

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**ELRC PETITION E006 OF 2025**

**JACOB KENNETH ODONGO.....PETITIONER**

**VS**

**THE COUNTY PUBLIC SERVICE BOARD, TAITA TAVETA COUNTY**

**GOVERNMENT**

**COUNTY GOVERNMENT OF TAITA TAVETA AND 1**

**OTHERS.....RESPONDENTS**

**RULING**

**Background**

1. In the Petition dated 10th January 2025, the Petitioner sought the following orders;

- a. A declaration that the purported Retirement of the Petitioner in the Public Interest was unfair, unlawful and unconstitutional.
- b. A declaration that the Petitioner's termination of employment in the nature of Retirement in the public interest was unfair in both procedure and in substance.
- c. That this Honourable Court do issue an order for Compensation under Article 23 of the Constitution of Kenya for violation of the Petitioner's Constitutional rights as relief for violation and infringement.
- d. That this Honourable Court do issue an award of exemplary and aggravated damages for the arbitrary, tortuous, oppressive, repeated, and unconstitutional conduct against the Petitioner by the 1st and 2nd Respondents, constituting gross violation of his Constitutional rights and the Constitution.

- e. That this Honourable Court do issue an order for compensation for unfair termination, at 12 months gross salary, under Section 49 of the Employment Act.
- f. That this Honorable Court do issue an order directing the payment of loss of salary, withheld salary, pension and accrued benefits from the date of Interdiction to the date of filing of this Petition, including an order directing the payment of 1/2 basic Salary from the date of Interdiction until the date of filing of the Appeal pursuant to Sections 70 and 71 of the Public Service Commission Act and any other payments withheld from the date of Interdiction to date.
- g. Costs of this Petition.
- h. Interest on c, d, e, f, and g above at Court rates.
- i. Any other Relief that this Honourable Court may deem appropriate to issue.

2. The 1st and 2nd Respondents raised a preliminary objection dated 17th June, 2025, on the grounds that;

- i. The Honourable Court lacks the requisite & necessary jurisdiction to hear & determine the said Petition.
- ii. The main Petition is statute-barred and, as such, the court lacks jurisdiction to hear and determine it.
- iii. The Honourable Court is devoid of jurisdiction pursuant to the express provisions of Section 90 of the Employment Act 2007.
- iv. The entire Petition is bad in law, incompetent, frivolous & vexatious, and the same is otherwise an abuse of court process.

### **1st & 2nd Respondents Submissions**

3. In support of the preliminary objection, Counsel for the 1st and 2nd Respondents submitted that the Petition is statute-barred and incompetent. As such, this Court lacks jurisdiction to entertain the petition and should down its tools. To support this buttress this point, Counsel placed reliance on the locus classicus case of Owners of the Motor Vessel 'Lilian S' v Caltex Oil [Kenya] Limited [1989] KLR. 4. Counsel submitted that, as evidenced by the letter dated 21st February 2022, the decision to terminate the Petitioner's employment was made during the meeting that took place on 15th December 2021. The cause of action thus arose in December 2021,

while the petition was filed in February 2025. This was contrary to the stipulations of Section 89 of the Employment Act. A cause of action in respect of termination-of-employment claims arises on the date of termination. To support this submission, reliance was placed on the case of *James Mugeria Igati v Public Service Commission* [2014] eKLR.

5. Further reliance was placed on the Court of Appeal decision in the case of *Beatrice Kahai Adagalav Postal Corporation of Kenya* [2015] eKLR, where the Court stated;

“Much as we sympathise with the Appellant, if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim hereinabove, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of *Divecon Limited v Samani* [1995-1998] 1EA P.48...in *Josephat Ndirangu vs Henkel Chemicals [EA] Limited*, [2013] eKLR, the termination period is never extended in matters based on contract. The period can only be extended in claims founded on tort, and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act.”

### **Petitioner's Submissions**

6. The Petitioner submits that the Preliminary Objection fails to meet the threshold set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, which defines a preliminary objection as one raising a pure point of law, argued on the assumption that all pleaded facts are correct and not requiring the ascertainment of contested facts.
7. The Respondents' objection is based on Section 90 of the Employment Act, alleging that the Petition is statute-barred. The Petitioner submits that his cause of action accrued on 21st February 2022, the date he received the letter announcing the purported retirement decision, rather than on 15th December 2021 as alleged. He relies on the reasoning in *Francis Mwangi Wariahe v Teachers Service Commission*, ELRC Petition No. E011 of 2023 (Ruling), which affirmed that a cause of action arises when termination is communicated.

8. The Petition, filed on or about 10th January 2025, was therefore within the three-year limitation period, which expired on 21st February 2025. The Petitioner maintains that the limitation argument is misplaced.
9. The Petitioner argues that the effective date of retirement is heavily contested, as there is no proof of the alleged meeting of 15th December 2021 nor evidence of any appeal having been lodged and declined. He submits that a preliminary objection cannot be sustained where facts require ascertainment, as emphasised in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.
10. The Petitioner further submits that he continued to receive half-salary for January, February, and March 2022, contradicting the Respondents' assertion that retirement took effect in December 2021.

This factual dispute renders the matter unsuitable for determination on a preliminary objection.

11. He contends that the applicable Human Resource Policies and Procedures Manual (Section K.10) and the Discipline Manual for the Public Service require formal communication of a retirement decision and notification of the right to appeal within prescribed timelines. No such proper retirement letter was issued in the prescribed format.
12. The Petitioner maintains that reliance on an unproven meeting date contravenes principles of fairness and natural justice, and invokes Article 159(2)(d) of the Constitution to urge the Court to administer justice without undue regard for technicalities.
13. Regarding jurisdiction, the Petitioner submits that the matter extends beyond a pure employment dispute and raises substantial constitutional questions, including alleged violations of Articles 10, 27, 28, 29, 35, 41, 47, 50(1), 232, and 236 of the Constitution of Kenya, 2010.

14. He relies on Articles 22, 258, and 165 of the Constitution to invoke the Court's jurisdiction and cites *Ndueyira v Inspector General of Police & 3 others*, Employment and Labour Relations Appeal No. E038 of 2020 [2023] KEELRC 2092 (KLR) (18 May 2023) (Ruling) to support the proposition that constitutional proceedings under Articles 22 and 258 are not subject to statutory limitation provisions.
15. The Petitioner further relies on authorities defining a cause of action, namely *Mbowa v EastMengo Administration* [1972] EA 352 and *Letang v Cooper* [1964] 2 All ER 929.
16. In the circumstances, the Petitioner submits that the Preliminary Objection is improperly raised, lacks merit, and constitutes an abuse of the court process. He urges the Court to dismiss it with costs and to affirm its jurisdiction to hear and determine the Petition.

### **Rejoinder Submissions**

17. In response to the Petitioner's response submissions, the Respondents submitted that the Petitioner's position, that time started running on the date of notification of retirement, doesn't have a legal foundation. Further, the material before the court reveals that the notification of retirement was acknowledged by way of reply on the 8th October 2021. This letter acknowledged receipt of the notification on 4th October 2021. The cause of action thus arose on 27th September 2021, when the notification of retirement letter was issued.
18. Even if the computation is to begin from the time when the employee is notified, the petition would still be time-barred. As acknowledged by the Petitioner, the notification was received on 4th October 2021.
19. Regarding the question of appeal, the Respondents submitted that the Petitioner had indeed invoked an internal appeal process, as evidenced by his letter dated 8th October 2021 challenging the retirement decision. All these are indicative of

the fact that the Petitioner, at all material times, was aware of a decision by the employer, which he ought to have challenged before this Court if he was aggrieved.

20. Relying on the case of Francis Mwangi Wariahe v Teachers Service Commission [2017] eKLR, Counsel submitted that contrary to the Petitioner's Counsel's submissions, engagement of an internal appeal mechanism does not stop time for purposes of employment disputes from running.
21. In conclusion, the Respondents maintained that the Preliminary Objection raises a pure point of law based on undisputed facts and documents on the record, and that the Court lacks jurisdiction to entertain a time-barred claim. They therefore urged the Court to uphold the Preliminary Objection and dismiss the Petition with costs.

### **Analysis and Determination**

22. I have carefully considered the material placed before this Court by the parties, and the following issues emerge for determination: whether the instant preliminary objection is properly taken, and whether the Petitioner's petition is time-barred.
23. It is now trite that a preliminary objection, to be properly taken, must raise a pure point of law capable of disposing of the matter without the need to ascertain contested facts. Where the objection invites the Court to investigate, ascertain, or evaluate factual matters, it ceases to be a true preliminary objection and cannot properly be determined at the preliminary stage. Consequently, any objection that is founded on disputed facts or that requires evidentiary interrogation is incompetent as a preliminary objection and must fail.
24. Undeniably, the timing of when that cause of action regarding the instant dispute arose is highly contested. It cannot be determined at this preliminary stage without examining documentary evidence. In fact, through their further submissions, the Respondents have asked the Court to consider several

documents [listed in the submissions] to establish the date on which the cause of action accrued.

25. By reason of the foregoing premise [para 24], I hesitate not to conclude that the preliminary objection raised by the Respondents does not meet the threshold of a properly taken preliminary objection.
26. Undoubtedly, the law is well settled. The limitation period prescribed under section 89 of the Employment Act does not apply to proceedings in which a party seeks redress of a constitutional right. Claims founded on alleged infringement of the constitutional guarantees fall outside the ambit of the statutory limitation provided under the Employment Act and are therefore not barred by the time limitation stipulated therein.
27. In *Ndueyira v Inspector General of police and 3 others* [2023] KEELRC 2092[ KLR], the Court stated;

The two provisions [Articles 22 and 258] provide a pedestal for the institution of proceedings with the subject matter[s] violation or threatened violation of the Petitioner's fundamental rights and a breach of the Constitution.

Within the Constitutional provisions, this Court discerns not any room for implying that the limitation of actions imposed by statutes hereinabove mentioned can be read into the Constitution and limit the time within which the proceedings under Articles 22 and 258 of the Constitution with regard to matters litigable under the Constitution."

28. I have carefully considered the matters raised in the Petitioner's petition, over which this court is invited to decide; they primarily concern an alleged violation of his constitutional rights. Moreover, given that the petition was not filed inordinately, I hold that the provisions of section 89 of the Employment Act do not militate against the Petitioner's petition.

29. At this point, it is important to point out that at this juncture, the position taken by the Respondents is no longer good law. In Francis Kimani Kiige vs The National Hospital Insurance Fund- Court of Appeal, Civil Appeal No. 657 of 2019, the Court of Appeal recently held; “18. We agree with counsel for the Appellant that the answer lies in when the cause of action accrued, as this has a direct bearing on when time started running for purposes of limitation. Would it be when the first communication of termination was received, or when he received the letter advising him that his appeal against termination had been disallowed?

19. We accept that, as defined in Drummond Jackson, a cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.

20. It is, of course, true that the letter communicating the decision to terminate the contract was dated 17th September 2007. While it may not be clear when it was received by the appellant, he responded to it on 27th September 2007. Ordinarily, therefore, the cause of action would have arisen at least by 27th September 2007, when it was obvious that he was aware of the termination.

22. To be deduced is that the termination communicated through the letter of the 12th September 2007 was tentative until the right to appeal was either waived or exhausted. Up to that point, there was no real grievance that could found a cause of action. This right of appeal is distinguishable from pursuit out of court negotiations which are not provided or required in a contract of employment  
.....”

30. By reason of the premises, the Respondents’ preliminary objection is hereby dismissed.

**Read Signed and Delivered on the 26th Day of February 2026.**

**SIGNED**  
**JUSTICE OCHARO KEBIRA**