



**Mbaja v County Government of Migori & another (Cause E041 of 2023) [2025] KEELRC 1194 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1194 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E041 OF 2023**

**JK GAKERI, J  
APRIL 30, 2025**

**BETWEEN**

**SYMON AYORO MBAJA ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF MIGORI ..... 1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The claimants commenced the instant suit on 19<sup>th</sup> June, 2023 alleging that they were employees of the respondent for periods between 4 - 14 years as casual workers and drawing salaries at the end of each month.
2. The claimant's case is that they did not fit within the ambit of the term casual workers and were constructively dismissed when their names were omitted from a list published by the respondent.
3. The claimants pray for a declaration that the termination of their employment on 15<sup>th</sup> June, 2023 violated their constitutional right and was wrongful, unfair and unlawful, reinstatement and an order to compel the employer to engage them on permanent terms.
4. By a Notice of Preliminary Objection dated 10<sup>th</sup> July, 2023 the respondent contends that the applicants have not exhausted the process for resolving their complaints under Section 87(1) of the [Employment Act](#) and the action and proceedings in this matter are time barred under Section 90 of the [Employment Act](#).
5. From the record, it is unclear to the court why the respondent took no steps to prosecute the Preliminary Objection, having been filed earlier on.



## 1<sup>st</sup> and 2<sup>nd</sup> Respondent's Submissions

6. Counsel submitted that the affidavits sworn by the claimants revealed that the claimants served under fixed term contracts of service which expired variously in the years 2013, 2014 and 2020 without renewal and none has been in employment and their claims are thus barred by dint of Section 90 of the *Employment Act*.

That those whose contracts expired in 2013 had taken 10 years to sue.

7. Counsel submitted that the action by the claimants is statute barred and the court had no jurisdiction to hear and determine the suit as held in *Nick Gitbinji Ndichu v Kiambu County Assembly & Another* [2014] eKLR.

8. The respondents did not submit on the objection on exhaustion under Section 87(1) of the *Employment Act*.

9. The claimants neither filed submissions nor appear for the mention to confirm compliance for purposes of hearing or confirmation of filing of submissions on 27<sup>th</sup> March, 2025.

10. As to what constitutes a Preliminary Objection, the court is guided by the sentiments of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] EA 696 where Law JA stated as follows:

“... A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of the 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 plead of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...”

Similarly, Sir Charles Newbold P. stated:

“A Preliminary Objection is in the nature of what used to be a demurrer. 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 the exercise of judicial discretion”.

11. (See also *Hassan Ali Jobo & Another V Suleiman Said Shabal & 2 Others* [2014] eKLR, *Hassan Nyanje Charo V Khatib Mwashetani & 3 Others* [2014] eKLR and *Nitin Properties Ltd V Singh Kalsi and Another* [1995] eKLR).

12. Since the respondent's Notice of Preliminary Objection raises the issue of limitation of actions under Section 89 of the *Employment Act* 2007, which is a jurisdictional issue, and the same has not been objected to, the court is satisfied that the respondents have demonstrated that they have a competent Preliminary Objection.

13. The ground of exhaustion under Section 87(1) of the *Employment Act* was not argued out and it is unclear why the respondent's abandoned it.

14. The pith and substance of the respondent's objection is that the claimants were employed by the respondent under fixed term contracts of service which expired and lapsed long before the suit was instituted.



15. The respondent's statement of response dated 16<sup>th</sup> July, 2023 sets out the employment duration of 18 out of 29 claimants identified by the statement of claim but still maintains that the suit is statute barred.
16. By default or design, the claimants omitted their employment details from the statement of claim dated 19<sup>th</sup> June, 2023 other than alleging that they worked for between 4 and 14 years.
17. The allegations made by the respondents about the employment status of the claimants is largely an evidential matter which can only be reconciled after hearing both sides and making a determination.
18. The documents filed in support of the case are generally lacking in consistency and possibly some of the 29 claimants did not file their documents.
19. It is trite law that a Preliminary Objection ought not to be raised where facts have to be ascertained.
20. The respondents argument that their factual representation is the correct one cannot be ascertained at this stage and cannot constitute the foundation of the Preliminary Objection.
21. Regrettably, the claimants have not revealed all the facts they intend to rely on in the case, which would appear to imply a contestation of facts.
22. In *Aviation and allied Workers Union Kenya V Kenya Airways Ltd and 3 Others* [2015] eKLR the Supreme Court stated as follows:

“ Thus, a Preliminary Objection may only be raised on a pure question of law. To discern such point of law the court has to be satisfied that there is no proper contest as to the facts”.
23. The Court is equally guided by the sentiments of the Court in *I.E.B.C V Jane Cheperenger & 2 Others* [2015] eKLR and *Eunice Karims Kibunja V Mwingi M'Ringera Kibunja* [1966] eKLR for the proposition that a litigant ought not to use a Preliminary Objection as a sword for winning a case which ought to be determined on merits.
24. Finally, it is trite law that striking out a pleading or a suit is a draconian step and ought not to be resorted to otherwise than in plain instances.
25. (See the *Co-operative Merchant Bank Ltd V George Fredrick Wekesa* Civil Appeal No. 54 of 1999, *Nazziwa V Serwaniko & Another* [1972] EA 246, *Wedlock V Moloney* [1965] IWL 1238, *Geminia Insurance Co. Ltd V Kennedy Ottieno Onyango* [2005] eKLR, *DT Dobie Co. Ltd V Muchina* [1982] KLR D T, and *Elijah Sikona & Another V Mara Conservancy & 5 Others* [2013] eKLR among others).
26. The court is further guided by the sentiments of the Court of Appeal in *Yaya Towers Ltd V Trade Bank Ltd (In liquidation)* 2000 eKLR thus:

“ ...A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiffs claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial”.
27. The upshot of the foregoing is that the respondent's Notice of Preliminary Objection dated 10<sup>th</sup> July, 2023 lacks merit and it is accordingly dismissed with no order Orders as to costs.

The matter be fixed for hearing on priority basis.

Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

**DRAFT**

