



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ngure v Kenya Rural Roads Authority (Cause E072 of 2024)  
[2025] KEELRC 500 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 500 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E072 OF 2024  
K OCHARO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**CLIVE MWAINO NGURE ..... CLAIMANT**

**AND**

**KENYA RURAL ROADS AUTHORITY ..... RESPONDENT**

**RULING**

1. The Claimant herein filed a Memorandum of Claim dated 24<sup>th</sup> July 2024, seeking the following reliefs;
  - I. Unpaid Salary difference arrears for 10 years from January 2013 to January 2023 totalling Kshs 12,600,000.
  - II. Unpaid Top salary arrears for 10 years from January 2013 to January 2023 totalling Kshs 2,453,160.
  - III. Interest on (I) and (II) above from the date the same became due until payment in full.
  - IV. Costs of the suit.
  - V. Any other relief this Honourable Court may deem fit to award under the circumstances.
2. The Respondent subsequently filed a Notice of Preliminary Objection dated 3<sup>rd</sup> October 2024, seeking the dismissal and or striking out with costs of the Claimant's Memorandum of Claim based on the following grounds;
  - a. That the suit herein contravenes section 90 of the *Employment Act* providing for limitation of actions for claims filed after three (3) years.
  - b. That in the circumstances, the Claimant's suit against the Respondent is frivolous, a monumental procedural and substantive legal nullity, fatally and irredeemably incompetent,



an abuse of the court process, an afterthought, and a proper candidate for dismissal and or striking out with costs.

3. The Claimant responded to the Preliminary Objection via the Replying Affidavit dated 23<sup>rd</sup> October 2024 and sworn by Mwazighe Micar, stating that, the Claimant resigned from the Respondent on 29<sup>th</sup> January 2024 vide a letter dated the same date. Therefore, the Claimant's cause of action arose on the date of resignation which is 29<sup>th</sup> January 2024. The suit was filed on 24<sup>th</sup> July 2024 and cannot therefore be barred by the provisions of Section 90.

### **Claimant's submissions**

4. The Claimant identified the following issues for determination, thus; whether the Preliminary Objection by the Respondent dated 3<sup>rd</sup> October 2024 can be sustained; and who is to bear costs.
5. The Claimant submitted that a preliminary objection must raise pure points of law capable of disposing of a dispute at once. To buttress this submission, he relied on the case of Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd, (1969) E.A.696 page 700 where the Court observed as follows: -

“That a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

6. The Claimant also submitted that he resigned from employment on 29/1/2024 and filed the suit on 24/7/2024, thus within 3 years from when the cause of action arose in conformity with Section 90 of the *Employment Act*. He relied on the case of John Kiiru Njiiri Vs University of Nairobi [2021] eKLR and the case of Serah Wairimu Kihara v Nokia Solutions Branch Operations [2021] eKLR.
7. The Claimant submitted that in the circumstances of the instant case, time for purposes of Section 90 of the *Employment Act*, could start running from the date of his resignation from employment as that is when the cause of action can be construed to have arisen, not when the Respondent stopped paying the top-up salary. He was under the employment of the Respondent and continued receiving a salary, from the Respondent until January 2024 when he resigned. To buttress this, he relied on the case of *Okere v County Government of Kakamega & another (Employment and Labour Relations Cause 17 of 2023)* [2023] and the case of George Hiram Ndirangu v Equity Bank Limited [2015] eKLR.
8. Further, the Claimant has been in employment receiving his salary at the end of the month. Despite being paid the normal salary by the Respondent, the top-up salary upon which the claim is based was not paid. As long as the Claimant remained in service until 29<sup>th</sup> January 2024, a fresh cause of action arose every month when he received his monthly salary. Therefore, his last salary from the Respondent in January 2024 meant that a fresh cause of action arose then. The Preliminary Objection should thus be dismissed with costs.



## Respondent's submissions

9. The Respondent identified the following issues for determination, thus; whether the suit herein is statute-barred; and who bears the costs.
10. The Respondent submitted that the effective date on which the Claimant was entitled to complain or obtain a remedy from the Respondent was within three (3) years from the stoppage of the top-up salary, which was on or about December 2012. The Claimant filed this claim on the 24<sup>th</sup> of July, 2024 which was 9 years long after the lapse of three (3) years limitation of time.
11. The Claimant sought payment of his top-up salary through the letter dated 7<sup>th</sup> January 2016. Even if the court were to take this as the date of the cause of action, the last statutory date expected for filing an employment claim should have been 7<sup>th</sup> January 2018.
12. The Respondent relied on the case of David Ngugi Waweru Vs. Attorney General & Another [2017] eKLR where the Court of Appeal stated:

“This Court has had occasion to grapple with the issue of defining a cause of action and determining when it arises in a contract of employment in the case of Attorney General & Another vs Andrew Maina Githinji & Another [2016] eKLR. Waki, JA with whose decision Kiage, JA agreed, examined the same issue and stated in part, as follows:

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.” That definition was given by Pearson J. in the case of Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688 at pg. 616. In an earlier case, Read vs. Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as: -“Every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgement of the court.

Lord Diplock, for his part in Letang vs. Cooper [1964] 2 All ER 929 at 934 rendered the following definition:

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

I am sufficiently persuaded by those definitions and I adopt them.”

13. The Respondent further relied on the case of Kibwambok Chumba vs. Chebut Tea Factory [2017] eKLR.
14. The Respondent further submitted that the Claim herein does not fall under a claim for continuous injury as it is not provided for as of right in the [Employment Act](#) but is only an incentive given to employees upon taking up certain responsibilities or transfers for a specific period. The Claimant was at all times paid a salary and the relevant allowances and no claim has been raised on them.
15. In the case of Vipingo Ridge Limited v Swalehe Ngonge Mpitta [2022] eKLR the Court held that,  
  
“..If this understanding of the matter is correct, then it means that the law on limitation of actions would apply to each of the incidents of default to pay the allowance distinctly. And hence the argument that those individual defaults that fall outside three (3) years of the date of institution of the suit to recover the unpaid allowances would, applying section 90 of the [Employment Act](#), be barred by limitation of action.”



I do not think that failure by an employer to remit any allowance or other payment that is payable periodically at agreed intervals constitutes a continuing injury or damage to the affected employee in terms of section 90 of the Employment Act merely because the non-remittance has been consecutive. The consecutive failures to pay, in so far as they relate to distinct periods of payment of remuneration, are separate and severable.

A continuing injury or damage would, in my view, for instance, arise in a case of discriminatory treatment at work which remains persistent over an extended period of time. In such case, one may not compartmentalize the discrimination unless it relates to distinct factual situations. See Ephraim Gachigua Mwangi v Teachers Service Commission & Board of Management Thogoto Teachers College [2018] in which the court said that the term "continuing injury" denotes an injury that is still in the process of being committed."

#### Analysis and determination

##### Issues

- a. Whether the preliminary objection is properly taken.
  - b. Whether the Claimant's claim herein is time-barred.
16. The Court in the case of George Stephen Njoroge Macharia v Issa Mjawiri Jabiri & 2 others [2022] eKLR held that "I need to start by setting out what a proper preliminary objection is, and I will heavily rely on Nitin Properties Ltd V Singh Kalsi & Another [1995] eKLR which elaborated the legal principle when it stated as follows:

"...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

It is clear from the above excerpts that a preliminary objection may only be raised on a 'pure question of law'. In order to discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The court should be able by looking at the pleadings against the objection raised and on these alone decide on the same. The moment the court has to ascertain any fact and this would be by evidence then it ceases being a pure point of law."

17. Similarly, in Mukisa Biscuit Manufacturing Co Limited v West End Distributor Limited [1960] EA 696 the court expressed itself, thus:

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Sir Charles Newbold P added;

"A preliminary objection is in the nature of what used to be a demur. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion."



18. Section 90 of the *Employment Act*, 2007, set in with two notable impacts. First, it ousted the applicability of section 4[1] of the *Limitation of Actions Act* in causes of action flowing from employment contracts and/or the Act itself. Second, it shortened the time within which suits based on the causes of action could be filed. Ordinarily, under the *Limitation of Actions Act*, they could be filed within six years. The time was reduced to three years under the above-stated section.
19. It is pertinent to note that the section set out a special class of causes of action, to which it applied differently: continuous injury or damage.
20. I have carefully considered the pleadings by the parties, and their submissions, it is my view, that the Claimant's case is presented as a continuous injury claim, a character that the Respondent asserts the claim doesn't possess. In *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Court of Appeal attempted to define the phrase "continuing injury that": -
36. Locally, there appears to be a paucity of court decisions defining the phrase "continuing injury". The *Employment Act* doesn't 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".
37. 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 continuing injury. "Recurring /successive wrongs" are those which occur periodically, each wrong giving rise to distinct separate causes of action. The Supreme Court of India in *Balakrishna S.P Waghmare v Shree Dhymeshwar Maharaj Sansthan* AIR 1959 SC 798 explained the concept of continuing in the context of their Indian Limitation Act as follows:
- "It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury."
38. Also relevant is *M. R. Gupta v Union of India*, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of "continuing wrong" and "recurring wrongs" and reversed the decision. It held:
- "The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery



of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation; the application cannot be treated as time barred.....In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition..... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years."

39. Also, the Supreme Court of India in *M. Siddiq v Suresh Das* (2020) 1 SCC 1 observed:

343. "... A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulate a breach of an obligation imposed on an individual, whether positive or negative, to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulate a breach of a continuing duty or a breach of an obligation which is of a continuing nature. [...] Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a continuing wrong. For instance, when the wrong is complete as a result of the act or omission which is complained of, no continuing wrong arises even though the effect or damage that is sustained may endure in the future. What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation."

40. The employment relationship is the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. It has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law. The existence of an employment relationship is the condition that determines the application of the labour law provisions. It is the key point of reference for determining the nature and extent of employers' rights and obligations towards their workers.



41. 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."
21. To determine whether or not the Claimant's claim falls under the category of "continuous injury claims", will require taking evidence from the parties and interrogation of facts. The question cannot be disposed of through the preliminary objection, therefore.
22. The Respondent submitted that the sums sought by the Claimant are incentive allowances that could be awarded from time to time depending on his performance, and therefore, the alleged non-payment of the same cannot properly fit in the definition of a continuing injury. This is a pivotal point for determination. However, it can only and justly be determined by considering the evidence by the parties.
23. The date on which the cause of action arose is heavily contested. The Court cannot determine this based on a Preliminary Objection as it has to hear the parties and consider evidence to determine when exactly the cause of action arose and whether or not the suit is time-barred.
24. In the upshot, I decline to uphold the preliminary objection.

**READ SIGNED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**OCHARO KEBIRA**

**JUDGE.**

In the Presence of: -

Ms. Bosire for the Respondent.

Mr. Masiga for the Claimant.

