

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

CAUSE NO. E001 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

GODFREY

MAINA

MWANGI..

.....**CLAIMANT**

VERSUS

LAKE BASIN DEVELOPMENT AUTHORITY.....

RESPONDENT

JUDGMENT

The claimant filed the instant suit vide a Memorandum of Claim dated 7th January, 2025 seeking:

- (i) A declaration that he be substantively confirmed to the position of Chief Manager Engineering & Technical Services by operation of law and entitlement to salary allowances and benefits of Job Group A as per the respondent's salary structure.*
- (ii) Declaration that he was discriminated and denied the right to career progression.*
- (iii) Accrued and unpaid salary allowances and benefits for the position of Chief Manager Engineering and Technical services Kshs.11,947,420.*

- (iv) Payment of arrears and benefits during the interdiction period.*
- (v) Compensation for discrimination.*
- (vi) Reissuance of Retirement Certificate reflecting the claimant's role for the final in (9) years of service.*
- (vii) Costs of the suit.*
- (viii) Interest.*
- (ix) Any other relief the court may deem just and reasonable to award.*

The claimants case is that he was employed by the respondent in March 1995 as Irrigation and Drainage Engineer and had risen to the position of Manager Engineering Services in January 2008 and was appointed Acting Chief Manager & Technical Services on 20th January, 2010 and was paid acting allowance from 2010 to September 2011 when it was reduced to 15% of the basic salary, reinstated in 2012 but reduced in 2013 and acted for 9 years. That although the position of Chief Manager Engineering and Technical Services was advertised variously, and the claimant applied, the recruitment process was never concluded and registration by the Engineers Board was a requirement in 2013 and the claimant was registered in 2013 but was

not appointed or confirmed and was interdicted in September 2019, cleared in November 2021 and the board recommended confirmation during interdiction.

That after being cleared in the criminal case, the respondent's board of directors reinstated the interdiction necessitating ELRC Judicial Review No. E002 of 2022 which quashed the interdiction and ordered payment of withheld salary allowances and Benefits.

That after the interdiction was quashed, the claimant was redeployed to the Department of Housing as a way to marginalise him professionally and impede his career growth.

The claimant stated that since he acted in the position for many years he was confirmed by operation of law and was thus entitled to the fully salary and allowances due to the position, 6 months after the acting commenced.

Respondent's case

The respondent admitted that the claimant was its employee since February 1995 and was confirmed on 28th June, 1996 and appointed Manager Engineering Services effective 15th June, 2011 and acted as Chief Manager

Engineering and Technical Services for a while and was paid acting allowance but was not confirmed to the position despite willingness of the Board to do so as in 2013, he was not registered as an Engineer and the position was advertised. That the claimant was registered as an Engineer in 2019 but when recommended for appointment, he was under interdiction. The respondent denied having underpaid the claimant's acting allowance.

Claimant's evidence

The claimant availed copies of two (2) signed letters dated 5th April, 2019 and 20th September, 2018 applying to the position of Chief Manager Engineering & Technical services. While the former had a Job Reference, the latter did not have and demand letter for withheld allowances and benefits for the period he was under interdiction Kshs.1,998,105.00. When cross-examined by counsel for the respondent, the claimant confirmed that he left the respondent's employment on retirement in January, 2024 as Deputy Director Land and Housing a position higher than Acting Chief Manager Engineering and Technical Services and acting allowance was not paid as per the respondent's terms and conditions of service.

That he was seeking confirmation as Chief Manager Engineering and Technical Services and allowance from

2013 till the moment he ceased to act and confirmation was not automatic as the position required certain qualifications including registration by the Engineers Registration Board and was registered in 2013.

CWI testified that although the position of Chief Manager was advertised variously, he could not trace his applications.

The claimant confirmed that he ought to have sued earlier for confirmation as Chief Manager.

RWI, Mr. Henry Makori confirmed that the claimant ceased acting as Chief Manager, Engineering and Technical Services in September 2019 when he was interdicted and his acting allowance was reduced when it raised an audit query.

That the claimant was qualified as Deputy Director Land and Housing as he was a Civil Engineer and was to manage properties and supervised construction.

RW I testified that, the respondents Board of Directors accorded the claimant time to register as a Graduate Engineer and he did so in 2013 and the position of Chief

Manager was subsequently advertised, the claimant applied but was not appointed for undisclosed reasons and could not be confirmed in 2019 as he was on interdiction and in 2021 another person had been appointed acting and the claimant was redeployed after having acted for 7 years, since 2013.

RWI could not recall how many times the position had been advertised.

On re-examination RWI testified that the claimant's acting allowance was reduced on account of the SRC/Public Service Commission circulars and was paid all the acting allowance due to him.

Claimant's submissions

On the court's jurisdiction, counsel submitted that the claimant's case was a continuing breach and crystallized on his retirement in January 2024 and the suit was filed in time.

Reliance was placed on the sentiments of the Court in **German School Society & another V Ohany & another [2023] KECA 894 (KLR)** to urge that there was a continuing wrong as were the sentiments of the court in

Nganga V Christ the King Parish & another [2023] KECA 1100 (KLR) to urge that continuing injury was an exception to the limitation of actions.

On reduction of acting allowance, counsel submitted that the absence of an explanation as to why the respondent held the claimant in acting position for inordinately long amounted to an unfair labour practice as held in **Kaumbuthu Mbutura V Meru Central Dairy Co-operative Union Ltd**, since the position was advertised and the claimant applied.

Reliance was also made on the sentiments of the Supreme Court in **Shollei V Judicial Service Commission [2022] KESC 5 (KLR)** as well as **Edah Cherono Maiywa V University of Nairobi Enterprises and Services Ltd [2020] eKLR**.

On the withheld allowance, counsel cited clause 9.9 of the respondent's terms and conditions of service on reduction of acting allowance which provided for the difference between the officer's salary and the minimum salary of the higher job group the officer was acting, but the respondent reduced it to 15% of the basic salary.

Reliance was placed on the sentiments of the court in **Njoroge V Nairobi City Water & Sewerage Co. Ltd [2024] KEELRC 1135 (KLR)**, **Ronald Kampa Logaba V Kenol Kobil Ltd [2013] eKLR** and **Hogas V Dower College [1990] ICR 39**.

On discrimination on grounds of ethnicity, counsel submitted that the claimant was not treated fairly. Reliance was on the sentiments of the court in **Edah Cherono Maiywa V UNES Ltd (supra)** as well as **Gicheha V Nairobi Water and Sewerage Co. Ltd [2024] KEELRC 1984 (KLR)**.

On reliefs, counsel submitted that the claimant was entitled to withheld allowances, citing **Oyatsi V Judicial Service Commission [2022] KEELRC 3 (KLR)**, compensation for discrimination as held in **OI Pejeta Ranching Ltd V David Wanjao Muhoro [2017] eKLR** and **V. M. K V CUEA [2013] eKLR**, among others and costs.

Respondent's submissions

On whether the instant suit was statute barred, counsel for the respondent revisited the court's ruling on the respondent's Notice of Preliminary Objection dated 18th

March, 2025 and cited the provisions of Section 89 of the Employment Act to urge the court to determine when the cause of action accrued in the matter.

Counsel submitted that the cause of action arose in 2019 when the claimant was interdicted and he took no action within the three years limitation period and at his retirement, he was serving as Deputy Director Land and Housing.

Counsel further submitted that the claimant's Judicial Review No.E002 of 2022 challenging interdiction after conclusion of the criminal case was silent on the position he held in an acting capacity and could have litigated the issue.

Counsel for the respondent submitted the claimant's suit was statute barred and cited the sentiments of the court in **Moturi V National Social Security Fund [2023] KEELRC 1463 (KLR)** as well as **Beatrice Kahai Adagala V Postal Corporation of Kenya [2015] eKLR**, to emphasize that a claim ground on a contract of employment had to be filed within 3 years.

On continuing injury relied upon by the claimant, counsel for the respondent submitted that such a claim had to be filed within twelve (12) months after cessation of the injury or damage as provided by Section 89 of the Employment Act and further submitted that the claimant omitted the accrual date of the cause of action by design and the cause of action arose on 26th September, 2019 when he ceased acting and if the injury was continuous, the suit ought to have been filed within 12 months.

Concerning substantive appointment to the position Chief Manager Engineering and Technical Services, counsel submitted that there was no law on automatic confirmation of an employee in the Public Service.

Reliance was placed on the provisions of Section 34(3) and (4) of the Public Service Commission Act on acting appointments and Article 232(1)(g) of the Constitution of Kenya on fair competition in recruitment.

Reliance was also placed on the decision in **Gicheha V Nairobi Water and Sewerage Co. Ltd (supra)** to reinforce the submission.

Counsel urged that the respondent's Board of Directors had in 2011 and 2019 recommended the claimant for confirmation to the position of Chief Manager, Engineering & Technical Services but in the former instance, he was not registered as an Engineer by the Engineering Registration Board and in the latter, he was on interdiction.

As to whether the claimant was discriminated, counsel relied on the decisions in **Salaries and Remuneration Commission & another V Parliamentary Service Commission & 15 Others; Parliament & 4 Others; Interested Parties [2020] eKLR** and **Gichuru V Package Insurance Brokers Ltd [2021] KESC 12 (KLR)**, on the essentials of discrimination to submit that the claimant adduced no evidence to show that he was treated differently compared to other employees in acting positions.

On reliefs, counsel submitted that none was merited because the law did not recognize automatic confirmation into positions of employment, the claimant failed to prove discrimination, was not appointed Chief Manager, Engineering & Technical Services for any salary to accrue and withheld acting allowances were statute barred and

reliefs introduced through submissions were not awardable as held in **Lamba V National Social Security Fund [2023] KECA 124 (KLR)**.

Counsel urged the court to dismiss the suit with costs.

Analysis and determination

The salient facts of this case are largely agreed upon.

It is not in dispute that the claimant joined the respondent in 1995 as an Irrigation/Drainage Engineer and appointed Manager Engineering Services in June 2011 and was appointed Acting Chief Manager, Engineering and Technical Services effective 1st April 2012 reporting to the Managing Director at Kshs.43,500 as Acting allowance and both parties agreed that the claimant continued acting in the position until he was interdicted in September 2019.

One of his major claims is that his Acting allowance was reduced by the respondent unilaterally and was claiming the salary and allowances for the substantive position of Chief Manager Engineering and Technical Services on the premises that since he was not confirmed to the position, he was deemed confirmed by operation of law.

The issue that arises is whether confirmation by operator of law can take place in respect of a public office post the Constitution of Kenya, 2010, whose provisions and values prevail over all other norms, and in particular the values and principles of public service under Article 232 which expressly provide for transparency, fair completion and merit based appointments and promotions over and above equality of opportunities.

But the foregoing is only part of the claimant's case he contends and rightly so that the respondent advertised the position of chief Manager Engineering and Technical services severally, and he applied and even attended the interviews but no appointment or response was given by the respondent's Board of Directors and RWI had no explanation or justification either. He testified that only the Board of Directors could unravel the mystery.

Noteworthy, the respondent filed a Notice of Preliminary Objection contending that the court had no jurisdiction since the claimant's case was statute barred. The court declined to hold that the claimant's case was statute on the premises that the claimant by design did not plead when his cause of action arose and in particular when he

ceased acting leaving it to the evidence adduced in court. Hearing of the case, in the court's view, was essential to disentangle the facts particularly on the acting which took exceedingly long. It is also important to indicate that some facts of the case were contested.

In any event the claimant's case is still amenable to being struck out if the court finds that it was indeed statute barred or dismiss certain reliefs if they were not claimed within the prescribed duration.

The issues for determination are:

- (i) Whether the claimant was confirmed to the position of Chief Manager Technical Services.*
- (ii) Whether the claimant was discriminated or subjected to unfair labour practices.*
- (iii) Whether the claimant is entitled to the reliefs sought.*

The answer to this question is patently in the negative as discernible from the foregoing.

The respondent's Board of Directors was obligated by law to advertise the position, shortlist applicants, conduct interviews and appoint the best candidate.

The fact that they advertised the position more than once and prospective applicants applied including the claimant and no appointment was made would appear to suggest that there was an undisclosed reason. It is unclear why the respondent's Board of Directors could not appoint the claimant and in any case he was acting in the position.

Whereas in 2012 the claimant had not registered with the Engineers board in accordance with the provisions of the Engineers Act 2012, which was mandatory, the claimant registered in 2013 but was kept in limbo until 2019 when he was interdicted after being charged for a criminal offence and the acting appointment ceased.

Strangely, the respondent's witness Mr. Henry Makori stated in his witness statement that the claimant was registered by the Engineers Board in 2019, but did not avail any documentary evidence.

The position of Chief Manager, Engineering and Technical Service was last advertised in March 2019 as Job Ref: LBDA/HR/CMTS/03/2019/01 and the claimant applied vide letter dated 5th April, 2019.

Minutes of a Board meeting held on 4th October, 2019 show that the respondent's Board of Directors finally agreed to confirm the claimant to the position of Chief Manager, Engineering and Technical Services, but he was already on interdiction, a fact the claimant admitted on cross-examination.

Significantly, after the claimant was discharged by the court and resumed duty, the Board reinstated the interdiction effective 10th December, 2021 but it was quashed by the court in Kisumu Judicial Review No. E002 of 2022.

It is unclear to the court why the claimant acted promptly after the Board of Directors reintroduced the interdiction pending a legal opinion from the Attorney General and approval by the Board yet he had not taken a single step to claim the position he had been acting since 2012 or the acting allowance, and only raised the issue after retirement in January, 2024 more than 12 years later.

When did the claimant's cause of action for the position of Chief Manager, Engineering and Technical Services arise?

In the court's view, and based on the evidence on record the acting ended in September 2019 when the claimant was interdicted. This is because the company was not obligated to keep the position unoccupied for an indefinite duration as services had to be rendered the interdiction notwithstanding. RWI testified that the respondent appointed another person to act and that was why the claimant could not resume duty in the office when he was reinstated by the court in June 2022.

It is notable that the claimant's suspension was lifted effective 2nd November, 2021 vide letter dated 15th November, 2021 and during the period September 9th 2019 to November 2nd 2021, the claimant did not render any service to the respondent and the interdiction was re-introduced on 10th December, 2021 and remained in force until 29th June, 2022 when the court quashed the interdiction and ordered recovery of withheld salary, allowances and benefits.

Puzzlingly, the claimant is still praying for the same in the instant case.

The claimant's last date of acting as Chief Manager Engineering and Technical Services was 10th December,

2021 but did not sue for the acting allowance until 7th January, 2025 more than 3 years later.

Section 89 of the Employment Act provides that: -

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.

The court is in agreement with the claimant's counsel that the reduction in the acting allowance was a continuing injury or damage as held in the **German School Society V Helja Ohany (Supra)** and **Esther Wairimu Ng'ang'a V Christ the King Parish & Catholic Diocese of Nakuru (Supra)** and amounted to an unfair labour practice, but the claimant did not sue for redress within twelve (12) months of cessation of the injury and waited until retirement yet he retired while in the position of Deputy Director Land and Housing.

In the court's view the alleged continuing injury or damage was unenforceable by dint of Section 89 of the Employment Act.

The next issue is whether the claimant was discriminated on the basis of ethnicity.

According to the claimant he was not appointed to the position of Chief Manager, Engineering & Technical Services partly because of his ethnicity.

However, the Memorandum of Claim is reticent on the particulars of the alleged discrimination other than the respondent's refusal to appoint him to the position of acting Manager, Engineering & Technical Services.

According to Black's Dictionary 10th Edition discrimination means:

“Differential treatment; especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”.

In **Nyarangi & Others V Attorney General [2008] eKLR 688** it was held:

“Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex, religion compared to someone without that attribute in the same circumstances”.

The concept of discrimination was also exquisitely captured in **Peter K. Waweru V Republic [2006] eKLR**. See also **Andrew V. Law Society of British Columbia [1989] ISCR 321**.

What emerges from these sentiments is that for discrimination to exist there ought to have been some distinction or differentiation between a person or group of persons wholly attributable to an attribute they possess compared to the another or others. It implies favouritism of a person or class at the expense of another or others.

Article 27 of the Constitution of Kenya prohibits direct and indirect discrimination on the grounds of race, sex pregnancy, marital status, health status, ethic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Section 5(3) of the Employment Act adopts a similar formulation. Innovatively, Section 5(7) of the Act imposes

an onerous burden on the employer to disprove an allegation of discrimination by an employee.

However, for an employee to succeed he/she is required, as a minimum, to demonstrate a *prima facie* case of discrimination.

In the instant case other than the non-appointment to the position of Chief Manager, Engineering and Technical Services by the respondents Board, the claimant tendered no evidence to suggest that the respondent's Board of Directors was acting in the manner it did on account of the claimant's ethnic background.

In the court's view, the claimant has failed to demonstrate that he was treated less favourably than anyone else.

The foregoing finding is further supported by the fact that in 2012 the respondent's Board of Directors had resolved to confirm the claimant to the position, but he was not a registered Engineer, which became mandatory after the enactment of the Engineers Act 2012 and the claimant registered in 2013. Similarly, in October 2019, the respondents Board of Directors again resolved to confirm

the claimant to position of Chief Manager, Engineering & Technical Services but regrettably, he was on interdiction owing to a pending criminal case.

However, whereas the resolution in 2012 appears to have been well-intentioned, the resolution in 2019 came late in the day after the claimant had been subjected to unfair treatment from the time the position was advertised after 2013, when he registered with the Engineers Board.

The foregoing is fortified by the sentiments of Byram Ongaya J in **Silas Kaumbuthu Mbutura V Meru Central Dairy Co-operative Union Ltd (supra)** where the Judge held:

“The court finds that the claimant was subjected to unfair labour practice by constantly being held on acting capacity in the post of production supervisor. The claimants claim to substantive appointment is valid and for the unfair labour practice in contravention of Article 41 of the Constitution, the court finds that a compensation of Kshs.300,000.00 under Article 21(3)e of the Constitution will meet the ends of justice...”

In that case, the claimant had acted for 18 years.

In the instant case, the claimant's cause of action arose when he was interdicted in September 2019 as at that time he had already applied for the position under Job Ref: LBDA/HR/CMTS/03/2019/01 vide letter dated 5th April, 2019 and had not received a response. He had all the information necessary to sustain a claim but slept on his rights for the entire duration of the criminal case, which was not a bar to the institution of the civil case against the respondent.

It is the finding of the court that the claim herein was filed after effluxion of the prescribed duration of three years and is thus unsustainable.

As to whether the claimant is entitled to the reliefs sought, the court proceeds as follows:

(a) Declaration

Having found that the supreme law prescribes the mandatory values and principles of public service, which include competition, equality of opportunity, transparency and merit based appointments and promotions and having further held that the claim was statute barred, the declaration sought is unmerited and it is declined.

(b) Accrued unpaid salary allowances and benefits for the position of Chief Manager

**Engineering and Technical Services
Kshs.11,947,420.**

Having found that the claim ought to have been filed earlier, a fact the claimant admitted on cross-examination, but he awaited until retirement and filed the suit more than a year after the retirement, the sum of Kshs.11,947,420 is unmerited.

(c) Payment of arrears and benefits during the interdiction period.

Documents availed by the claimant revealed that in Kisumu JR No. E002 of 2022 the court issued an Order of *mandamus* compelling the respondent to pay the applicants any withheld salary allowances and benefits during the period of interdiction.

This prayer is *res judicata* Kisumu JR No. E002 of 2022 and thus unmerited.

(d) Compensation for discrimination

Having found that the claim for discrimination was not proved, the claim for damages was unmerited.

(e) Reissuance of Retirement Certificate

Having found as above the reissuance of the Retirement Certificate is unmerited.

Having found that the instant suit was filed out of time which implicates the court's jurisdiction to hear and determine the matter, the court hereby downs its tools.

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 29TH DAY OF SEPTEMBER, 2025.**

DR. JACOB GAKERI
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 15th March 2020 and subsequent directions of 21st 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 Civil 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.

DR. JACOB GAKERI
JUDGE