



**Gitatha v Teachers Service Commission (Cause E454 of 2024)
[2025] KEELRC 1073 (KLR) (4 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1073 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E454 OF 2024
CN BAARI, J
APRIL 4, 2025**

BETWEEN

SAMUEL KUNGU GITATHA CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. Before Court is the Respondent’s Notice of Preliminary Objection dated 11th Novemeber, 2024, seeking the striking out of the Claimant’s claim on the grounds 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 the alleged cause of action.
 - ii. The claim herein, being premised on causes of action arising on 1/7/2017 and 27/11/2020 is statute barred pursuant to the provisions of Section 90 of the Employment Act.
 - iii. The claim herein is statute barred pursuant to the provisions of Section 3(2) of the Public Authorities Limitation Act.
 - iv. The proceedings herein have been commenced contrary to the law.
2. The objection was canvassed through written submissions and submissions were received from both parties.

The Respondent’s Submissions

3. The Respondent submits that the Claimant was privy to a Collective Bargaining Agreement as a union member to Kenya National Union of Teachers (KNUT) that was negotiated on the 25th October 2016 and which became effective in July 2017.



4. It is the Respondent's submission that the Claimant at paragraph 12 of his claim, states that he was appointed as Head teacher with effect from 27/11/2020, and that any claim pursuant to such appointment accrued as at 27/11/2020. It submits further that a claim from such appointment, if any, ought to have been brought before court within 12 months pursuant to the employment Act, as a continuing injury or that in any event, any such claim ought to be lodged within 3 years from 27/11/2020 which lapsed on 27/11/2023.
5. The Respondent submits that a straightforward calculation, reveals that this claim was submitted beyond the three-year limitation period and/or the 12 months period for lodging a continuing injury. The Respondent placed reliance in *Njunge V Muasya (Appeal E040 of 2023) [2024] KEELRC 265 (KLR)*, where the court, addressing Section 90 of the Employment Act, held:-

“ A plain reading of the above section clearly shows that it is couched in mandatory terms. That is to say "no action shall lie 'which implies that once the three year period lapses, no civil action shall lie on a claim based on the Act or contract of employment. Further, it is important to note that an action arising out of a contract of employment is an action based on contract. Therefore under the Limitation of Actions Act which previoush governed contracts generally, including contracts of employment, no extension was permissible once the limitation period lapsed. ”
6. The Respondent submits that it is undeniable that the Court's position regarding Section 90 has become a banal principle in our jurisprudence, reinforcing its mandatory application as a jurisdictional limitation. It sought to rely in the case of *Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] eKLR* to buttress this position.
7. It is the Respondent's submission that this Court is bound by the determinations arising under Section 90, which clearly supposes that the Court cannot adjudicate a time-barred claim and must, accordingly, cease further proceedings.
8. The Respondent finally prays that the Claim be struck out with costs to the Defendant as the same is devoid of any merit.

The Claimant's Submission

9. It is the Claimant's submission that the Respondent disputes the date in which the cause of action arose, alleging that it stems from events occurring on 1st July, 2017 and 27th November, 2020. He submits further that the preliminary objection introduces a factual dispute which requires facts and documentary evidence to verify the actual date when the cause of action arose, and is therefore an abuse of the Court process.
10. The Claimant submits further that as at 11/11/2024 when the notice of preliminary objection was filed, there is no pleading on record that the suit is caught up by Section 90 of the Employment Act. That the preliminary objection therefore offends the provisions of Rule 32(3) of the Employment and Labour Relations Court (Procedure) Rules, 2024 and must therefore fail.
11. The Claimant submits that the preliminary objection as filed does not raise pure points of law and that it raises facts which have to be ascertained by the court contrary to the holding in the *Mukisa Biscuits Manufacturing case*.
12. The Claimant prays that the Preliminary Objection be dismissed with costs.



Determination

13. I have appraised the Preliminary Objection together with the parties' written submissions. The issue for determination is whether the suit herein is statute barred.
14. It is settled that a preliminary objection must consist of pure points of law and cannot be raised if facts are in dispute or need to be ascertained. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the Court opined:-

“----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 a contract giving rise to the suit to refer the dispute to arbitration”.

Furthermore, Sir Charles Newbold, P. in the same case clarified:

“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.”
15. The Claimant's case is that he was appointed to the position of Head Teacher vide a letter dated 26th October, 2021 and which took effect on 27th November, 2020. The Claimant asserts that he served in the said position until 31st August, 2022 when he officially retired.
16. He avers further that on 27th November, 2020 when he was promoted to the position of Head Teacher, he was infact supposed to have been promoted to Senior Head Teacher in accordance with the Respondent's Career Progration Guidelines, having previously served as Deputy Head Teacher for three years.
17. The Claimant's case therefore, is that he was on 27th November, 2020 placed in the wrong job group. The Claimant further contends that he was upon his promotion placed in the wrong salary category going by the salary categories under the Collective Bargaining Agreement (CBA) entered between the Respondent and the Claimant's union for the year 2017-2021.
18. A glance at the Claimant's foregoing contention, clearly shows that the Claimant's issue concerns a continuing injury which begun on his promotion in November, 2020 and continued to 31st August, 2022 when he retired.
19. Section 90 of the *Employment Act* provides thus on time limitation in employment matters:-

"Notwithstanding Section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceeding arising out of this Act or a contract of service shall be instituted unless commenced within three years after the alleged act, neglect, or default, or, in the case of ongoing injury or damage, within twelve months after cessation thereof (emphasis own)."
20. By this provision, the injury that the Claimant complains of herein, ceased on 31st August, 2022 on the Claimant's retirement. It then follows that the suit herein, ought by simple arithematic to have been lodged 12 months after the said retirement - precisely by 31st August, 2023 at the latest.



21. In the case of John Chelimo (suing as the administrator of the Estate of Josiah Kandie Chelimo (Deceased) v Africa Inland Church of Kenya Trustees & 2 others [2016] KEELRC 381 (KLR) the court had this to say on objections based on time limitation:-
“... although limitation may be raised as a preliminary objection, in my view, it can only be raised as a preliminary objection if there is no factual contention of when time started or stopped running (emphasis mine). Where there is a factual contention, then the question of fact has to be determined and the issue will go beyond the parameters of a preliminary objection.”
22. In this matter, it is not disputed that time started running on 31st August, 2022 when the Claimant retired from the service of the Respondent, being the time when the injury the Claimant suffered ceased. The claim herein is dated 13th June, 2024 and filed in court on even date, which clearly means that the claim was time barred the day after 31st August, 2023.
23. In the end, I find and hold that the Claimant’s claim dated 13th June, 2024 is statute barred, and is for striking out.
24. The claim is struck out in its entirety with no orders on costs.
25. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 4TH DAY OF APRIL, 2025.

C. N. BAARI

JUDGE

Appearance:

Ms. Makila present for the Claimant

Mr. Mulaku present for the Respondent

Ms. Esther S – C/A

