



**Opito v Kenya Ports Authority (Employment and Labour Relations Cause
E046 of 2024) [2025] KEELRC 1764 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1764 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E046 OF 2024**

**K OCHARO, J
APRIL 30, 2025**

BETWEEN

EDWARD OPITO CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

RULING

1. This ruling is in respect of a preliminary objection raised herein by the Respondent through a notice dated 22nd July 2024 against the entire of the Claimant's claim.
2. Through a Memorandum of claim dated 5th June 2024, the Claimant sued the Respondent seeking the following reliefs:
 - a. A declaration and an order that the Respondent's action of Demotion /Reduction in Rank from Grade HE. 2 to Grade HM.1 meted out against the Claimant on 2nd October was unfair, discriminatory, null and void.
 - b. A declaration and order that the Respondent's letter of Demotion Ref. HR/7/4/8819/CON dated 5th October 2020 addressed to the Claimant be withdrawn and expunged from the Claimant's file records, his correct grade and rank be reinstated and file be updated accordingly.
 - c. Payment of general damages to the Claimant equivalent to twelve [12] months' salary based on his last gross monthly salary of KShs. 655,479 amounting to KShs. 7, 865, 748.
 - d. Payment of special damages for infringement of the Claimant's constitutional right to equality and freedom from discrimination, right to fair labour practices, right to fair trial, right to fair administrative action, for reputational damage and injury to his self -esteem and loss of career prospects and income due to adverse records left on his personal file equivalent to twelve [12]



months' salary based on his last gross monthly salary of Kshs. 655,479 amounting to KShs. 7,865,748.

- e. Issue the Claimant with a new certificate of service depicting his correct grade and rank on retirement as Head of Container Operations Grade HE.2
 - f. Costs of the suit.
3. The Respondent resists the claim through a Response to the Memorandum of Claim, dated 22nd July 2024, which was later amended on 5th August 2024, denying the Claimant's claim in its entirety, inclusive of the reliefs sought.
 4. Owing to the matters raised in the preliminary objection, it is important to briefly set out the Claimant's case which in my is straight forward and not complex.
 5. The Claimant contends that at all material times relevant to this suit, he was an employee of the Respondent for a period of thirty nine and half years having been first employed as a Junior Clerk Grade PA 08 in Operations Department in 1982 and thereafter rising through the ranks on merit to the position of Head of Container Operations Grade HE.2 which role he held until 2nd October 2020 when the Respondent unfairly demoted him and reduced his rank to Grade HM.1 with only seven[7] remaining to his retirement.
 6. The Respondent's decision to demote him and of reduction of his rank was communicated through a letter reference No. HR/ 7/ 88199/CON dated 5th October 2020. His rank was reduced from Grade HE.2 to Grade HM. 1, without any lawful justification or valid reason.
 7. Leading to the Respondent's stated decision, he had been served with a show cause letter dated 26th March 2020 in which he was charged with allegations of incurring expenditure without due approval and budgetary provisions for 2019/2020. He responded to the letter, giving an elaborate and factual explanation of each accusation. On 29th July 2020, he was given an opportunity to orally defend himself before the Human Resources Committee of the Respondent.
 8. The manner in which the Respondent treated him, handled and concluded his case amounted to differential treatment and discrimination in employment, in contravention of Section 5[3], [7] and [8] [c] of the [Employment Act](#).

The Preliminary Objection

9. The Respondent's objection is based on the following grounds;
 - a. The Employment and Labour Relations Court doesn't have jurisdiction to hear and determine the cause herein as the same is time-barred by dint of section 89 of the [Employment Act](#) Cap 226.
 - b. The Claimant, who is retired, is not an employee of the respondent within the intent and purposes of the [Employment Act](#) 2007.
 - c. The matters raised in the memorandum of claim herein do not fall within the meaning of a dispute relating to employment and labour relations and for connected purposes within the meaning and intent of the Industrial Court Act Number 20 of 2011.
 - d. The Memorandum of claim herein is bad in law, mischievous, vexatious, frivolous and otherwise an abuse of the Court process.



- e. The Claimant cannot challenge his lawful demotion after retirement and after unreasonable and/or inordinate delay.

Analysis and Determination

10. What constitutes a properly taken preliminary objection was elaborately set out in the celebrated decision in *Mukisa Biscuit Manufacturing Company Limited v- West End Distributors Limited* [1969] EA at 696, thus;

“A preliminary objection consists of a 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 on 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.”

11. As correctly submitted by Counsel for the Respondent, preliminary objections serve two pivotal purposes: Firstly, they protect the party objecting from unnecessary expenditure of time and resources. And secondly, it aids in saving judicial time.

12. In *Independent Electoral & Boundaries Commission v – Jane Cheperenger & Two others* [2015] eKLR, the Supreme Court stated;

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection-against profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on merits.”

13. With the foregoing in mind, I now turn to consider each of the grounds forming the basis for the preliminary objection. Counsel for the Respondent submits that the Claim herein is time-barred, having been filed out of time. The cause of action arose on 5th October 2020, and thus the three years for purposes of section 89 of the *Employment Act* lapsed on 5th October 2023. Yet, the suit herein was filed in June 2024.

14. The Claimant’s Counsel submits that the Respondent’s submissions are misleading, as they ignore the fact that, at the time of retirement, the Claimant’s appeal against the decision of the Respondent to demote him and reduce his rank was still pending resolution pursuant to the internal mechanisms of the Respondent. As such, for purposes of section 89 of the *Employment Act*, the cause of action would be taken to have arisen on the date of determination of the appeal, or his retirement.

15. It is further submitted that owing to the diametrically opposite positions taken by the parties on this aspect, and I agree, this point will require an interrogation of facts before a decision is rendered on it, making it not a fit point to be decided on a preliminary objection.

16. The Respondent’s Counsel argues that since the Claimant is retired from the employment of the Respondent, he is not an employee for purposes of the *Employment and Labour Relations Court*



Act, to be subject to the jurisdiction of this Court. This point offers this Court an opportunity to make a statement. Time and again, this Court has seen litigants and Advocates alike perceive the meaning of employee too narrowly for the purposes of proceedings before the Employment and Labour Relations Court. This is usually occasioned by a deliberate or otherwise search for the meaning, only by considering one section of a statute as the Respondent's Counsel has done herein, instead of garnering meaning from the various provisions of the different statutes that speak to matters of employment and labour relations.

17. A keen look at the provisions of Section 5 of the Employment Act, for example, and even borrowing jurisprudence from jurisdictions like South Africa will support the position taken by this Court.
18. In my view, an employee for proceedings before this court can be a past, present or prospective employee. It matters not that the employee exited service by retirement. What matters most is whether the cause of action, the basis of his or her claim, arose during his or her service of employment and is not time-barred or barred in any manner by operation of the law.
19. It is further argued that the matters raised by the Claimant in his pleadings are constitutional matters, which ought to be addressed by a Constitutional Court. I am unpersuaded by this argument for two reasons: firstly, it is clear that the argument ignores the doctrine of constitutional avoidance and its effect on the Claimant's claim if he engaged in constitutional litigation. Secondly, it lacks appreciation that it is now trite that the Employment and Labour Relations Court has jurisdiction to entertain and resolve disputes related to alleged violations of constitutional rights, as long as the alleged violated rights are related to employment and labour relations. The controversy for resolution can be presented either through a statement of claim or a petition, depending on the circumstances of each case.
20. By reason of the premises, I find the preliminary objection without merit. It is hereby dismissed.
21. Orders accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY IN MALINDI THIS 30TH DAY OF APRIL, 2025.

OCHARO KEBIRA

JUDGE

