination of a suit is laid.
 9. The respondent submitted that the Appellant does not qualify as ‘the government or a local authority’ within the meaning of the *Public Authorities Limitation Act* (PALA). Further, the application of the PALA is strictly related to the government and local authorities. Section 2 of the PALA describes a local authority as a municipal council, county council, town council, urban or area council, and, in respect of any function delegated to or conferred upon a local council, such local council. From this definition, the Appellant is not a local authority.
 10. The respondent cited Bernard Amoro Mutendi v Teachers Service Commission [2018] eKLR, where the claim was founded upon a contract of employment, the Respondent who was the Teachers Service Commission in arguing its Preliminary Objection, purported that the claim was statutorily time-



barred pursuant to the provisions of Section 3(2) of the PALA as read together with Section 90 of the *Employment Act*, 2007. The court observed as follows;

“As correctly pointed out by the claimant, the *Public Authorities Limitation Act* does not apply to the respondent. The relevant law is therefore Section 90 of the *Employment Act*.”

11. The respondent argued that the time limitation of matters involving the appellant is covered under the Limitations of Action Act. Section 4 (2) of the act provides that the limitation period for acts founded on tort such as the one herein to be capped at three years.
12. The sole issue for determination in this appeal is whether the trial court was right in dismissing the preliminary objection dated 22/12/2020.
13. A preliminary objection arises out of the pleadings and it is argued on the presumption that the facts are correct.
14. In this particular case I find that there are certain facts which require to be ascertained such as the correct interpretation of Section 21 of the *Teachers Service Commission Act*.
15. The trial court relied on the case of Zachary Onyambu Manani v Teachers Service Commission [2018] eKLR where it was stated as follows;

“The gist of the petition is that the petitioner was retired early before he attained the mandatory age of retirement. *The constitution* does not concern itself with retirement age.

I thus agree with the respondent that this is a contractual matter that is governed by employment law and that the only reason the petitioner filed a petition was in the hope of evading the law on limitation.

The petitioner does not deny that the cause of action is statute barred under the *Limitation of Actions Act*.

As was stated by the court in the cases cited by the respondent being John Miriti Mbarire v The Attorney General, Josephat Ndirangu v Henkel Chemicals (ea) Limited And Joseph Muturi Mberia & Another v Council Of Jkuat, the framing of a cause of action does not jettison the applicable substantive and procedural law on employment and labour relations. The courts must guard against distortion or manipulation of the constitutional jurisdiction to escape the consequences of limitation.

For the foregoing reason the preliminary objection succeeds with the consequence that the petition filed herein being anchored on a cause of action that is statute barred, the court has no jurisdiction to determine the same.”

In Michael Cherogony v TSC [2015] eKLR where it was held;

“Section 4 (1) of the Limitation of Action Act lists actions which may be brought prior to expiry of six years from the date on which the cause of action accrued. Section 4(2) of the said Act however provides that actions based on tort may not be brought after expiry of three years from the date on which the cause of action accrued.”

16. I find that Section 26 of the *Government Proceedings Act* Cap 40 when read together with Section 21 of the *Teachers Service Commission Act* do not set a limitation of action period.
17. I also find that there is the issue as to whether this cause of action arose out of negligence or as a result of a contract of employment.



18. The habit of raising preliminary objections must be discouraged in view of the right to every party to be accorded a fair trial based on the rules of natural justice.
19. The respondent deserved his day in court in view of the nature of injuries he sustained.
20. I find that the trial court was right in dismissing the preliminary objection.
21. I dismiss the appeal with costs to the respondent and direct that the suit be fully prosecuted.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

