



REPUBLIC OF KENYA



KENYA LAW
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**Kibidi v Teachers Service Commission (Cause E386 of 2024)
[2025] KEELRC 64 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 64 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E386 OF 2024
S RADIDO, J
JANUARY 23, 2025**

BETWEEN

HARRISON KAYERI KIBIDI CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. Harrison Kayeri Kibidi (the Claimant) sued the Teachers Service Commission (the Respondent) on 21 May 2024, and he set out the Issues in Dispute as:
 - i. Wrongful job placement on account of Career Progression Guidelines.
 - ii. Underpayment on account of the 2017 – 2021 Collective Bargaining Agreement.
 - iii. Discrimination on account of non-implementation of Collective Bargaining Agreement.
 - iv. Claim of compensatory damages.
2. The Claimant sought the following reliefs:
 - (a) A declaration that the Claimant be placed in the correct job group as per the provisions of Career Progression Guidelines.
 - (b) A declaration that the implementation of the 2017 – 2021 Collective Bargaining Agreement has been discriminatory towards the Claimant.
 - (c) A declaration that the Claimant’s right to fair labour practices has been breached.
 - (d) A declaration that the Claimant is a unionisable staff and is entitled to the CBA benefit.
 - (e) Review and proration of the Claimant’s salary and applicable benefits as per the 2017 – 2021 Collective Bargaining Agreement.



- (f) Tabulation and comparison of underpaid salary, housing allowance, commuter allowance and medical allowance as below:
- (i) Underpaid Basic Salary Kshs 1,158,936/-.
 - (ii) Underpaid commuter allowance Kshs 192,000/-.
 - (iii) Underpaid House allowance Kshs 154,000/-.
 - (iv) Underpaid medical allowance Kshs 20,000/-.
 - (v) Underpaid leave allowance Kshs 24,000/-.
 - (vii) Compensatory loss and damages Kshs 1,500,000/-.
3. Upon service, the Respondent filed a Notice of Preliminary Objection dated 17 July 2024, contending that:
- i. The Honourable Court lacks jurisdiction to hear and determine this matter pursuant to the provisions of section 90 of the *Employment Act*, this matter having been filed outside the statutory limit of 3 years from the date of alleged cause of action.
 - ii. The claim herein being premised on causes of action arising on 1/7/2017 and 2/1/2020 is statute-barred under the provisions of section 90 of the *Employment Act*.
 - iii. The claim herein is statute-barred under provisions of section 3(2) of the *Public Authorities Limitation Act*.
 - iv. The proceedings herein have been commenced contrary to the law.
4. The Court gave directions on the Preliminary Objection on 29 October 2024, and the Respondent filed its submissions on 14 November 2024. The Claimant filed a replying affidavit and submissions on 4 December 2024.
5. The Court has considered the Preliminary Objection, affidavit and submissions.
6. The Respondent advanced the Preliminary Objection on the understanding that the Collective Bargaining Agreement underpinning the cause of action was effective from 1 July 2017 to 30 June 2021.
7. According to the Respondent, the Claimant was alleging breach of contract in respect of a promotion to Deputy Headship on 1 July 2017 and Headship on 2 January 2020.
8. In the view of the Respondent, the actions for underpayments accrued on 1 July 2017 and 2 January 2020, and being continuing injury, any court claims should have been lodged with the Court within 12 months of the respective dates (or in the alternative within 3 years) in terms of section 90 of the *Employment Act*.
9. The Respondent asserted that the Claimant moved the Court on 24 May 2024, long after the 12 months (3 years in the alternative).
10. The Respondent cited the judgments in *Njunge v Muasya (2024) KEELRC 265 (KLR)*, *Beatrice Kahai Adagala v Postal Corporation of Kenya (2015) eKLR* and *Johnson Kazungu v Kenya Marine and Fisheries Research Institute (2021) eKLR*.
11. The Claimant was of the view, like the Respondent, that the claims constituted continuing injury within the context of section 90 of the *Employment Act*.



12. However, the Claimant took the position that the Court had to ascertain several facts such as when the cause of action accrued and, therefore, the Preliminary Objection did not meet the test set out in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd (1969) 696*.
13. In this regard, the Claimant asserted that the failure by the Respondent to implement the terms of the 2017 – 2021 Collective Bargaining Agreement was continuing injury and that the legal injury or wrong accrued upon his retirement on 1 January 2023.
14. The Claimant also made several arguments including that the Respondent had not filed any pleading raising the question of section 90 of the *Employment Act* to anchor the Preliminary Objection and that he was alleging violation of his right to fair labour practices and fair administrative action as guaranteed by Articles 41 and 47 of *the Constitution*.
15. The Court can straight away deal with these contentions. A Preliminary Objection can be raised at any time and it is immaterial that it has not been founded upon a substantive pleading by the party raising it.
16. Both parties were in agreement that the legal wrongs in question fell under the rubric of continuing injury within the context of section 90 of the *Employment Act*, 2007.
17. What constitutes continuing injury has now been clarified by the Court of Appeal in *The German School Society & Ar v Ohany & Ar (2023) KECA 894 (KLR)*.
18. The Court stated:

The respondent’s argument is that the claims in question constitute a continuing injury within the meaning of section 90 of the *Employment Act*. Specifically, she argued that the claim for back pay, underpayments and loss of purchasing power are a continuing claim that was not resolved during the pendency of her contract and the several amendments/alterations/additions made to the said contract, and, it was upon the unlawful termination of her contract that the claim crystalized, so, the institution of the suit for the recovery of the amounts claimed was within time as set out in section 90 of the Act. The respondent contended that every unequal pay received reset the date of the accrual of action.

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Locally, there appears to be a paucity of court decisions defining the phrase “a continuing injury.” The *Employment Act* does not define the said phrase. We are alive to the dictate in Article 259 of *the Constitution* which requires courts to advance the development of the law. We shall attempt to judicially define what constitutes “a continuing injury.”

The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. “A continuing wrong” refers to a single wrongful act which causes a continuing injury. “Recurring/successive wrongs” are those which occur periodically, each wrong giving rise to a distinct and separate cause of action.

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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 wrong contemplated under section 90.

19. The Claimant is primarily alleging breach of contract, that is the failure to implement the terms of a Collective Bargaining Agreement (underpayments) when the employment relationship subsisted. These heads of claim constitute continuing injury within the holding by the Court of Appeal.
20. The Claimant retired from the employment of the Respondent with effect from 1 January 2023. The Claimant would have been entitled to the allowances and basic salary underpayments at the time of appointment to Deputy Headship on 1 July 2017, and to the position of Headship on 2 January 2020. In other words, the continuing legal wrongs started accruing on 1 July 2017 and 2 January 2020.
21. The Claimant moved the Court on 21 May 2024.
22. This was more than 12 months after the cessation of the alleged legal wrongs by the Respondent.
23. It is also clear that the remedies sought by the Claimant are found in statute and are not dependent on constitutional application or interpretation.
24. In the circumstances, the Court concludes that the action is caught up by the 12-month prescription on continuing injury claims in section 90 of the *Employment Act*, 2007.
25. Before concluding, the Court notes that the Collective Bargaining Agreement relied on by the Claimant had alternative dispute resolution avenues embedded in it, and there is nothing on record to suggest that the parties attempted to resolve the dispute through that avenue.

Orders

26. The Court finds merit in the Notice of Preliminary Objection. It is upheld with the result that the Memorandum of Claim is struck out with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI ON THIS 23RD DAY OF JANUARY 2025.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant C.O. Wasonga & Co. Advocates

For Respondent Patrick Mulaku, Advocate. Teachers Service Commission

Court Assistant Wangu

