



**Mwangi v Lake Basin Development Authority (Cause E001 of 2025)
[2025] KEELRC 1382 (KLR) (12 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1382 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E001 OF 2025**

**JK GAKERI, J
MAY 12, 2025**

BETWEEN

GODFREY MAINA MWANGI CLAIMANT

AND

LAKE BASIN DEVELOPMENT AUTHORITY RESPONDENT

RULING

1. The claimant commenced the instant suit vide a Memorandum of Claim dated 7th January, 2025 claiming confirmation to the position of Chief Manager, Engineering & Technical Services of the respondent by operation of law, cumulative unpaid allowances and salary, cumulative unpaid acting allowance, damages for discrimination and certificate of service reflecting the claimant's actual roles.
2. The claimant avers that he was appointed acting Chief Manager Engineering and Technical Services on 20th January, 2010 and acted until an undisclosed date and was redeployed to the position of Deputy director, Land Housing, effective 18th October, 2022.
3. The claimant alleges that he acted for a duration of nine (9) years and 7 months, effective 20th January, 2010.
4. The respondent filed its statement of response on 18th March, 2025 stating inter alia that the claimant case was statute barred.
5. By a notice of a Notice of Preliminary Objection dated 18th March, 2025, the respondent urges that
6. This Honourable court is divested of jurisdiction to hear and determine this matter as the claim is time barred having been instituted outside the three (3) years period from the time the cause of action arose and prays for the striking out of the memorandum of claim in limine with costs.

Respondent's submissions



7. As to whether the claimant's suit against the respondent is statute barred, counsel for the respondent submitted that the claimant was appointed Acting Chief Manager Engineering and Technical Services vide letter dated 20th February, 2009, 20th January 2010 and 15th March, 2012.
8. Counsel urges that the claimant wanted the court to enforce Section 34(3) of the Public Service Commission Act which prohibits a public officer from acting for more than 6 months and further submits that Section 90 of the Employment Act provides that actions based on contracts of service must be instituted within 3 years after the cause of action accrues and the instant suit ought to have been complied with the provisions of Section 90 of the Employment Act.
9. According to the respondent the claimant was deemed appointed Chief Manager after 6 months of appointment in an acting capacity on 15th March, 2012 and should have sued from 16th September, 2012 and the claim for confirmation is statute barred since he waited until he retired.
10. Reliance was placed on the sentiments of the court in *Moturi V National Social Security Fund* [2023] KEELRC 1463(KLR) to urge that the claimants suit is statute barred.

Claimant's submissions

11. On jurisdiction of the court to entertain the claimants suit, the claimant's advocate submitted that the respondent had not cited the statute under which the Preliminary Objection arises and fails the test of a Preliminary Objection as it requires production of evidence.
12. Counsel urges that the instant suit relates to a continuing state of affairs which was not resolved during the pendency of the claimant's employment and crystalized upon his retirement in 2024 and thus fell within the 3 year rule.
13. Reliance was placed on the sentiments of the Court of Appeal in *The German School Society and another V Ohany* [2023] KECA 894 (KLR) as well as those in *Rift Valley Railways (K) Ltd V Hawkins Wagunza Musonye & another* [2016] eKLR.
14. In *Nganga V Christ the King Parish & another* [2023] KECA 1100 (KLR), the Court of Appeal stated that:

“We agree with the interpretation adopted in the decisions referenced above. Perhaps to add our understanding, a continuing wrong simply put is a wrong arising out of a continuous breach of an obligation which transcends a single completed act or omission. The obligation so breached must be one borne of law or agreement between parties and which gives rise to an actionable claim.

And this court stated in the *German School Society & another* (supra), the existence of a continuing wrong is an exception to the rules of limitations of actions hence the claimant is within their right to seek reliefs emanating from the date when the continuing wrong commenced. We therefore reject the respondents defence that the appellant did not raise these grievances with the respondents during her term of service. We find that the appellant's claim is one of a continuing injury and the claims ought to be considered dating back to the year 2000 when she was first employed by the respondents”.

15. Finally, reliance was also placed on the sentiments of the court in *Jonesmas Thoya Mukamba v Crest Security Services Ltd* [2016] KEELRC 267 (KLR), to urge that while a belated service related claim may be rejected, cases of a continuing wrong are excepted to submit that since the claimant continued working in the same circumstances the breaches complained of were a continuing wrong and the claim that the suit was statute barred was not sustainable.



Analysis and determination

16. Since the respondent's Notice of Preliminary Objection is contested, it is essential to determine whether the notice dated 18th March, 2025 raises a competent Preliminary Objection.
17. It is trite that a Preliminary Objection raises a threshold issue which the court must determine at the earliest possible instance as it has the potential to dispose of the case at that stage.
18. In determining whether the respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection, the court is guided by the sentiments of the Court of Appeal for Eastern Africa in its celebrated decision in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] EA 696 where Law JA stated:

“... 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 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”.

In the words of Sir Charles Newbold P.

“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.”

19. Finally, in *Hassan Ali Joho & another V Suleiman Said Shabhal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR, the Supreme Court stated:

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which argued as a preliminary point may dispose of the suit”.

20. Granted that an objection to the jurisdiction of the court is identified as an example of a Preliminary Objection, the court is satisfied that the respondent's Notice of Preliminary Objection dated 18th March, 2025, meets the threshold of a Preliminary Objection.
21. Similarly, a plea of limitation implicates the court's jurisdiction of the court and as aptly captured by Nyarangi JA in *Owners of Motor Vessel “Lillian s” V Caltex Oil (Kenya) Ltd* 1989 KLR 1

“Jurisdiction is everything. Without it a court has no power to make one mere step...”.

22. The foregoing notwithstanding, this case turns on whether the respondent's Preliminary Objection is sustainable or merited.
23. While the respondent submits that the claimant's suit is statute barred by dint of the 3 years limitation period under Section 89 of the *Employment Act*, the claimant's advocate contended that the claimants suit falls within the ambit of continuing injury and thus can be enforced from the date the wrong commenced as provided by the *Employment Act* and construed by the Court of Appeal in various decisions.



24. By default or design the claimant discloses neither the date of accrual of the cause of action nor cessation of the alleged continuing injury or wrong. Other than stating that he acted in the position of Chief Manager Engineering and Technical Services of the respondent for 9 years and 7 months, the claim is silent as to when the acting ended including how it was sustained for the duration it is alleged to have subsisted.
25. The respondent, on the other hand argues that the claimant's cause of action accrued on 16th September, 2012 when the six (6) months acting period pursuant to the letter dated 15th March, 2012 lapsed.
26. However, the claimant's concatenation of events is different which implies contestation of facts.
27. In the court's view, this case has a complex web of facts and allegations which ought to be disentangled before a determination is made as to whether the claimant has a cause(s) of action and perhaps when they accrued and whether they are statute barred whether continuing wrongs or not.
28. It is also worthy of note that the provisions of the *Public Service Commission Act* relied upon by the respondent to urge that the claimant was appointed to the position of Chief Manager Engineering and Technical Services by operation of law, did not exist before 26th April, 2017 and were of no consequence.
29. Needless to emphasize the fact that there is no concurrence on the facts as presented by the claimant make it necessary for the court to hear evidence by both sides and make an informed determination on the question whether the claimant's case is statute barred.
30. In arriving at the foregoing position, the court is guided by well settled principles of law that since the striking out of a suit is a drastic and draconian step and a court of law should exercise caution in invoking it.
31. In *Coast Projects V MV Shah Construction (K) Ltd* [2004] 2 KLR 118 the court expressed itself as follows:

“Striking out a pleading is to be resorted to in very clear, plain, and obvious cases. It is a summary procedure and by virtue of that it is a radical remedy and a court of law should be slow in resorting to this procedure”.
32. See also *D. T. Dobie & Company (Kenya) Ltd V Joseph Mbaria Muchina & another* [1980] eKLR where Madan JA stated inter alia:

“If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not overact by considering itself in a bind summarily to dismiss the action.

A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it...”
33. Flowing from, the foregoing, it is discernible that the claimant's suit is for sustaining for hearing and determination on merit.
34. The upshot of the foregoing is that the respondent's Notice of Preliminary Objection dated 18th March, 2025 is without merit and it is dismissed with no orders as to costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 12TH DAY OF MAY, 2025.

DR. JACOB GAKERI

JUDGE

