



**Aradi v Teachers Service Commission (Petition E003 of 2024)
[2024] KEELRC 1966 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1966 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
PETITION E003 OF 2024**

**JW KELI, J
JULY 25, 2024**

BETWEEN

RAJAB ARADI PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

(On the Notice of Preliminary Objection dated 24th May 2024 by the Respondent)

1. The ruling is on the Respondent’s Notice of Preliminary Objection dated 24th May 2024.
2. The Petitioner filed the Petition dated 23rd April 2024 and received in court on 24th April 2024 seeking the prayers that: -
 - a. His deployment vide the letter dated 9th April 20214(sic) was unfair as it breached articles 10, 20, 27, 41, 47, 50, 232, 236, and 247 of the Constitution and SS 10(5), 41, and 43 of the Employment Act and the Code of Conduct for Teachers as his right to be heard which cannot be limited by dint of Articles 25 of the Constitution was breached.
 - b. He is entitled to general damages for breach of the rights above and unfair demotion.
 - c. That be(sic) he be reinstated to his position as head teacher and all benefits before the 2017-2021 CBA have accrued to him and that he is entitled to benefit from 2017-2021 CBA and any subsequent CBA before his retirement on 1/7/2025.
 - d. The Respondent shall then calculate his pension based on the earnings in the scale of head teachers.
 - e. The costs of the petition.



3. The Respondent then filed the Notice of Preliminary Objection the subject of this ruling, alleging that:-
 - a. The Claim herein being premised on a cause of action arising 9/4/2012 is statute barred pursuant to the provisions of Section 90(sic) of the [Employment Act](#).
 - b. The claims herein is statute barred pursuant to the provisions of section 3(2) of the [Public Authorities Limitation Act](#),
 - c. The proceedings herein have been commenced contrary to the law.

Written Submissions

4. The Court directed that the Preliminary Objection be canvassed through written submissions. The parties complied. The Respondent/Applicant's written submissions dated 10th June 2024 were filed by Patrick Mulaku, Advocate. The Petitioner's written submissions dated 1st July 2024 were filed by Oscar Wachilonga & Associates Advocates on an even date.

Determination

Issues for determination.

5. The Respondent/Applicant submitted on the merit of the Preliminary objection being to save judicial time as the petitioner's petition was an irredeemable error, statute-barred under Section 90 of the [Employment Act](#) and Section 3(2) of the [Public Authorities Limitation Act](#).
6. The Petitioner/Respondent submitted in opposition to the preliminary objection alleging that the failure by the Respondent to render a decision on his letter of 11th April 2014 estopped the Respondent from relying on the limitation provisions.
7. The Court having perused the pleadings by the parties and their submissions was of the considered opinion that the issues placed before the court by the parties for determination of the preliminary Objection was whether the cause of action was statute –time barred.

Whether the cause of action is statute- time-barred.

8. The Preliminary Objection by the Respondent was premised on section 90 of the [Employment Act](#) stating the cause of action was statute- barred having arisen from the letter dated 9th April 2024.
9. The facts of the case were not disputed. The issue of time limitation is a point of law. The Preliminary objection was thus properly consistent with the landmark authority in *Mukisa Biscuits Biscuits Manufacturing Co. Ltd v West End Distributors* (1969)EA 696 where the Court held:- ‘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 facts pleaded by the other side are correct.’”
10. The Respondent submits that it had been established that the petition was filed in 2024 challenging a letter dated 9th April 2014. That the cause of action is statute-barred and an abuse of the court process relying on the provisions of section 90 of the [Employment Act](#) and section 3(2) of the [Public Authorities Act](#).
11. The Petitioner in his written submissions on the preliminary objection submits that the Respondent is an independent constitutional commission created under Article 249 of the [Constitution](#) and thus



the Public Authorities Act on time limitation has no place in its dispensation of duties as it is not a public authority.

12. The petitioner submits that the promotion of teachers from one grade to another is governed by relevant schemes of services. All administrative posts are deployment posts and on receipt of the letter dated 9th April 2014, he was waiting for a promotion but to a different station. That the promotion was not forthcoming. That the letter dated 9th April 2014 titled Deployment sounded like a demotion yet there were no disciplinary proceedings against him as envisaged under section 35 of the [Employment Act](#). That he wrote to the respondent about the deployment vide letter dated 11th April 2014 but there was no response. He did make a follow-up vide letter dated 11th November 2021 and was advised to write vide email, which he did on 10th November 2021 and it was responded to on 11th November 2021 advising him to liaise with the County Director. He wrote to the County Director on the 17th November 2021 and there was no response. He submitted that the principle of the doctrine of exhaustion is as settled in [Speaker of National Assembly v James Njenga Karume](#) (1992) eKLR.
13. The Petitioner submits that his right to be heard cannot be limited by dint of Article 25 of the [Constitution](#). The Respondent issued him a letter that appeared to confirm the demotion on the 2nd December 2021 advising him to apply for the position of Deputy Head Teacher in response to his complaint about the demotion.
14. The Petitioner submits that the Respondent having not responded to his demotion complaint and appeal by dint of section 46 of the [Teachers Service Commission Act](#) cannot rely on the provisions of section 90 of the [Employment Act](#) to defeat his right to be heard. That by failing to make a decision on his complaint against the illegal letter of 9th April 2014 by the County Director the Respondent was acting in contravention of Articles 249 and 10 of the [Constitution](#) and thus for lack of its decision, time had not run out. The Petitioner was still in service but set to retire on the 30th of June 2025 and had raised issues on breach of his rights under Articles 25, 27, 41, 47, and 50 of the Constitution. That the breach was continuing till he retires on 1st July 2025. That further a breach of fundamental rights cannot be time-barred as alleged in the Preliminary Objection relying on the decision by the Supreme Court in [Monica Wangu Wamwere & 5 others v Attorney General](#) where the Court stated in paragraph 37:- “[37] Perhaps, the starting point under this issue should be a consideration of whether the two superior courts below in their impugned decisions imposed limitation of time as alleged by the appellants. Having perused the decisions in question, we are satisfied that the two courts did not impose the limitation alluded to. In point of fact, the two superior courts affirmed the position that the [Limitation of Actions Act](#), Cap 22 Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under the Constitution which are evaluated and decided on a case by case basis.” The Petitioner relied on other authorities which the Court perused and took note of.

Decision

15. The Court finds that the Preliminary Objection referred to claim yet before the Court was a Constitutional Petition.
16. Applying the decision by the Supreme Court in [Monica Wangu Wamwere & 5 others v Attorney General](#) in paragraph 37 (*supra*) there is no limitation of time in matters relating to violation of rights under the [Constitution](#) which are evaluated and decided on a case by case basis.
17. It was an undisputed fact that the cause of action arose from the letter dated 9th April 2014 (RA-6). The letter addressed to the Petitioner by Ngware F.K TSC County Director, Vihiga was titled ‘Deployment’ and stated: - ‘The [TSC Act](#) 2012 provides that, ‘The Commission shall take necessary



steps to ensure that persons in the teaching service comply with the teaching standards.” The Commission shall also monitor the conduct and performance of teachers in the teaching service..” In this regard, the Commission has put in place mechanisms to monitor the performance of teachers, especially in National examinations. Your performance in the previous school Idavaga Muslim Primary School has been on the downward trend. Your brief stay as Head Teacher at Davanga Primary School has not shown any change. Consequently, it has been decided that you be deployed to teach as advised in a separate communication.”

18. The Court finds that on the face of the above letter, it communicated to the Petitioner a deployment and not a demotion as Head Teacher. The Petitioner filed in Court the letter dated 9th March 2009 being his appointment as Head Teacher (RA1-4). The correspondence that followed however communicated a demotion of the Petitioner under the letter dated 9th April 2014 (RA-6).
19. Vide letter dated 27th May 2024 (RA-8) Ngware F.K TSC County Director, Vihiga, further informed the Petitioner that he had been deployed to perform duties of Assistant Teacher at Wangulu Primary School.
20. The documents before the Court are not disputed. Among the documents filed in Court by the Petitioner was a letter dated 7th December 2021 by the Respondent to the Petitioner advising him to apply for the position of Deputy Head Teacher when the posts are advertised.
21. Section 90 of the *Employment Act* (now 89 under Revised Act of 2024) states:- ‘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 Petitioner’s cause of action was the deployment letter dated 9th April 2014. The said deployment turned out to be a demotion from Head Teacher to Assistant Teacher. The Petitioner had complained severally (relied on various correspondence filed in Court)and the Respondent has not explained in any of the responses whether he was demoted. The Petitioner is still in service and set to retire on the 1st of July 2025. His retirement benefits are likely to be affected by the said letter dated 9th April 2014. The injury caused by the said letter is continuing as he is still in service.
22. The Court holds that the cause of action in the Petition falls under the continuing injury category under section 89 of the *Employment Act*, Rev.Ed 2024 (formerly section 90) thus not statute-barred. The Court of Appeal in *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) (HM Okwengu, HA Omondi & JM Mativo, JJA) held that:- 41. Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellants’ argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.”(Emphasis added).” I do uphold the decision to apply in the instant case in holding the cause of action is a continuing injury.



23. For the foregoing reasons the preliminary objection dated 24th May 2024 premised on the cause of action being statute-barred fails as the cause of action is a continuing injury. The Notice of Preliminary Objection dated 24th May 2024 is dismissed with costs to the Petitioner in the cause.

24. It is so Ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF JULY 2024.

J.W. KELI

JUDGE

In The Presence Of:

Court Assistant: -Macheso

Applicant: - Mulaku

Respondent: -Aradi in person - Advocate absent

