

Court at Kisii seeking payment of a negotiated remuneration package allegedly agreed upon between the Appellant and the Kenya National Union of Teachers. He contended that the deceased was entitled to benefits under the package, which was to take effect on 1st July 1997, but that the same were never paid.

2. In response, the Appellant raised a preliminary objection dated 12th September 2024, contending that the suit was statute barred under section 90 of the Employment Act, section 3(2) of the Public Authorities Limitation Act and section 4(4) of the Limitation of Actions Act.

3. Upon considering the parties' submissions, the Trial Magistrate dismissed the preliminary objection. The court held that the objection did not raise pure points of law, finding that issues such as whether a declaratory suit was subject to the doctrine of *res judicata*, and when time begins to run in declaratory suits, required the adduction of evidence.

4. Aggrieved by that ruling, the Appellant lodged a memorandum of appeal on 14th May 2025 contending that:

- (a) The Learned Magistrate erred in law and fact in dismissing the Preliminary Objection despite clear evidence and submissions that the claim was instituted outside the statutory limitation period.
- (b) The Learned Magistrate misdirected himself in failing to hold that the suit was filed in breach of *res judicata*, contrary to section 7 of the Civil Procedure Act, in view of the matter being substantially in issue in **Nakuru HCCC No. 65 of 2006: Simon P Kamau & 19 others v TSC** and **Nakuru Civil Appeal No. 300 of 2009 TSC v Simon P Kamau & 19 others** which had been conclusively determined.
- (c) The Trial Magistrate misdirected himself in finding that the suit was declaratory in the process failing to uphold that it was bad in law under section 34 (1) of the Civil Procedure Act.
- (d) The Learned Magistrate erred by failing to appreciate that the Preliminary Objection was on pure points of law which did not require the court to delve into

factual or evidentiary matters, and ought to have been determined on the face of the pleadings.

(e) The Learned Magistrate erred in holding that the issues in the Preliminary Objection required evidence when in fact they were legal issues capable of determination without resort to evidence.

(f) The Learned Magistrate failed to consider or give due weight to the binding judicial precedent and authorities cited by the Appellant in support of the Preliminary Objection.

(g) The Learned Magistrate grossly misinterpreted and misapplied the relevant law and arrived at an erroneous conclusion in law.

5. On the basis of those grounds, the Appellant urged this Court to allow the appeal, set aside the ruling of the Trial Court, uphold the preliminary objection, and dismiss the suit before the Magistrate's Court, with costs both in the appeal and in the trial court.

6. Pursuant to directions issued on 23rd September 2025 parties agreed to canvass the appeal by way of written submissions.

Appellant's Submissions

7. In its submissions, the Appellant identified four issues for determination, namely:

- (i) Whether the suit was time barred under the Employment Act and the Limitation of Actions Act.
- (ii) Whether the suit was barred by the doctrine of *Res Judicata*.
- (iii) Whether the Trial Court erred in holding that the suit was a declaratory claim and thus sustainable.
- (iv) Whether the Trial Court misapprehended the nature of a preliminary objection in law.

8. On the suit being time barred the Appellant maintained that it was filed outside the three-year period prescribed under section 89 of the Employment Act. It asserted that the suit arose from an employment relationship and concerned pension or gratuity dues, thus falling squarely within the ambit of the Employment Act. It emphasized that the

deceased died in 1997, yet the suit was not instituted until 2024. In support of this position, reliance was placed on **Divecon Ltd v Samani [1995-1998] 1 EA 48** as referenced in **Josephine Wanjiku Munyua (Suing in her capacity as the Legal Representative of the Estate of Munyua Githuthu) v Ngungi Cubitu [2018] KEELC 599 (KLR)**, for the proposition that courts lack jurisdiction to extend time in employment matters, as well as on **G4S Security Services (K) Ltd v Joseph Kamau & 468 others [2018] eKLR**, which underscored the mandatory nature of section 90 of the Employment Act.

9. On *res judicata* the Appellant submitted that the issues raised in the present suit had been conclusively determined in **Nakuru HCCC No. 65 of 2006: Simon P Kamau & 19 others v TSC** and **Nakuru Civil Appeal No. 300 of 2009 TSC v Simon P Kamau & 19 others**. It contended that section 7 of the Civil Procedure Act barred the re-litigation of matters already determined by courts of competent jurisdiction. The Appellant relied on **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others**

[2015] eKLR, where the Court of Appeal emphasized that the doctrine of *res judicata* promotes the efficient use of judicial time and guards against inconsistent decisions.

10. On the question whether the suit was declaratory, the Appellant submitted that the Learned Magistrate erred in so holding. It argued that the claim related to execution of an existing decree and ought to have been pursued within the original proceedings, rather than by way of a fresh suit. In that regard, the Appellant relied on section 34(1) of the Civil Procedure Act, which mandates that all questions relating to execution, discharge, or satisfaction of a decree be determined by the executing court. It further cited **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** for the proposition that courts should strike out matters where issues of execution are disguised as fresh claims.

11. Lastly with regard to the Learned Magistrate's misapprehension of the nature of a Preliminary Objection, The Appellant submitted that jurisdiction and *res judicata* formed perfect grounds for preliminary objections. It

maintained that they were pure points of law as per **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** and **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**. Additionally, the Appellant submitted that the Trial Court failed to consider binding authorities cited, thereby misapprehending the law. Consequently, it urged the Court to allow the appeal as prayed.

Respondent’s Submissions

12. In response, the Respondent maintained that the suit before the trial court was declaratory in nature and that, consequently, the doctrines of limitation and *res judicata* did not arise. He submitted that the purpose of the suit was merely to prompt the Appellant to quantify and pay the deceased’s dues in accordance with the determination by the Supreme Court. He asserted that the Supreme Court had ordered the payment of salary increments to persons who were on the payroll as at 1st July 1997, whether alive or deceased, and that the present claim was anchored on that decision. He further contended that the suit was not time-barred, as twelve years had not lapsed since the Supreme

Court judgment delivered on 9th May 2019. In view of the foregoing, the Respondent submitted that the Trial Court rightfully dismissed the Preliminary Objection. He urged this Court to dismiss the appeal and to allow him to prosecute and prove his case before the Trial Court.

Disposition

13. The issue central to this dispute is the payment of pension dues for the 1st Respondent. From all accounts, this was settled in July 1997. The issues that lend themselves for determination is whether the dismissal of the preliminary objection by the Learned Magistrate was proper. In dismissing the objection by the Appellant, the Learned Magistrate held that the questions were both mixed fact and law and could not be determined *in limine*. I respectfully disagree. The matter of pension dues for the teachers were subject of a series of cases including the ones cited herein and the same having been determined conclusively, the only appropriate action would have been to dismiss the suit for being *res judicata* and time barred as the claim ought to have been presented by the 1st Respondent or any one

claiming under any right of a teacher circa the early 2000s. Preferring a claim so late in the day hamstrung the Appellant. The 1st Respondent should pursue the 2nd Respondent for the sums that were awarded by Maraga J. (as he then was) in the Nakuru case which conclusively dealt with the package for retired teachers. The Appellant is successful as its challenge succeeds in having the case before the Magistrate being struck out. However, the Court exercises its discretion to order the non-payment of any costs by the Respondents.

Orders accordingly.

Dated and delivered at Kisumu this 20th day of January

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**