



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Railways Corporation v Ododa & 216 others (Civil Appeal
E345 of 2023) [2024] KECA 1620 (KLR) (8 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1620 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E345 OF 2023
F TUIYOTT, JW LESSIT & GWN MACHARIA, JJA
NOVEMBER 8, 2024**

BETWEEN

KENYA RAILWAYS CORPORATION APPELLANT

AND

GEORGE OCHIENG ODODA 1ST RESPONDENT

NJOROGE NGANGA 2ND RESPONDENT

NJOROGE NGANGA 3RD RESPONDENT

**ESTATE OF SIMON M MAHUGU NDIRANGU (DECEASED) 4TH
RESPONDENT**

JUMA BUTHETHE 5TH RESPONDENT

CHRISTOPHER MUSYIMI 6TH RESPONDENT

COSMAS SOMBA MBEZI 7TH RESPONDENT

ELIJAH OTIENO NDEDA 8TH RESPONDENT

ABRAHAM KWENDO ATEKE 9TH RESPONDENT

SOPHIE SIDI MWABEGA 10TH RESPONDENT

RAPHAEL ONYACH ODENDE 11TH RESPONDENT

SWALEH MWERO CHINDARO 12TH RESPONDENT

HARON NGANGA NJOROGE 13TH RESPONDENT

STEPHEN KAMAU NDEGWA 14TH RESPONDENT

MWANGI KAMAU 15TH RESPONDENT

CHRISTOPHER N NGA'NG'A 16TH RESPONDENT



VITALIS MATENGO MARIWA	17 TH RESPONDENT
THOMAS OKOTH ODONGO	18 TH RESPONDENT
JOHNSON JUMA BARASA	19 TH RESPONDENT
ROUNE OUMA NGON	20 TH RESPONDENT
AYUB NJUGUNA WANYOIKE	21 ST RESPONDENT
WH KISTER A OBARE	22 ND RESPONDENT
CHARLES IRIMU GACHAHI	23 RD RESPONDENT
FRANCIS AYIEYE ALUKO	24 TH RESPONDENT
DISMAS ALOO NGUYE	25 TH RESPONDENT
BERNARD ONYANGO MENYA	26 TH RESPONDENT
JOSEPH OKUOMI HEZEWA I UKOYE	27 TH RESPONDENT
MARGARET ASIBIGO	28 TH RESPONDENT
ALLOYS OYUGA	29 TH RESPONDENT
CHRISTOPHER N NABONN	30 TH RESPONDENT
HESBON OKOTH OBONGO	31 ST RESPONDENT
JAMES J MURITHI	32 ND RESPONDENT
PENINAH MATOLO	33 RD RESPONDENT
JAMES WAWERU GIKUNGA	34 TH RESPONDENT
SK MWANGI	35 TH RESPONDENT
JOANES ADOYO ONDENGGE	36 TH RESPONDENT
TERESA ANYANGO KATAKA	37 TH RESPONDENT
JULIANA M GERVASI	38 TH RESPONDENT
JAMES ANANDA OGANA	39 TH RESPONDENT
SHEM M KADIVIRA	40 TH RESPONDENT
JOSEPH M MUTISO	41 ST RESPONDENT
FELGONA OMOLO OKENDO	42 ND RESPONDENT
JOSHWA KIDIGA	43 RD RESPONDENT
GILBERT OBAT JEJE	44 TH RESPONDENT
JOHN KIPKORIR MALAKWEN-P	45 TH RESPONDENT
JOSEPH GITURWA NGACHA	46 TH RESPONDENT
E MACHARIA	47 TH RESPONDENT
FRANCIS KURUKWA	48 TH RESPONDENT



мбака МУСЮКА	49 TH RESPONDENT
BERNARD IRUNGU MUNDIA	50 TH RESPONDENT
JOHNSTONE JAGOLA	51 ST RESPONDENT
JOSEPH ADO OBUOLA	52 ND RESPONDENT
ESTATE MUSTAFA WAKO JIMA	53 RD RESPONDENT
ESTATE OF MWANGI KAMAU	54 TH RESPONDENT
EUSTACE M WACHIRA	55 TH RESPONDENT
MARGARET S ALUSIOLA	56 TH RESPONDENT
JOSEPH NYALITI KYENGO	57 TH RESPONDENT
MATHUSELAH ANYEYO	58 TH RESPONDENT
EUNICE MUPE	59 TH RESPONDENT
JENIFFER W. NGETHE	60 TH RESPONDENT
JAMES MIDIWO	61 ST RESPONDENT
PETER MUNGAI KIGATHI	62 ND RESPONDENT
RODGERS CHAI KARISA	63 RD RESPONDENT
AGREY M OMUNE	64 TH RESPONDENT
ALBERT MWAURA NDEGWA	65 TH RESPONDENT
MAUICE A ODERO	66 TH RESPONDENT
JAMES OKWARE OKWIRI	67 TH RESPONDENT
THOMAS RUCHACHU MACHARIA	68 TH RESPONDENT
SAMMY KIMANZI	69 TH RESPONDENT
MATHEW AIRO OTUOMA	70 TH RESPONDENT
JULIUS MUCHOKI NJOGU	71 ST RESPONDENT
SAMUEL MWANGI WACHECHE	72 ND RESPONDENT
JOHN NDIRANGU WAMBUGU	73 RD RESPONDENT
JOHN JARED MSAGAH MAGANGA	74 TH RESPONDENT
ESTATE OF DAVID MWANGI NJUGUNA	75 TH RESPONDENT
NGATIA WARIGO	76 TH RESPONDENT
JOSPEH MUTUA KIARIE	77 TH RESPONDENT
IBRAHIM SORA ADO	78 TH RESPONDENT
JOSPHAT MUCHIRI	79 TH RESPONDENT
WILLIAM N ODHIAMBO	80 TH RESPONDENT



ALLOICE OKELLO MASUDI	81 ST RESPONDENT
JOHN MURIMI KARIUKI	82 ND RESPONDENT
PETER KARUGA MUKIUKI	83 RD RESPONDENT
JAMES MWANGI KIRAGU	84 TH RESPONDENT
KENNETH NGA'NGA' GATURU	85 TH RESPONDENT
BERNARD MWANGI MIURIMA	86 TH RESPONDENT
BINANSIO KINGORI	87 TH RESPONDENT
PETER MWANGI KIBIRO	88 TH RESPONDENT
PIUS KABU UCHEBE RIERI	89 TH RESPONDENT
SOLOMON C. ADAGALA	90 TH RESPONDENT
JOSPEH M MUCHIRI	91 ST RESPONDENT
ELIUD MWANGI KINGORI	92 ND RESPONDENT
JOHN WANDERA JUMA	93 RD RESPONDENT
JOHN YAA KATANA	94 TH RESPONDENT
JOHN MAINA UIMBIA	95 TH RESPONDENT
CHARLES OTIENO ONYANGO	96 TH RESPONDENT
JOHN KAWWARA	97 TH RESPONDENT
JOSEPH M MBUGUA	98 TH RESPONDENT
PETER IRUNGU	99 TH RESPONDENT
KENETH GAGAI	100 TH RESPONDENT
ALFRED NGARI NJAGI	101 ST RESPONDENT
ARTHUR OKWEMBA	102 ND RESPONDENT
JOSEPH MWANGI NGUGI	103 RD RESPONDENT
RACHAEL J. JUMA	104 TH RESPONDENT
PETER GATHAIGA MUTURI	105 TH RESPONDENT
FRANCIS WAHOME NGAHU	106 TH RESPONDENT
BISHAR NOOR MOHAMED	107 TH RESPONDENT
DISHON AMOLO	108 TH RESPONDENT
PETER OBOK	109 TH RESPONDENT
MICHAEL C OCHAKA	110 TH RESPONDENT
EVANS W MWIRIGU	111 TH RESPONDENT
BOSCO M MUIA	112 TH RESPONDENT



LAWRENCE O WANYANGU	113 TH RESPONDENT
AMINA OMAR HAMADI	114 TH RESPONDENT
TABITHA KIDUNU HILDA	115 TH RESPONDENT
MARGARET WANJE	116 TH RESPONDENT
JAMES MAINA WACHIRA	117 TH RESPONDENT
JOSHUA OWITI OBUNGE	118 TH RESPONDENT
ELIUD GACHOKI GIRAINE	119 TH RESPONDENT
JOHN KIMANI MUIRURI	120 TH RESPONDENT
JAOANNES OJIAMBO OGEMA	121 ST RESPONDENT
CASTAN GEORGE OKUMU	122 ND RESPONDENT
FRANCIS KIUMO MUHAHE	123 RD RESPONDENT
ESTER KINGI	124 TH RESPONDENT
PETER OKOTH OMOLO ODIALO	125 TH RESPONDENT
WILIAM GICHAGA KIIRU	126 TH RESPONDENT
EDWARD MWANGI MURIUKI	127 TH RESPONDENT
JACOB MWANGI GACHAMBA	128 TH RESPONDENT
SAMWEL K GICHURI	129 TH RESPONDENT
MAMZUNGU AZIZA ATHMAN	130 TH RESPONDENT
GLADWELL WANGUI GATHAIYA	131 ST RESPONDENT
MARGARET MUTU MBITHI	132 ND RESPONDENT
MARY WANGARI MURIUKI	133 RD RESPONDENT
THERESA WAMBUI GUCHU	134 TH RESPONDENT
TRUPHENA OMBINA	135 TH RESPONDENT
MARY NUNGARI WAMITI	136 TH RESPONDENT
MARGARET KANUTHU GATHONI	137 TH RESPONDENT
EPHRAIM GITHUA	138 TH RESPONDENT
JUMA SHEMSHI JUMA	139 TH RESPONDENT
ESTATE OF BERNARD MWANGI MAINA	140 TH RESPONDENT
CHARLES NGATIA NGETHE	141 ST RESPONDENT
GODFREY MUCHUNGIA NG'ANG'A	142 ND RESPONDENT
RUTH WAMBUI NJUGUNA	143 RD RESPONDENT
JOSEPH NJOROGE NDERITU	144 TH RESPONDENT



BENSON K MUGO	145 TH RESPONDENT
GRISHON MULWA	146 TH RESPONDENT
TRUPHOSA ANDEYI ESELO	147 TH RESPONDENT
JOHN KATHIANYU KIBUCHI	148 TH RESPONDENT
PETER WAMBUA KAVITI	149 TH RESPONDENT
BONFAS NGUI KYENGO	150 TH RESPONDENT
WILFRED MUCHERU	151 ST RESPONDENT
STEPHEN GICHERU NJOROGE	152 ND RESPONDENT
JAMES MUNYI	153 RD RESPONDENT
MARGARET WANJIRU	154 TH RESPONDENT
MARTIN AMIRI OUNZA	155 TH RESPONDENT
P KAMAU MBUGUA	156 TH RESPONDENT
HARUN NG'ANG'A NJOROGE	157 TH RESPONDENT
ESTHER MWIKALI	158 TH RESPONDENT
JOSEPH FRANCIS MUTAVI	159 TH RESPONDENT
PATRICK ESAU AMBUNDO	160 TH RESPONDENT
MAURICE AGENDO ODERA	161 ST RESPONDENT
JAMES JORAM NJOROGE	162 ND RESPONDENT
FRANCIS MUNIU NGUGI	163 RD RESPONDENT
KARANI GACHOKA HARON	164 TH RESPONDENT
ALICE WAITHIRA MWAURA	165 TH RESPONDENT
RODGERS GEOFFREY MWANGIRI	166 TH RESPONDENT
FAITH WANJIKU KAMAU	167 TH RESPONDENT
JACOB OGHENG KOKADO	168 TH RESPONDENT
KIILU KIMANI	169 TH RESPONDENT
JOSPHAT MACHADI KAGAGI	170 TH RESPONDENT
PATRICK OKODI OIRYA	171 ST RESPONDENT
PATRICK ODUOR ONYANGO	172 ND RESPONDENT
JAMES NYAJI OBALA	173 RD RESPONDENT
DAVID KARANJA MULIRA	174 TH RESPONDENT
PETER IRUNGU KAMAU	175 TH RESPONDENT
NELSON I SAWE	176 TH RESPONDENT



ISAAC GAVUDI MUSALAGAN	177 TH RESPONDENT
FREDRICK A AWIMBO	178 TH RESPONDENT
SAMUEL N KIMANI	179 TH RESPONDENT
STANLEY MUNGAI WAIGANJO	180 TH RESPONDENT
JAMES ANDABWA	181 ST RESPONDENT
GEORGE ATINA	182 ND RESPONDENT
IBRAHIM MWOLO	183 RD RESPONDENT
MILTON OSORO	184 TH RESPONDENT
MARGARET OYOMBE	185 TH RESPONDENT
GLADWELL MASERO	186 TH RESPONDENT
DISMASS OLOO NGURE	187 TH RESPONDENT
MAURICE A ODEKO	188 TH RESPONDENT
JANIPHER OPONDO	189 TH RESPONDENT
JOSEPH KARIUKI GATUA	190 TH RESPONDENT
KEZIA MAKORI	191 ST RESPONDENT
AYUB ODIA OWUOR	192 ND RESPONDENT
DAVID NDEGWA MBAKI	193 RD RESPONDENT
MARGARET ACHOKI	194 TH RESPONDENT
SAMUEL NYAKUNDI	195 TH RESPONDENT
BENSON MUCHIRU	196 TH RESPONDENT
AGNES WANJIRU MWANGI	197 TH RESPONDENT
NJOROGE KURIA	198 TH RESPONDENT
DAMARIS MURI	199 TH RESPONDENT
JOHN KARANJA	200 TH RESPONDENT
PATRICK SIMIYU	201 ST RESPONDENT
PETER OTIENO	202 ND RESPONDENT
MARGARET OUMA	203 RD RESPONDENT
WILLIAM KINYUA	204 TH RESPONDENT
NAHASHON OWINO	205 TH RESPONDENT
ODHIAMBO OTUNG	206 TH RESPONDENT
JAMES ADEDE	207 TH RESPONDENT
FREDRICK KARIBA	208 TH RESPONDENT



STABLEY ONDERE	209 TH RESPONDENT
CHRISTOPHER LUTA	210 TH RESPONDENT
JENIFFER APONDI OPONDO	211 TH RESPONDENT
PETER RAPELA	212 TH RESPONDENT
PETER HANNINGTON OSODO	213 TH RESPONDENT
BENSON ONDONG ODIDA	214 TH RESPONDENT
WELLINGTON OMBEWA OFWENJE	215 TH RESPONDENT
LUSENO NATHAN	216 TH RESPONDENT
KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME	217 TH RESPONDENT

(Being an Appeal from the Judgment and Decree of the Employment & Labour Relations Court at Nairobi (M. Onyango, J.) dated 13th August, 2021 in ELRC No. 1789 of 2015)

Labour disputes involving continuing wrongs are not time barred

The appeal stemmed from a labor dispute between Kenya Railways Corporation (appellant) and its former employees (respondents) regarding retrenchment benefits under a 1998 Collective Bargaining Agreement (CBA). The respondents claimed they were not fully compensated as per the CBA and contested ownership of staff housing. The appellant argued that the matter had been litigated in a previous Nakuru case, was time-barred, and fell under the jurisdiction of the Retirement Benefits Authority (RBA). The court held that the claim was not res judicata, involved a continuing wrong, and was within the jurisdiction of the Employment and Labour Relations Court (ELRC). The appeal was dismissed.

Reported by John Ribia

Jurisdiction – jurisdiction of the Retirement Benefits Authority Tribunal - jurisdiction of the Retirement Benefits Authority Tribunal vis-à-vis jurisdiction of the Employment and Labour Relations Court - where the aggrieved parties' salaries were in question - whether in a retirement benefits dispute, where the aggrieved parties' salaries (determined by a CBA) were also a matter for determination, the parties were expected to first seek recourse from the Chairman of the Retirement Benefits Authority, the Retirement Benefits Authority Tribunal, or the Employment and Labour Relations Court – Retirement Benefits Act, (cap 197), sections 46, 47.

Labour Law – limitation of actions – period provided – continuing wrong - what was the meaning of a continued wrong as used in determining a claim on limitation of actions - whether in a labour dispute, one could claim that a dispute was time barred where the wrong deemed to be perpetuated was continuing - Employment Act, (cap 226), section 90; Employment And Labour Relations Court Act, (cap 8E), section 12(i)(j).

Brief facts

The appeal arose from a labour dispute between the Kenya Railways Corporation (the appellant) and its former employees (the respondents). At the trial court the respondents pleaded that they were former employees of the appellant having been affected by retrenchment. They were parties to the Collective Bargaining Agreement (CBA) dated June 11, 1998 and registered in court in Industrial Court Case No. 169 of 1998, and that some of them filed Nakuru High Court Civil Case No. 397 of 1998 ('the Nakuru Case') which was later struck out for being incompetent. The respondents further pleaded that they had never entered into any agreement with the Kenya Railways Staff Retirement Benefits Scheme and the Scheme could not therefore claim ownership of the houses which the respondents were occupying while in any event they had not been settled by the appellant



as per the terms of the CBA. They were aggrieved that since the signing of the CBA, which was to be effected within a period of 12 months from January 1 to December 31, 1998, the appellant had not honoured its terms and conditions.

The appellant averred in its response that the issues which the respondents raised in their claim were litigated upon in the Nakuru Case which was struck out for being incompetent; that it fully settled all the respondents' retrenchment packages, and the continued stay of the respondents in the appellant's staff quarters was contrary to the agreement and they ought to have vacated the houses upon payment of their retrenchment benefits; that the trial court was divested of jurisdiction as the dispute was about pension and payments of retirement benefits; that the respondents were not entitled to any of the prayers sought in their amended claim, and that it ought to be dismissed with costs.

The trial court found that the case was not *res judicata* or time barred and that the respondents had not been paid their terminal benefits in full as per the CBA. Therefore, they were owed salary arrears and resultant pension and/or gratuity based on the reviewed salary as well as entitled to retain the houses they had been occupying pending payment of full terminal benefits

Aggrieved the appellants filed the instant suit.

Issues

- i. What was the nature of disputes that were to be referred to the Chief Executive Officer of the Retirement Benefits Authority in the first instance before being referred to the Appeals Tribunal?
- ii. What was the meaning of a continued wrong as used in determining a claim on limitation of actions?
- iii. Whether in a labour dispute, one could claim that a dispute was time barred where the wrong deemed to be perpetuated was continuing.
- iv. Whether in a retirement benefits dispute, where the aggrieved parties' salaries (determined by a CBA) were also a matter for determination, the parties were expected to first seek recourse from the Chairman of the Retirement Benefits Authority, the Retirement Benefits Authority Tribunal, or the Employment and Labour Relations Court.

Held

1. A suit was considered *res judicata* not only if the parties in the former suit were the same as the parties in the current suit, but also if the subject matter between the parties was the same, and had been heard and determined. *Prima facie*, the issues in the Nakuru Case and the claim before the trial court touched on retrenchment issues. The claim in the Nakuru Case was filed by the former appellants' locomotive drivers. Their claim centred around failure to pay their overtime and night shift allowances. In as much both claims touched on retrenchment issues, it would only apply to the respondents who litigated in the Nakuru Case. The prayers in both cases were substantially different from each other. The claim by the respondents was not *res judicata*.
2. The appellant very well knowing of the terms of the CBA and the discussions it had had with the respondents during the various Central Joint Council Agreement (CJC) meetings, purposefully transferred the houses to the Kenya Railways Staff Retirement Benefits Scheme to defeat its obligations. The timeframe when the CBA would last was for one year from January 1 to December 31, 1998. When it became clear that the appellant was not willing to honour the terms of the CBA and CJC agreements, some of the respondents filed a suit before Nakuru High Court on September 22, 1998.
3. Section 90 of the Employment Act provided that the time limit of filing claims of continuing injury or damage should be within 12 months after cessation of the continuing wrong. Regardless of the three-year period lapse for institution of employment disputes, if an employer continued to breach a term of agreement, agreed between the employer and employee, the employer remained liable up until the breach was purged.
4. As long as the continuing injury persisted, it gave rise to a distinct and separate cause of action. The time limit set to file claims arising out of 'continuing injury' was 12 months after the cessation. In the appeal,



- the court was not told by the appellant when cessation happened to enable the court to compute time. The joining of the appellant in the proceedings in 2018 was necessary since the controversy of the unpaid terminal dues which they undertook to pay, persisted. The question of payment of the dues, could not have been answered by the Kenya Railways Staff Retirement Benefits Scheme.
5. A continuing wrong was a wrong that arose out of a continuous breach of an obligation which transcended a single completed act or omission. The obligation so breached must be one borne of law or agreement between parties and which gave rise to an actionable claim.
 6. The appellant pleaded with the Kenya Railways Staff Retirement Benefits Scheme to stay the intended eviction pending compliance with the terms of the CBA and the Central Joint Council Agreement (CJC) Agreements. The appellant could not be heard to say that the time for filing claim by the respondents had lapsed whereas it acknowledged severally in its letters that they were yet to comply with the terms of the CBA and the resolutions made in the CJC Agreement. The instant case was one of a 'continuous injury' and time did not stop running as long as the appellant was not complying with the terms of the CBA and the CJC.
 7. Whereas the appellant contended that the respondents were paid their terminal dues. However, the appellant did not provide that the terminal dues as computed complied with the agreed salary increment in terms of the CBA and the CJC Agreement. All the appellant would have prudently done was to tabulate the erstwhile salaries of the respondents and the progression of the increase of salaries as per the terms of the CBA and the CJC Agreement, the core issue in dispute being honouring the agreed salary increment and then demonstrate that indeed the alleged payments considered the increments.
 8. The respondents' claim was not time barred. It was filed within time for the reason that the injury against them was continuing even as at the time of filing the claim.
 9. Section 46 of the Retirement Benefits Act provided that a person who was a member of a scheme and was dissatisfied with the decision of the manager, administrator, custodian or trustees of the scheme, may request in writing that such decision be reviewed by the Chief Executive Officer of the Retirement Benefits Authority with a view to ensuring that such decision was made in accordance with the provisions of the relevant Scheme Rules or the Act under which the schemes was established. An appeal against the decision of The Chief Executive Officer lay with the Appeals Tribunal under section 47 of the Retirement Benefits Act.
 10. The disputes referred to the Chief Executive Officer of the Retirement Benefits Authority in the first instance before being referred to the Appeals Tribunal, were those in which a person was aggrieved by the decision of a manager, trustee or administrator of a scheme. The respondents were never dissatisfied with the decision of the established retirement scheme of the appellant. The respondents were specifically dissatisfied by the decision of the appellant for failing to honour the CBA and the resolutions made in the CJC which was admitted by the appellant severally. The respondents could not have been expected to approach the Chairman of the Retirement Benefits Authority without having a clear picture on what their salaries were, since pension benefits largely depend on the salary an individual had.
 11. Once the terms of the CBA and CJC were honoured, it then followed that the other issues of payment of the pension benefits for those respondents employed on permanent and pensionable basis, would fall into place. In any event, the terms of the agreement reached at the CJC meeting held in 1997 had partially been implemented and the second instalment was yet to be paid. That was what the respondents were seeking to enforce before the trial court.
 12. The instant matter had not been presented with documents of the purported calculations by the Trustees of the Kenya Railways Staff Retirement Benefits Scheme to warrant the matter be referred to the Chief Executive Officer of the Retirement Benefits Authority under section 46(1) of the Retirement Benefits Act. Section 12(a) of the Employment and Labour Relations Court (ELRC) Act empowered the ELRC to determine disputes relating to, or arising out of, employment between an



employer and an employee. The present dispute was one between an employer (appellant) and the employee (respondents). The Kenya Railways Staff Retirement Benefits Scheme was never part of the CBA and the CJC Agreement that were agreed upon by the parties. The ELRC was vested with jurisdiction to hear and determine the dispute before it.

Appeal dismissed.

Orders

Costs to the respondents.

Citations

Cases

Kenya

1. *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* Civil Appeal 105 of 2017; [2017] KECA 477 (KLR) - (Explained)
2. *Kavilu v CFC – Stanbic Bank Kenya Limited* Cause 2003 of 2015; [2024] KEELRC 512 (KLR) - (Followed)
3. *Kenya Ports Authority v Kustron (Kenya) Limited* Civil Appeal 315 of 2005; [2011] KECA 98 (KLR) - (Explained)
4. *Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Comboni Polytechnic* Cause 67 of 2007; [2020] KEELRC 763 (KLR) - (Mentioned)
5. *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* Petition 3 of 2016; [2019] KESC 83 (KLR) - (Explained)
6. *Nganga v Christ the King Parish & another* Civil Appeal 22 of 2019; [2023] KECA 1100 (KLR) - (Explained)
7. *Ochieng, Ogoda & 6 others v Kenya Railways Corporation* Civil Suit 397 of 1998; [2012] KEHC 4589 (KLR) - (Mentioned)
8. *German School Society & another v Obany & another* Civil Appeal 325 & 342 of 2018; [2023] KECA 894 (KLR) (Consolidated) - (Explained)

South Africa

Barnett and others v Minister of Land Affairs and others (304/06) [2007] ZASCA 95; 2007 (6) SA 313 (SCA); 2007 (11) BCLR 1214 (SCA) - (Explained)

Regional Court

1. *Peters v Sunday Post Limited* [1958] EA 424 - (Mentioned)
2. *Selle & Another v Associated Motor Boat Co Ltd & another* [1968] EA 123 - (Mentioned)

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 7 - (Interpreted)
2. Employment Act (cap 226) section 90 - (Interpreted)
3. Employment And Labour Relations Court Act (cap 8E) section 12(i)(j) - (Interpreted)
4. Kenya Railways Corporation Act (cap 397) sections 81, 87- (Interpreted)
5. Retirement Benefits Act (cap 197) sections 46, 47 - (Interpreted)

Advocates

Mr Chacha Odera and *Ms Sandra Kavagi* for the appellant

Mr Odhiambo for the other respondents

Mr Duncan Okatch for the 54th and 55th respondents

Kerongo & Co Advocates for the Kenya Railways Staff Benefits Scheme



JUDGMENT

1. The central issue in this appeal arose from a labour dispute between The Kenya Railways Corporation (the appellant) and George Ochieng Ogoda & 217 others (the respondents). The appellant filed this appeal challenging the decision of M Onyango, J in the Employment and Labour Relations Court ('the ELRC') dated August 13, 2021 in Nairobi ELRC Cause No 1789 of 2015.
2. A cursory context of the dispute is that the respondents filed a statement of claim dated April 27, 2009 which they amended on April 16, 2019 and further amended on August 13, 2019. In the further amended claim, they pleaded that they were former employees of the appellant in Job Groups B & C, having been affected by the retrenchment; that they were parties to the Collective Bargaining Agreement ('CBA') dated June 11, 1998 and registered in court on even date in Industrial Court Case No 169 of 1998, and that some of them filed Nakuru High Court Civil Case No 397 of 1998 ('the Nakuru case') which was later struck out for being incompetent.
3. The respondents further pleaded that they had never entered into any agreement with the Kenya Railways Staff Retirement Benefits Scheme and it could not therefore claim ownership of the houses which they (the respondents) were occupying while in any event they had not been settled by the appellant as per the terms of the CBA. They were aggrieved that since the signing of the CBA, which was to be effected within a period of 12 months from 1st January to December 31, 1998, the appellant had not honoured its terms and conditions.
4. The respondents particularly drew the trial court's attention to Clause (ii) of the Central Joint Council Agreement (CJC or CJC Agreement) dated November 10, 1997 which was registered alongside the CBA in Industrial Court Case No 169 of 1998. The terms of the CJC provided for the conditions attached to the retrenchment package. They contended that it was imperative that the appellant be compelled to enforce the CBA, more so from the fact that most of them were senior citizens and living in gross conditions with their families owing to the appellant's inactions.
5. It was further pleaded that some of the respondents who were occupying the appellant's houses, filed High Court Civil Case No 230 of 2009 (now ELRC No 1789 of 2015), and they were granted interim orders on October 9, 2009, restraining the appellant from evicting or interfering with the respondents' quiet possession and enjoyment of the staff houses until they were fully settled.
6. The respondents summed up their pleadings by asking the trial court to: issue an order of injunction restraining the appellant from interfering with their quiet enjoyment of the tenancy and to allow them to continue retaining the houses until their dues are fully paid; to uphold the provisions of the CBA executed and dated November 24, 1997 alongside the CJC Agreement dated November 10, 1997 both registered on June 12, 1998 at the Industrial Court Case No 169 of 1998; issue an order compelling the appellant to pay the respondents their dues as per the CBA dated November 24, 1997 as tabulated for each individual in regards to salary arrears for the year 1998 RBI 25% & R CII 40%; pension arrears as from 1st January 1998 to date; severance pay; gratuity arrears; 50% of their monthly salaries accruing from the date of registration of the CBA to date; leave allowance due to the respondents in Job Group B; and any other relief the court deemed fit to grant.
7. In response, the appellant filed an amended response dated December 14, 2019. The record shows that the amended response is indexed to be between pages 885 - 888 of the record of appeal but we have only seen a portion of it between pages 887 - 888. We have perused the whole record of appeal to ascertain whether it was a case of wrong pagination and arrangement of documents, but we have not been able to



trace the missing pages of the appellant's amended response dated December 14, 2019. Therefore, the appellant's response to the respondents' amended claim which is on record is incomplete. We can only fall back to the observations made by the learned Judge in her judgement since she had the advantage of perusing the physical record.

8. The appellant averred in its response that the issues which the respondents raised in their claim were litigated upon in the Nakuru Case which was struck out for being incompetent; that it fully settled all the respondents' retrenchment packages, and the continued stay of the respondents in the appellant's staff quarters was contrary to the agreement and they ought to have vacated the houses upon payment of their retrenchment benefits; that the trial court was divested of jurisdiction as the dispute was about pension and payments of retirement benefits; that the respondents were not entitled to any of the prayers sought in their amended claim, and that it ought to be dismissed with costs.
9. At the hearing, the respondents called three witnesses to testify on their behalf. John Bernard Ochieng ('CW1'), testified that he was employed by the appellant but that his dues had not been fully settled. He testified that he seeks payment of his dues on account of the terms of the CBA of 1997 signed in Nanyuki by the CJC between 10th and November 14, 1997; that the CBA was registered in court on June 12, 1998; that in the CBA, they were awarded an aggregate salary increment of 45% in the top ranks and 70% in the bottom range; and that the total increment was to be 70% which was to be paid before December 31, 1998. He was aggrieved that he was only paid 30% and the balance of 40% had not been paid as at the time he was testifying.
10. It was CW1's further testimony that his salary of Kshs 3,910 was increased by 30% to Kshs 6,000 and the balance of 40% was to bring his salary to Kshs.7,680. He stated that he was not entitled to pension, and that he was paid his gratuity although the balance owing was Kshs 922, 835 which translates to the balance of the 40% salary increase. He added that, according to the conditions of the package, all Nanyuki staff were to be given 3 months' notice prior to termination, annual leave allowance and terminal benefits.
11. CW1 told the court that if the appellant was unable to pay them, then those staff eligible for pension would have a reduction in their pension while those eligible for gratuity would have been paid a monthly allowance of 50% of their salary until the claim was fully settled. He stated that the appellant was doing so until December 1998 when he was retrenched. It was his case that there was no limitation in the agreement as to when the half salary and reduced pensions would stop being paid.
12. Christopher Njoroge Ng'ang'a ('CW2'), a former employee of the appellant and Ruth Simon Mahugu ('CW3'), a wife of a former employee (then deceased) of the appellant basically reiterated what the terms of the CBA were and the pending dues they were claiming from the appellant. They emphasised that the terms of the CBA had not been honoured fully and substantially. CW3 stated that her late husband died while he was still pursuing his dues.
13. Richard Kosgei ('RW1'), the appellant's Senior Human Resource Assistant testified that indeed there was a CBA that was entered into pursuant to meetings held on 10th and November 14, 1997 between Railways Workers' Union which represented the respondents and the management of the appellant. He stated that the agreement contained several issues that were agreed upon between the parties, amongst them that there would be a salary review which was to be implemented in two instalments; and that the 1st instalment was to be effected from January 1, 1998, which was done. He testified that on January 16, 1998, the two parties came up with a new CBA which was registered in the Industrial Court. He denied that the CBA registered was the one for January 1, 1998.



14. According RW1, the terms of the new CBA agreement were that: some 6,000 staff members were to be retrenched; severance pay of 16 days for every year worked was to be made to staff who had worked for between 1 and 9 years, and of 21 days for a year for those who had worked for more than 9 years; and that all retrenched staff were to be given a special 3 months' leave, after which they were to take any accumulated leave. RW1 added that the 3-months' special leave was paid which meant that the respondents were earning a salary during the special leave period.
15. RW1 denied that the respondents were entitled to salary arrears for the year 1998, being 25% for RD 1 and 40% for RC grades, pension arrears from 1st January 1998, 50% gratuity, leave allowance and severance pay. He testified that the 25% and 40% salary increases claimed by the respondents were not part of the terms of the registered CBA, and that in any case, those claims were not due since they were already paid as per the CBA of 16th January 1998.
16. Nicholas Kikui ('RW2'), the Kenya Railways Staff Retirement Benefits Scheme Benefits Manager (2nd respondent in the trial), testified that the Retirement Benefits Scheme did not employ the respondents. He stated that, although the appellant transferred property to it, (Retirement Benefits Scheme), that did not imply that it had also transferred any liability/burden it held to it; that it only took over property which is what was transferred to it; that the Retirement Benefits Scheme therefore expected to receive rental income from the tenants which as at 2019 had accumulated to Kshs.56 million; and that hence, the respondents' claim that they were occupying the houses for free was not valid or factual.
17. After hearing the parties and considering the written submissions by the respective counsel on record, the learned Judge crystallised the issues for determination into five, to wit: whether the matters raised in the suit were res judicata; whether the suit was statute barred; whether the trial court had jurisdiction to determine the payable pension; whether the claim was bad in law for non-compliance with section 81 of the [Kenya Railways Corporation Act](#); and whether the respondents were entitled to the orders sought.
18. On the claim being res judicata, the learned Judge observed that the undeniable fact is that the dispute in the Nakuru case and the one before her revolved around the retrenchment package. The court held that the issues raised in the present claim could only have been res judicata in so far as they could have been determined in the Nakuru case, and if they related to the claimants who litigated in that case; that the Kenya Railways Staff Retirement Benefits Scheme was not a party to the Nakuru case since it came into existence on May 4, 2006 after the case had been filed; and that the prayers in the Nakuru case were substantially different from the ones in the claim before the ELRC.
19. The learned Judge further held that the instant claim was provoked by the notice issued by the Kenya Railways Staff Retirement Benefits Scheme, requiring the respondents to vacate the residential premises since their services were terminated. It was reiterated that, as at the time when the Nakuru case was determined, the Kenya Railways Staff Retirement Benefits Scheme was not a party to the Nakuru case; that the appellant was joined to the claim in the ELRC in the year 2018; and that for those reasons, the trial court did not find the claim before it to be *res judicata*.
20. On whether the suit was statute barred, the learned Judge held that whereas the respondents were retrenched in 1998, what was in contention was the continued failure by the appellant to pay them their terminal dues as per the terms of the CBA and CJC Agreement; and that since it was not disputed that the appellant did not pay the full terminal benefits, having only been paid 20% and 30% instead of 40% and 70% respectively of the salary increment, then due to the balance of the unpaid dues, it meant that time started running from the date when the balance was paid. To the court, the non-payment and failure to fulfil the terms of the CBA constituted a continuing injury because the conditions attached to the retrenchment package were never fulfilled. The court further emphasised



the existence of the continuing injury attested by the fact that there were several correspondences vide which the Permanent Secretary of Transport acknowledged the pending terminal benefits payable to the respondents; and that hence, the claim was not time barred.

21. On the jurisdiction of the trial court to entertain the claim, it was held that the issue was not entirely a pension matter, but it also comprised a question of computation of dues; and that on the latter issue, it was about whether the pension tabulations considered the entire salary increment as per the CJC Agreement. The court held that determination on the rightful salary increment is a matter within the court's jurisdiction as per section 12(i) and (j) of the *Employment and Labour Relations Court Act* which provides that the ELRC has jurisdiction to determine registration and enforcement of collective agreements; and that therefore, the court was seized with the requisite jurisdiction to determine the matter.
22. On whether the claim against the appellant is bad in law in light of section 87 of the *Kenya Railways Corporation Act*, it was held that the primary legislation is the *Employment Act*; and that a shorter period than is provided for under section 87 of the *Kenya Railways Corporation Act*, cannot be applied since the respondents would have been discriminated against other employees. The court went on to reiterate that the claim against the appellant was a continuing injury claim as had been acknowledged over the years; and, as such, the case was not bad in law.
23. On whether the appellants were entitled to the orders sought, it was held that RW1 in evidence in chief testified that he was unaware of any terms of the 1998 CBA that were unimplemented; that he (RW1) however contradicted his evidence in cross-examination by stating that the respondents received a salary increment of 20% and 30% against the intended 45% and 70% respectively; and that CW1 confirmed this by testifying that only 30% of the CBA salary increase was implemented and that the respondents were claiming the remaining 40%. Whilst referring to the agreement reached at the CJC meeting held on 10th and November 14, 1997, the learned Judge held that the argument that the agreement could not be implemented could not stand, since the terms of the agreement were incorporated into the contracts of the employees and partially implemented; and that the remainder thereof, of the increment, was to be paid in instalments.
24. The assertion by RW1 that the 2nd instalment was overtaken by events as the CBA was reviewed, was found to be incorrect because regardless of the time, the instalment was due and the respondents' eventual terminal benefits were to be based on the salaries. The trial court held that the respondents would only not be entitled to increments under subsequent CBAs that reviewed the CBA dated January 16, 1998.
25. On the transfer of the houses to the Kenya Railways Staff Benefits Scheme, it was held that it was not within the trial court's jurisdiction to determine landlord/tenant relationship; that the appellant transferred the houses in spite of the existing obligation under condition (ii)(a) of the CBA; and that the appellant's liability remained due to the fact that the respondents had not received their terminal dues.
26. In view of the foregoing, the learned Judge found merit in the respondents' case. She held that the respondents had proved their case on a balance of probabilities that they had not been paid their full terminal benefits pursuant to the CBA dated November 24, 1997 and CJC Agreement dated November 10, 1997; that they were therefore owed salary arrears and resultant pension and/or gratuity based on the reviewed salary; and that they were entitled to retain the houses they had been occupying pending payment of full terminal benefits as per CJC Agreement. On the computation of benefits due, the trial court directed that the same be filed within 30 days to enable it to issue a final judgement on



- the amount payable. On costs, the court observed that the respondents had not prayed for the same, and so no order as to costs was made.
27. Aggrieved by the decision of the trial court, the appellant invoked this court's jurisdiction vide a notice of appeal dated August 19, 2021 and a memorandum of appeal dated May 19, 2023 containing 9 grounds of appeal which we hereby summarise into 6 grounds as follows:
- a. The learned Judge erred in failing to take into consideration the appellant's defence and submissions on the issue of the validity and applicability of the CBA dated November 10, 1997 to November 14, 1997 and the persuasive decision of the same court (Mbaru, J) in the case of *Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Comboni Polytechnic* (2020) eKLR;
 - b. The learned judge erred in making a finding that the claim by the 218 respondents is not entirely a pension matter but an issue on whether the pension tabulations took into account salary increment as per the CJC Agreement. The learned judge contradicted herself and went against her own decision in Nairobi ELRC Cause No 2003 of 2015 *Jimmy R Kavilu & 14 others v Stanbic Bank Kenya Limited & 6 Others* where the court found that it had no jurisdiction to determine matters concerning retirement benefits which are matters that ought to be referred to the Retirement Benefits Authority;
 - c. The learned judge erred in re-writing the respondents' claim by making a finding that the appellant's failure to fulfil the terms of the CBA gave rise to a continuing injury, thus not time barred despite the matter being complained of arose in the year 1998 more than 20 years after the appellant was joined in the suit. The claim was therefore out of time;
 - d. The learned judge erred in not finding that the suit was *res judicata* by dint of prayer (a) in Nakuru HCCC NO 397 of 1998 *Ochieng Ogoda & 6 others v Kenya Railways Corporation* which was in similar terms to prayers 2 and 3 of the 218 respondents' amended claim dated August 13, 2019. The parties in the amended claim are strikingly similar to the parties in the Nakuru case;
 - e. The learned judge failed to address the appellant's submissions in relation to Preliminary Issue No (v) on the proper representation of some of the 1st to 218th respondents in the claim and the fact that Claimant No. 85 was in an active suit before the ELRC being Cause No 1494 of 2015.
 - f. The learned judge erred in finding that the 218 respondents could not be evicted by the 219th respondent until they are fully paid by the appellant and yet the appellant had produced documents exhibiting that the 218 respondents had been fully paid their terminal benefits.
28. The appellant asked that this appeal be allowed; that the judgement and decree of M Onyango, J in ELRC Cause No 1789 of 2015 be set aside and the judgement in the said suit be substituted with an order dismissing the suit with costs; and that the costs of this appeal be awarded to the appellant.
29. At the virtual hearing of this appeal on April 23, 2024, learned counsel Mr Chacha Odera with Ms Sandra Kavagi appeared on behalf of the appellant, learned counsel Mr Odhiambo appeared for the other respondents save for the 54th and 55th respondents who were represented by learned counsel Mr Duncan Okatch. It was confirmed to us that the Kenya Railways Staff Benefits Scheme which was being represented by the firm of Kerongo & Co Advocates, although being served, did not make an appearance nor file any submissions.
30. Mr Chacha Odera highlighted the submissions filed on behalf of the appellant dated April 17, 2024. Whilst recapping the brief background, counsel submitted that the matter traces its history to Nakuru



High Court Civil Suit No 397 of 1997 which was heard and determined in a judgement dated and delivered on January 27, 2012 by Ouko, J (as he then was). However, the proceedings giving rise to the present appeal were instituted in the now ELRC Case No 1789 of 2015 where the appellant was joined in the proceedings on or about March 19, 2018 after determination of the Nakuru case.

31. According to the appellant, the Nakuru case dealt with the matters which arose from the employment of the respondents; and that in that case, matters relating to the CJC Agreement of 10th to November 14, 1997 and the contents of the Gazette Notice No 4750 which was published on August 28, 1998 were considered and litigated upon.
32. Counsel stated that some of the orders sought in the ELRC were litigated upon in the Nakuru case. Therefore, it was not open to the trial court to entertain the case against the appellant as it was *res judicata*; that the doctrine of *res judicata* is not just limited to looking at the issues which were previously determined; but that section 7 of the [Civil Procedure Act](#) provides that *res judicata* extends to matters which ought to have been in issue in the previous case.
33. According to the counsel, the agreements which were being relied on, being the CBA and CJC were entered into, in the year 1997 before the Nakuru case was determined; that the amended claim was merely patch work of the Nakuru Case which was heard in October 2009, whereas the amendments in the ELRC claim were made on May 18, 2018, 9 years later; that by the time of the amendments, the judgment in the Nakuru case had been delivered in which all the issues concerning the employment terms of the respondents together with the CBAs and CJs were subject of the determination; and that therefore, a party cannot file a suit 23 years after the cause of action arose as the appellant did, by way of amending the claim.
34. We asked learned counsel what he had to say about the claims by the respondents that they have not been fully paid. In response, he submitted that the appellant's position is that the respondents had already been paid. Counsel led us to the documents in the record of appeal from pages 287 to 767 as evidence of the payments which were made to the respondents.
35. On what counsel would say about the doctrine of 'continuing injury', Mr Odera submitted that the dispute started in the year 1998, and even after the suit was dismissed in 2001, the respondents filed an application to stay the dismissal which application was also dismissed; that the respondents waited until 2018 to join the appellant in the suit and then plead continuing injury; that the respondents should have joined the appellant in the Nakuru case and pursued their quest there; that in between there was a big gap of time which the respondents never took advantage of, to sue the appellant, and which failure was not explained even as at the initiation of the suit that was filed in 2015.
36. We sought to know whether the tabulation of the dues as directed by the court had been agreed upon by the parties. Mr Odera submitted that tabulation of pension is part of the issues that the appellant is challenging the trial court's jurisdiction as it lies with the Retirement Benefits Authority Tribunal as per the provisions of sections 46 and 47 of the [Retirement Benefits Act](#).
37. On behalf of the respondents being represented by Mr Odhiambo, counsel briefly highlighted the submissions dated April 19, 2024. He contended that the subject matter in the Nakuru case involved locomotive drivers, and the parties in the claim giving rise to this appeal are different; that the appellant and the Kenya Railways Staff Retirement Benefits Scheme are one and the same entity and cannot be separated; that the claim was filed pursuant to the attempts by the Kenya Railways Staff Retirement Benefits Scheme in 2009 to evict the respondents from their respective homes; that the issue on the validity of the CBA was not raised in the trial court; that at the trial, RW1 confirmed that a CBA existed; that furthermore, the issues in the Nakuru case were not substantively heard; and that in an earlier ruling by Ndolo, J, the issue of *res judicata* was dealt with.



38. Learned counsel Mr Okatch for the 55th and 56th respondents highlighted their submissions dated April 19, 2024. He submitted that it is not in dispute that there exists a CBA agreement, and that it was registered in court; that it is not disputed that the respondents were not paid; that there was an order that the respondents were to remain in the houses until payment was made; that Ndolo, J dealt with the question of whether the claim was res judicata; that the appellant filed a notice of appeal against the determination by Ndolo, J but it did not pursue the appeal; and that it was not therefore open to the appellant to raise the issue in this appeal. Counsel contended that the Nakuru case was not dealt with conclusively, and therefore, there was nothing stopping a party, just as the respondents did, from filing its claim afresh.
39. On the issue of continuing injury, counsel submitted that it emanates from the non-observance of the CBA by the appellant; that the appellant transferred the houses to the Kenya Railways Benefits Retirement Scheme knowing very well that there was an agreement recorded in court; that the issues herein do not only fall within the ambit of Retirement Benefits Authority and pensions, but they also relate to matters salaries which have not been paid in full. Counsel urged us to dismiss the appeal with costs.
40. In a rejoinder, Mr Odera conceded that the plaintiffs in the Nakuru case were locomotive drivers, but that nonetheless, some of the plaintiffs therein were also plaintiffs in the claim giving rise to the instant appeal.
41. Counsel reiterated that Cause No 1789 of 2015 was initially instituted as a claim on April 27, 2009, and later amended on April 16, 2019 and August 13, 2019 respectively; that during this period, the Nakuru case, being HCCC No 397 of 1998 was still alive as judgement in its respect was delivered in 2011; that as such, the claim in Nairobi was instituted when the Nakuru case was subsisting; and that it follows that the claim giving rise to this appeal was therefore res judicata and the trial court should not have entertained it.
42. Counsel further submitted that the Retirement Benefits Authority was established to separate pension funds from employer's pension schemes. Therefore, the appellant and the Kenya Railways Benefits Retirement Scheme cannot be one and the same entity or body.
43. We have considered the record of appeal, the oral and written submissions by counsel, the authorities relied upon by each party and the law. As a first appellate court, our primary role is to re-evaluate the evidence adduced before the trial court on both law and facts and draw our own conclusions. However, we must bear in mind that we did not have the advantage of seeing and hearing the witnesses testify and we should therefore give allowance for that. See Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 and *Selle & another v Associated Motor Boat Co Ltd & Another* [1968] (EA) 123.
44. This mandate was reiterated in the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 as follows:
- “On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
45. In our considered view, the three main issues that fall for our determination are:
- (i) Whether the respondents' claim was res judicata;



- (ii) Whether the respondents' claim was statute barred on account of limitation of time; and
 - (iii) Whether the respondents' claim is one of pension falling under the *Retirement Benefits Act*.
46. On whether the respondents' claim was res judicata, the record confirms that some of the appellant's employees filed Nakuru Civil Suit No 397 of 1998. One of the plaintiffs in the Nakuru case is the 1st respondent herein. The plaintiffs in the Nakuru case sought among others: orders of permanent injunction restraining the appellant from evicting them from the houses they were occupying, and from disturbing their quiet continued tenancy they were enjoying until they are fully settled in accordance with the CJC Agreement Clause (ii)(b), (c) and (d) of January 16, 1998 (KR 1) and General Manager Circular letter ref. Est/19/14/1/e of March 30, 1995 (KR) 2 respectively; and an order ordering the appellant to pay them salary increment in accordance with the terms of the CBA made at CJC meeting of 10th - 14th November 1997 items 1 (iii) and 2 (a)(iii).
47. The Nakuru case proceeded for hearing. The appellant did not file its defence. The learned Judge (Ouko, J) (as he was then) critically observed as follows: that the respondents and the appellant entered into two CBAs following meetings in Nanyuki and Railways Headquarters; that the respondents were side-lined during the retrenchment exercise in violation of the two CBAs; that some of the respondents did not receive their severance pay contrary to the CBA of January 16, 1998; and that the respondents complained of delayed payment of their retrenchment package and taxation of severance pay contrary to the CBA of January 16, 1998.
48. The Nakuru case was dismissed on the basis that the 1st respondent who testified on behalf of the other plaintiffs, exhibited the payslip for the month of February 1998 as evidence that the 25% salary increase which was awarded to them by the defunct Industrial Court had not been effected. The court observed that the Memo dated December 18, 1998 from the Regional Manager confirmed that the terminal benefits would be paid with the retrenchment package, and that that was the same message that was reiterated in the Staff and General Notice No. 12 of December 23, 1998. Therefore, the award of the 25% increment on the retirement package was not expected to reflect in the payslips.
49. The Nakuru case also considered the claim of overtime and nightshift allowances, and it held that the pronouncement on these awards was not part of the decision of the Industrial Court; and that there was no evidence led to confirm that the respondents indeed worked overtime. Lastly, on the alleged threatened evictions, it was held that the respondents failed to identify the persons who were in occupation of the appellant's staff quarters in order to qualify for the injunctive orders. On those three findings, the plaintiffs' case was adjudged not have been proved on a balance of probabilities and it was dismissed.
50. The respondents then filed Nairobi HC Civil Case No 230 of 2009 (now ELRC Cause No 1789 of 2015), against the Kenya Railways Staff Retirement Benefits Scheme. As rightly submitted by learned counsel Mr Odera, the appellant was joined in the proceedings in the year 2018. The reliefs sought by the respondents were injunctive orders against the appellant and the Kenya Railways Staff Retirement Benefits Scheme from interfering with their peaceful enjoyment of the tenancy; that the court do uphold the contents of the CBA dated November 24, 1997 alongside the CJC Agreement dated November 10, 1997, both registered on June 12, 1998 at Industrial Court Case No 169 of 1998; and an order compelling the appellant and the Kenya Railways Staff Retirement Benefits Scheme to pay the respondents their dues as per the CBA dated November 24, 1997; and any other relief the court deemed fit to grant.



51. Section 7 of the [Civil Procedure Act](#) provides for the principles which a court should consider before a suit is considered to be *res judicata* as follows:

7. *Res judicata*

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

52. While giving interpretation of the above provision, in [Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others](#) (2017) eKLR, the Supreme Court held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

53. A suit is considered *res judicata* not only if the parties in the former suit are the same as the parties in the current suit, but also if the subject matter between the parties was the same, and had been heard and determined. It was submitted that Kenya Railways Staff Retirement Benefits Scheme filed an application dated May 28, 2015 challenging the trial court’s jurisdiction to determine the suit since it was *res judicata*, and a ruling dated February 19, 2016 by Ndolo, J was delivered dismissing the said application. The said application by the Kenya Railways Staff Retirement Benefits Scheme and the ruling by Ndolo, J do not form part of the documents in the record of appeal. However, we have traced the ruling on the online law reporting platform, Kenya Law.

54. The Kenya Railways Staff Retirement Benefits Scheme’s contention was that the claim before the ELRC was *res judicata* by dint of the determination of the Nakuru case in favour of the appellant; that since the Kenya Railways Staff Retirement Benefits Scheme is just but an extension of the appellant, it followed that the Nakuru case was also determined on its behalf. Ndolo, J held that the relationship between the Kenya Railways Staff Retirement Benefits Scheme and the appellant cannot otherwise invalidate a claim; and that it is in fact not the appellant who raised the issue of the suit being *res judicata* in the first instance but the Kenya Railways Staff Retirement Benefits Scheme.

55. No doubt, *prima facie*, the issues in the Nakuru case and the claim before the trial court touched on retrenchment issues. The claim in the Nakuru case was filed by the former appellants’ locomotive drivers. Their claim centred around failure to pay their overtime and night shift allowances resulting from Industrial Court Cause No 72 of 1998, 25% award to locomotive drivers as per Kenya Gazette No Vol 51 of 28th August 1998 Notice No 4750. Even in its final determination, the trial court in the Nakuru case specifically addressed itself on issues of the overtime and night shift allowances being claimed by the plaintiffs before it.



56. The matter before the ELRC was filed by the former appellants' employees of all cadres. For instance, John Benard Ochieng, CW1, testified that he was working as a record assistant, ABC and filing clerk with the appellant. CW1 further confirmed in his testimony that the Nakuru case was for the locomotive drivers. The issues which were litigated in the Nakuru case were substantially different from the ones which were being litigated upon in the claim before the ELRC. Furthermore, the Nakuru Court did not address its mind on the terms of the CBA and CJC Agreement, but only narrowed its findings on whether the plaintiffs in that suit had proved their claim for the overtime and night shift allowances, which it found they did not, and on that basis, dismissed their suit. Further, and suffice to note is that, some of the parties in the claim before the ELRC were not parties in the Nakuru case as was the case with CW2, Christopher Njoroge Ng'ang'a.
57. From the foregoing analysis, we agree with the observation of the learned Judge that in as much as the claim before her and in the Nakuru case touched on retrenchment issues, it would only apply to the respondents who litigated in the Nakuru case. We also note that the prayers in the Nakuru case were substantially different from what was before the ELRC. Consequently, the claim by the respondents was not *res judicata*.
58. On whether the claim was time barred, the suit before the trial court was provoked by the notice to evict some of the respondents from staff houses by the Kenya Railways Staff Retirement Benefits Scheme as the houses occupied by them were transferred *vide* Legal Notice No 169 of September 7, 2006. The respondents pleaded that the said evictions would have been contrary to the CBA and the CJC Agreement between the appellant and the respondents.
59. The record of appeal and the different trial court notes/proceedings reveal that the respondents filed a Chamber Summons application dated April 27, 2009 in HCCC 230 of 2009 (now ELRC Cause No 1789 of 2015) asking the superior court to issue interim injunctive orders against the Kenya Railways Staff Retirement Benefits Scheme not to evict them from the staff houses. On April 30, 2009, Waweru, J granted interim orders. It seems that some of the respondents were evicted as it can be confirmed from the record when Mr Ndungu, counsel for the respondents, told the court on May 27, 2009 that it is only the then 1st, 3rd and 5th plaintiffs who had been evicted and some of their goods taken. Counsel for the respondents, Ms Wangari, further confirmed on June 30, 2009 that some of the respondents had been evicted.
60. Indeed, Clause (ii)(b) of the CBA reached during the CJC meeting held on January 16, 1998 at the Railways Headquarters by the appellant and respondents' representatives stated as follows:
- “ All staff who will be retrenched will be allowed to retain Railway houses/leased houses if in occupation of any; those drawing owner occupier house allowance or normal house allowance will continue drawing their allowances until they are fully settled.”
61. It is not difficult to see that the appellant very well knowing of the terms of the CBA and the discussions it had had with the respondents during the various CJC meetings, purposefully transferred the houses to the Kenya Railways Staff Retirement Benefits Scheme to defeat its obligations. It is common ground that the timeframe when the CBA would last was for one year from 1st January to December 31, 1998. When it became clear that the appellant was not willing to honour the terms of the CBA and CJC agreements, some of the respondents filed a suit before Nakuru High Court on September 22, 1998.
62. Some 11 years later, the appellant's former employees filed Nairobi Civil Suit No 230 of 2009 against The Board of Trustees of Kenya Railways Staff Retirement Benefits Scheme. Still, at the heart of the dispute, was the threatened eviction from the staff houses which was proved before the court - that



some 3 former employees had already been evicted even after stay orders were issued; and that clearly there was the failure to honour the terms of the CBA and CJC agreements, including the dues which remained unpaid. All in all, the letter from the then PS Transport, dated September 13, 2007 advised the appellant and the Kenya Railways Staff Retirement Benefits Scheme to halt the eviction of the retrenched employees as discussions were ongoing.

63. Mr Chacha Odera’s argument was that the doctrine of continuing injury would not apply since the respondents waited for 23 years to join the appellants in the suit then plead continuing injury. Mr Okatch took the position that continuous injury continued to occur the moment the appellant failed to honour the terms of the CBA.

64. Section 90 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 after the cessation thereof.”

65. The law provides that the time limit of filing claims of continuing injury or damage should be within 12 months after cessation of the continuing wrong. Therefore, we interpret the provision to mean that regardless of the three-year period lapse for institution of employment disputes, if an employer continues to breach a term of agreement, agreed between the employer and employee, the employer remains liable up until the breach is purged.

66. As long as the continuing injury persists, it gives rise to a distinct and separate cause of action. The time limit set to file claims arising out of ‘continuing injury is 12 months after the cessation. In the appeal before us, we were not told by the appellant when cessation happened to enable us to compute time. The joining of the appellant in the proceedings in 2018 was necessary since the controversy of the unpaid terminal dues which they undertook to pay, persisted. The question of payment of the dues, could not have been answered by the Kenya Railways Staff Retirement Benefits Scheme.

67. The Supreme Court of South Africa in *Barnett and Others v Minister of Land Affairs and Others* (304/06) [2007] ZASCA 95; 2007 (6) SA 313 (SCA); 2007 (11) BCLR 1214 (SCA) (6 September 2007) drew a distinction between a single completed wrongful act and a continuous wrong which we find persuasive as follows: -

“a distinction is drawn between a single, completed wrongful act – with or without continuing injurious effects, such as a blow against the head – on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures.”

68. This court extensively discussed the issue of continuing injury in The *German School Society & another v Ohany & Another* (2023) KECA 894 (KLR) as follows:

“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 appellant's 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."

69. Further, in *Nganga v Christ the King Parish & another* (Civil Appeal 22 of 2019) (2023) KECA 1100 (KLR) (22 September 2023) (Judgment), this Court held that:

"..a continuing wrong simply put, is a wrong arising out of a continuous breach of an obligation which transcends a single completed act or omission. The obligation so breached must be one borne of law or agreement between parties and which gives rise to an actionable claim."

70. There are several letters from the appellant acknowledging the terms of the CBA, one of them being the one dated October 6, 1998 at Page 768 - 769 of the record of appeal. In fact, in the said letter, Mr Mutangili, the appellant's Chief Personnel and Administrator Manager asked that the names of all the permanent and pensionable and contractual employees be forwarded for processing of the dues.
71. Furthermore, the letters of October 2, 2006, September 13, 2007, 2nd and October 9, 2008 are all a testament that the appellant pleaded with the Kenya Railways Staff Retirement Benefits Scheme to stay the intended eviction pending compliance with the terms of the CBA and the CJC Agreements. The appellant cannot now be heard to say that the time for filing claim by the respondents had lapsed whereas it acknowledged severally in its letters that they were yet to comply with the terms of the CBA and the resolutions made in the CJC Agreement. It is our finding that, this was a case of a 'continuous injury' and time did not stop running as long as the appellant was not complying with the terms of the CBA and the CJC.
72. Learned counsel Mr Odera led us to pages 287 - 767 as confirmation that the respondents were paid their terminal dues. However, counsel did not tell us whether the terminal dues as computed complied with the agreed salary increment in terms of the CBA and the CJC Agreement. All the appellant would have prudently done was to tabulate the erstwhile salaries of the respondents and the progression of the increase of salaries as per the terms of the CBA and the CJC Agreement, the core issue in dispute being honouring the agreed salary increment and then demonstrate that indeed the alleged payments considered the increments.
73. For the foregoing reasons, we find and hold that the respondents' claim was not time barred. It was filed within time for the reason that the injury against them was continuing even as at the time of filing the claim.
74. Finally, we delve into whether the claim is one which fell for determination by the Retirement Benefits Authority Tribunal. The appellant's case was that the trial court did not have jurisdiction to determine the dispute before it, since the respondents being members of the Kenya Railways Staff Retirement Benefits Scheme, they ought to have referred their dispute to the Retirement Benefits Authority Tribunal under sections 46 and 47 of the *Retirement Benefits Act*. One of the grounds of appeal is that the learned Judge departed from her own decision in Nairobi ELRC Cause No 2003 of 2015 *Jimmy R Kavilu & 14 others v Stanbic Bank Kenya Limited & 6 others* where she found that she had no jurisdiction to determine matters concerning retirement benefits, but it was within the purview of the Retirement Benefits Authority.



75. Section 46 of the *Retirement Benefits Act* provides that a person who is a member of a scheme and is dissatisfied with the decision of the manager, administrator, custodian or trustees of the scheme, may request in writing that such decision be reviewed by the Chief Executive Officer of the Retirement Benefits Authority with a view to ensuring that such decision is made in accordance with the provisions of the relevant Scheme Rules or the Act under which the schemes is established. An appeal against the decision of The Chief Executive Officer lies with the Appeals Tribunal under section 47 of the *Retirement Benefits Act*.
76. The Supreme Court in the case of *Albert Chaurembo Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (Petition 3 of 2016) (2019) KESC 83 (KLR) (8 November 2019) (Judgment) held as follows on the provisions of section 46(1) of the *Retirement Benefits Act*:
- “A reading and interpretation of the provisions of the section 46(1) poses no difficulty and leaves no doubt that the section requires that any member, beneficiary or dependents of the Scheme who is aggrieved or dissatisfied by any decisions made by a manager, administrator or trustees of the Scheme while exercising their powers under the provisions of the relevant scheme rules or the Act under which the scheme is established, may if he or she wishes make a written request to the CEO to review such decisions with a view to ensuring that such decisions are in accordance with the provisions of the relevant Scheme Rules or the Act under which the Scheme is established and above all lawful.”
77. Our understanding is that the disputes referred to the Chief Executive Officer of the Retirement Benefits Authority in the first instance before being referred to the Appeals Tribunal, are those in which a person is aggrieved by the decision of a manager, trustee or administrator of a scheme. The respondents were never dissatisfied with the decision of the established retirement scheme of the appellant. The respondents were specifically dissatisfied by the decision of the appellant for failing to honour the CBA and the resolutions made in the CJC which was admitted by the appellant severally. The respondents could not have been expected to approach the Chairman of the Retirement Benefits Authority without having a clear picture on what their salaries are, since pension benefits largely depend on the salary an individual had.
78. Once the terms of the CBA and CJC are honoured, it then follows that the other issues of payment of the pension benefits for those respondents employed on permanent and pensionable basis, will fall into place. In any event, RW2 testified to the effect that the terms of the agreement reached at the CJC meeting held between 10th and 14th 1997, had partially been implemented and the 2nd instalment was yet to be paid. This was what the respondents were seeking to enforce before the trial court.
79. In the findings of the learned Judge in *Jimmy R Kavilu & 14 others (supra)*, there was already a decision by the Trustees of the Scheme on the terminal benefits payable to the claimants therein. Unlike in the situation before us, we have not been presented with documents of the purported calculations by the Trustees of The Kenya Railways Staff Retirement Benefits Scheme to warrant the matter be referred to the Chief Executive Officer of the Retirement Benefits Authority under section 46(1) of the *Retirement Benefits Act*.
80. Section 12(a) of the *Employment and Labour Relations Court Act* empowers the ELRC to determine disputes relating to, or arising out of, employment between an employer and an employee. The present dispute is one between an employer (appellant) and the employee (respondents). The Kenya Railways



Staff Retirement Benefits Scheme was never part of the CBA and the CJC Agreement that were agreed upon by the parties. The ELRC was indeed vested with jurisdiction to hear and determine the dispute before it.

81. We think that we have endeavoured as much as possible to address the concerns raised in this appeal. From our re- evaluation of the evidence tendered before the trial court, we reach the inescapable conclusion that the appeal is unmeritorious. It is hereby dismissed with costs to the respondents.

82. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

E. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is the

E. W. NGENYE - MACHARIA

.....

JUDGE OF APPEAL

true copy of the original

signed

DEPUTY REGISTRAR

