

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E083 OF 2025

TERESA WAIRIMU
MUTHEE.....CLAIMANT
VERSUS
KENYA POWER & LIGHTING COMPANY LTD.....
RESPONDENT

RULING

1. This ruling relates to the Respondent’s Notice of Preliminary Objection dated 14th April, 2025, wherein, it contends that the Court lacks jurisdiction to hear and determine this dispute and suit by dint of Section 90 of the Employment Act, 2007, and Sections 3(1) and (2) of the Public Authorities Limitation Act, CAP 39 of the laws of Kenya.
2. Parties canvassed the Preliminary Objection by way of written submissions, and both parties filed submissions.

The Respondent’s Submission

3. It is the Respondent’s submission that the nature of the claim is that of continuing injury or damage, which occurred in the year 2015 and subsisted until the time of the Claimant’s retirement in April 2022. It had reliance in the case of ***Olwande v Kenya Medical Research Institute & 2 others (Cause E056 of 2021) [2023] KEELRC 745 (KLR)***

(28 March 2023), where the court classified an acting allowance as a continuing injury.

4. The Respondent submits that by the fact that this is a continuing injury claim, the same falls under the ambit of Section 90 of the Employment Act, and as such, it ought to have been brought within twelve months after the cessation, and this claim, having been filed on 11th February 2025 which is outside statutory timeframe, ought to be struck out for being time-barred.

5. In support of its foregoing submissions, the Respondent sought to rely in **Okere v County Government of Kakamega & another** for the holding that: -

“A claim for a continuing injury should be brought within twelve months after the cessation. The alleged continuing injury relating to the payment of salary based on the wrong increment ceased in July 2019, and the Claimant continued in service until retirement in December 2019.

The court in The German School Society & another v Ohany & another(supra) held:- “..... 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....

Applying the foregoing holding by the Court of Appeal I find the Claimant was required on his retirement on 30th December 2019 when the claim crystalized with the salary payment stopping, to within twelve months to file a claim on basis of the continued injury, which ought to have been filed on or before 31st December 2020. The first prayer is therefore statute barred."

6. The Respondent further submits that there is nowhere in Section 90 of the Employment Act where it indicates that in the event of a continuing injury, the 12 months of limitation are an extension to a time of three years from the date the continuing injury commenced.

7. The Respondent submits that it is undeniable that the Court's position regarding Section 90 has become a banal

principle in our jurisprudence, reinforcing its mandatory application as a jurisdictional limitation. It submits further that it is trite law that the Court derives its jurisdiction from the Constitution or statute, and as such, it must be slow to arrogate itself jurisdiction. It placed reliance in the case of ***Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1*** to support this assertion.

8. The Respondent further submits that this Honourable Court does not have the power to hear and determine a claim that is time barred.
9. On the threshold of a Preliminary Objection, the Respondent placed reliance on the often-cited sentiments of Law JA and Sir Charles Newbold V.P, in ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd***, to assert that its objection meets the threshold.
10. The Respondent prays that this Honourable Court does allow the Preliminary Objection dated 14th April 2025 and dismiss the Claimant's Claim with costs.

The Claimant's Submissions

11. The Claimant submits that the authorities hereof are only in respect of the determination of the second limb of Section 90 and not the entire Section 90. It is submitted that the Claimant's claim or suit cannot be relegated to only one limb of the claim, as to deny the interpretation of the entire Section 90 of the Act.

12. The Claimant submits that the doctrine of interpretation ensures that laws are applied fairly, justly, and in line with legislative intent. That it is the duty of Courts to balance literal meanings with broader purposes, especially in light of constitutional values and evolving societal needs.

13. It is submitted that the Claimant has the choice of instituting a claim or suit by using the first limb of Section 90 of the Employment Act, which grants a Claimant three a year period within which to institute a claim.

14. The Claimant submits that the Respondent's Submissions and Preliminary Objection do not address the second prayer that the Claimant seeks to be granted, which is the prayer for damages for psychological trauma.

15. It is the Claimant's submission that the Respondent has engaged her variously in respect of the terminal dues post her retirement, in which the Respondent has acknowledged owing her and has given its own tabulation of the said amount claimed.

16. The Claimant's prayer is that this Honourable court dismisses the preliminary objection with costs.

Analysis and Determination

17. The singular issue for determination is whether the Claimants' claim is statute barred.

18. The Respondent's argument is that the Court lacks jurisdiction on the premise that the claim is time barred under Section 90, of the Employment Act, 2007 and Sections 3(1) & (2) of the Public Authorities Limitation Act (PALA). This no doubt is a proper point of law capable of being raised as a preliminary objection. (See ***Mukisa Biscuit Manufacturing Co. Ltd -vs West End Distributors Ltd (1969) EA 696***).

19. Section 90, which is now Section 89 of the Employment Act, contains two distinct limitation periods; one being for general claims arising out of employment contracts with a limitation period of three (3) years, and continuing injury/damage, whose limitation is 12 months after cessation of the injury. Generally, the limitation period is determined by the classification of the cause of action.

20. The Respondent's position is that the Claimant's claim concerns acting allowances which the courts have repeatedly held to constitute continuing injury. It contends that the continuing injury ceased in April 2022 when the Claimant retired, hence, the suit ought to have been filed within 12 months of cessation, meaning by April 2023, and that having filed the claim in February 2025, renders it time barred.

21. Conversely, the Claimant argues that Section 90 must be interpreted as a whole, and not only the continuing injury

limb. It is her contention that she may rely on the first limb, which is the 3 year limit, rather than being restricted to the 12 month limb. She avers further that she also seeks psychological trauma damages, which the Respondent did not address. It is her assertion that the Respondent engaged her after retirement, and acknowledged owing her terminal dues, suggesting the cause of action may still be alive or at least not time barred.

22. Salary underpayments, acting allowance claims, and miscalculation of salary are well established by various court decisions as continuing injuries.

23. The Respondent states that cessation occurred upon the Claimant's retirement in April 2022, and this assertion, the Claimant did not directly dispute.

24. It is clear that the claim herein was filed on 11th February, 2025, almost 3 years after cessation of the injury subject of the complaint.

25. The three year limit that the Claimant seeks to rely on, applies only to non-continuing injury claims. Courts have firmly held that for continuing injuries, the only applicable limitation period is the 12 month limb, and the Claimant cannot therefore, elect which limb to apply as the nature of the cause of action determines the limitation period.

26. On the Claimant's assertion of negotiation with the Respondent, it is now settled that negotiations or

acknowledgment of a debt do not stop or extend statutory limitation under Section 90(now S.89). The Court of Appeal has repeatedly held that Section 90 is strict, mandatory, and not subject to extension.

27. On the prayer for psychological trauma damages, this portion of the claim does not fall under continuing injury, it falls instead, under the 3 year limitation. It then follows that if the psychological injury arose around retirement in April 2022, and the suit filed in February, 2025 this claim is still valid as it falls under the 3 year limitation period.

28. I in the premise, find and hold that while the salary related claim is statute barred, the psychological trauma claim is not.

29. In whole, I make the following orders: -

- a) That the Preliminary Objection is allowed in part.
- b) That the salary related claim, specifically the acting allowances is struck out for being time barred.
- c) The claim for psychological trauma shall proceed to hearing and determination on the merits.
- d) Costs of the Preliminary Objection shall be in the cause.

30. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN
COURT AT NAIROBI THIS 27TH DAY OF NOVEMBER,
2025.**

C. N. BAARI
JUDGE

Appearance:

Mr. Kimani present for the Claimant

Ms. Kihara present for the Respondent

Ms. Esther S-C/A