



**Nyangongo v CEO and Secretary Teachers Service Commission & another  
(Cause E077 of 2024) [2025] KEELRC 1271 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1271 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E077 OF 2024**

**JK GAKERI, J**

**MAY 6, 2025**

**BETWEEN**

**EVANS MORARA NYANGONGO ..... CLAIMANT**

**AND**

**THE CEO AND SECRETARY TEACHERS SERVICE COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**THE COMMISSION ON ADMINISTRATIVE JUSTICE (OFFICE OF THE  
OMBUDSMAN ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a memorandum of claim dated 20<sup>th</sup> September, 2024, the claimant sued the respondents seeking various reliefs including declaration, general damages, exemplary damages, aggravated damages, special damages and 12 months salary for constructive dismissal by the 1<sup>st</sup> respondent.
2. He also prayed for salary arrears from July 2018 to date, costs and interest.
3. The pith and substance of the claimant's case is the transfer of his services and payroll to the SDVTT and eventual withholding of salary from 2018 to date without reasonable cause which occasioned loss in terms of CBA 2021/2025 entitlements with KUPPET and KNUT, discrimination in promotion and succession transfer and baggage allowance, basic salary payable on transfer, interest on loan and default medical expenses and was not reinstated as directed by the court.
4. After filing the 1<sup>st</sup> respondent's response to the claim, counsel filed a Notice of Preliminary Objection dated 12<sup>th</sup> March, 2025 objecting to the instant suit on the grounds that: -
  1. The Honourable court lacks jurisdiction to hear and determine this matter by dint of Section 89 of the *Employment Act* as it is filed outside the limit of 3 years.
  2. The claim being premised on causes of action arising on 1<sup>st</sup> August, 2018 is statute barred.



3. The claim herein is statute barred pursuant to the provisions of Section 3(2) of the *Public Authorities Limitation Act*.
4. The claim is in breach of Section 7 of the *Civil Procedure Act*, therefore amounts to res judicata the causes of action determined in Nairobi ELRC Cause No. 85 consolidated with Nairobi ELRC Petition No. 97 of 2018 and Kisumu ELRC Petition NO. E007 of 2023 Evans Morara Nyangongo & Another V Cabinet Secretary Ministry of Education & 2 Others.
5. The claim is fatally defective having enjoined a wrong party in contravention of Article 253 of *the Constitution* of Kenya and Section 21 and 22 of the *Teachers Service Commission Act*.
6. The proceedings have been commenced contrary to the law.

### **Respondent's submissions**

5. As to whether the 1<sup>st</sup> respondent is properly enjoined in this court, the respondent's counsel submitted that she is improperly enjoined on account that the Teachers Service Commission is a creation of *the Constitution* of Kenya, a body corporate with capacity to sue or be sued in its name and its functions are both constitutional and statutory under Section 80 of the *Teachers Service Commission Act* and the 1<sup>st</sup> respondent is the Secretary/CEO of the Commission and thus its accounting officer and bears no personal liability for the commission's functions and is protected by law from any liability on matters done in good faith in the execution of powers or duties of the commission.
6. Reliance was placed on decision in Teachers Service Commission V Kenya National Union of Teachers and 3 Others [2015] eKLR as well as TSC V Wanjiru Kinya & Another [2020] eKLR and the reasoning of this court in Vincent Mariita Omao V Secretary/Chief Executive Officer, Teachers Service Commission & 2 Others [2025] KEELRC 1041 (KLR) that the 1<sup>st</sup> respondent ought not to have been enjoined in the case, to urge that the Secretary of the Commission ought not to be sued for matters including the Commission.
7. As regards res judicata, since the issue in dispute relates to Circular No. 17/2018, the same has been addressed in several cases such as
  1. Nairobi ELRC Cause No. 85 of 2018 consolidated with Nairobi ELRC Petition No. 97 of 2018.
  2. Nakuru ELRC Petition No. E021 of 2022 Evans Morara Nyangongo V TSC & 4 Others.
  3. Nakuru ELRC Petition No. E005 of 2023 Evans Morara Nyangongo V TSC and Another and
  4. Kisumu ELRC Petition No. 7 of 2023 Evans Morara Nyangongo & Another V Cabinet Secretary Ministry of Education & 2 Others.
8. Counsel urges that the instant suit is res judicata and an abuse of the court process by dint of Section 7 of the *Civil Procedure Act*.
9. Reliance was placed on the decisions in Nairobi ELRC Cause No. 85 of 2018, and all the other cases listed above which were all grounded on Circular 17/2018, sentiments of the court in Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others [2017] eKLR and Lal Chand V Radha Kishnan A IR 1977 SC 78.
10. As to whether the suit is statute barred, the respondent's counsel submitted that according to the Judiciary CTS, the instant suit was filed on 26<sup>th</sup> September, 2024 and the claimant was claiming benefits accruing from the 2017/2021 CBA between the TSC and the unions effective 1<sup>st</sup> July, 2017



and thus the action ought to have been filed within 12 months under the provisions of the Employment Act as a continuing injury and the 3 years lapsed on 30<sup>th</sup> June, 2020. Counsel, further submits that it was 6<sup>1/2</sup> since the transfer of services took place on 1<sup>st</sup> August, 2018 and the period of limitation lapsed in July 2021.

11. Reliance was placed on the decisions in *Njunge V Muasya* [2024] KEELRC 265 (KLR) on the import of Section 89 of the Employment Act as well as the sentiments of the court in *Beatrice Kahai Adagala V Postal Corporation of Kenya* [2015] eKLR, *Kenya Electrical Trades & Allied Workers Union V Kenya Power & Lighting Co. Ltd* [2015] eKLR, *Kenya Local Government Workers Union V Kangundo Town Council and Ndirangu Henkel Chemicals (EA) Ltd* [2013] eKLR, to urge that after 3 years the cause of action is unenforceable and the court loses jurisdiction to hear or determine the suit.

### **Claimant's submissions**

12. Counsel isolated two issues for determination namely; whether the Preliminary Objection is sustainable and whether the Preliminary Objection is properly filed without a proper response to the claim.
13. On the 1<sup>st</sup> issue, reliance was placed on the sentiments of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] EA 696 to submit that since the issue of res judicata requires evidence for the court to ascertain the issues before it, it is not a pure point of law.
14. On misjoinder, counsel urges that the 1<sup>st</sup> respondent's actions were beyond the provisions of the Teachers Service Commission Act, namely; withholding the claimant's entitlements and in any case misjoinder does not defeat a suit under Order I Rule 9 of the Civil Procedure Rules.
15. As regards limitation of time, counsel cited the sentiments of the Court of Appeal in *German School Society & Another V Ohany & Another* to urge that since the claimant is still an employee of the respondent and the injury is ongoing to date since the claimant did not obtain other benefits, he is entitled to sue and Section 89 of the Employment Act and Section 3(1) of the Public Authorities Limitation Act are not applicable.
16. As to whether the Preliminary Objection was properly filed, counsel cited the sentiments of an undisclosed case to urge that since there is no valid response to the claim, the Preliminary Objection is unsustainable and in any case it raises factual issues and fails.

### **Analysis and determination**

17. It requires no emphasis that once a Preliminary Objection is raised it must be determined at the earliest possible opportunity because it has the potential to have the suit dismissed at that stage.
18. Needless to belabour a Preliminary Objection raises a threshold question.
19. The issues for determination are:
  - i. Whether the respondent's Notice of Preliminary Objection dated 12<sup>th</sup> March, 2025 meets the threshold of a Preliminary Objection and  
Depending on the answer to (i) above
  - ii. Whether the Preliminary Objection is merited.
20. On the 1<sup>st</sup> issue, the claimant's counsel contended that the respondent's Notice of Preliminary Objection required evidence to ascertain coupled with the fact that there is no valid response to the claimant's claim.



21. I will address the second arm of the argument, namely; absence of a valid response to the claim.
22. To start with, it is unclear to the court what the claimant's counsel denotes by a valid response. While it is evident that the respondent took long to respond to the claim, on 28<sup>th</sup> January, 2025, the claimant's counsel sort leave to amend the memorandum of claim and was accorded 7 days and a mention slated for 19<sup>th</sup> February 2025, when none of the parties was present in court.
23. The mention on 13<sup>th</sup> March, 2025 was at the instance of the court when the respondent's counsel reported that he had filed a response and a Notice of Preliminary Objection and directions on its disposal were issued.
24. As matters stand, the 1<sup>st</sup> respondent has responded to the claim and the response to the memorandum of claim dated 12<sup>th</sup> March, 2025, is on record, the fact that it was filed after the 14 days given on 28<sup>th</sup> July, 2025 does not render it invalid.
25. More significantly, the claimant did not contest its late filing and equally failed to inform the court whether he had amended the claim and served the amended claim upon the respondents.
26. The foregoing is important because as late as 28<sup>th</sup> April, 2025, the claimant had not served the 2<sup>nd</sup> respondent, whose counsel informed that they were unaware of the case until 28<sup>th</sup> April, 2025.
27. The court finds nothing irregular about the Notice of Preliminary Objection.
28. As regards the threshold of a Preliminary Objection, it is trite law that requirements in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (Supra)* must be met.
29. According to Law JA

... 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 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”.

The foregoing sentiments were amplified by Sir Charles Newbold P.

30. In *G4S Security Services (K) Ltd V Joseph Kamau & 468 Others [2018] eKLR* the Court of Appeal stated as follows:

The test to be applied undermining whether the Preliminary Objection met the threshold as in the *Mukisa Case (Supra)* which are whether the Preliminary Objection raises a pure point of law that there is a demonstration that all facts pleaded by the other side are correct and that there are no fact that needs to be ascertained”.

31. The 1<sup>st</sup> respondent's Notice of Preliminary Objection raises the issues of limitation of actions and res judicata.
32. Whereas the issue of limitation implicates the jurisdiction of the court, doctrine of res judicata is enshrined in Section 7 of the *Civil Procedure Act* which is couched in mandatory terms, analogous to the provisions of Section 89 of the *Employment Act*. Both Objections implicate the court's jurisdiction to hear and determine the instant case and as espoused by Nyarangi JA in *Owners of Motor Vessel "Lilian S" V Caltex Oil Kenya Ltd [1989] KLR 1*



33. Jurisdiction is everything. Without it a court has no power to make one more step and must down its tools.
34. In the court's view, none of the claimant's objections to the Notice of Preliminary Objection is sustainable. This is because the court has no jurisdiction to hear or determine a statute barred suit. (See the sentiments of Law JA in the Mukisa case *Supra*).
35. Likewise, a court has no jurisdiction to entertain a suit that is *res judicata*.
36. In the end the court is satisfied that the 1<sup>st</sup> respondent's Notice of Preliminary Objection meets the threshold of a Preliminary objection.
37. As to whether the Preliminary Objection is sustainable or merited the court proceeds as follows.
38. Concerning limitations of actions, while the 1<sup>st</sup> respondent submitted that the action is barred by dint of Section 89 of the *Employment Act* on account that it is premised on the causes of action arising on 1<sup>st</sup> August, 2018, the claimant contended that since he was still an employee, the injury is still continuing.
39. It is trite law that in contracts of employment a cause of action arises when an employee is dismissed or terminated from employment.
40. In *Attorney General & Another V Andrew Maina Githinji & Another* [2016] eKLR, the Court of Appeal stated as follows:
 

... The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2<sup>nd</sup> October, 2010. They had all the facts which had been placed before them in the disciplinary proceedings if they felt aggrieved by that dismissal but they did not. Having found that the cause of action arose on 2<sup>nd</sup> February, 2010 and the claim was filed on 16<sup>th</sup> June, 2014 it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1<sup>st</sup> February, 2013, and I so hold".
41. The court expressed similar sentiments in *G4S Security Services (K) Ltd V Joseph Kamau & 468 others* (*Supra*). See also *Rift Valley Railways (K) Ltd V Hawkins Wagonza Musonye & Another* [2016] eKLR.
42. The pertinent question is when the claimants cause of action arose.
43. As correctly submitted by the 1<sup>st</sup> respondent's counsel, the claimant's suit is grounded on Circular 17 of 2018 dated 27<sup>th</sup> July, 2018 which according to him transferred the payroll services of 3780 teachers to the State Department of Vocational and Technical Training (SDVTT) in the Ministry of Education.
44. The claimant states that both KUPPET and KNUT successfully challenged the constitutionality of the transfer of services in Petition 97 and 85 of 2018.
45. Equally, the claimant makes reference to the decision of Baari J in *Kisumu ELRC Petition No. E007 of 2023*.
46. Needless to underscore, other cases based on the circular were also filed, heard and determined on the issue of the circular.
47. Puzzlingly, although the claimant blames Circular 17 of 2018 as the genesis of his woes of being denied entitlements under the CBA 2017 to 2021, was discriminatory in promotions on succession management awarded to his counterparts for equal work denial or transfer and baggage allowance, Kshs.123,780 and transfer or rerouted and transferred to Burch TTI in Kericho to Kisii National



- Polytechnic of Kshs.123,780, loss of monthly responsibility allowance, Kshs.10,000, loss of Kshs.518 Gusii Mwalimu Sacco shares used as collateral among other losses, including medical insurance cover of self and wife, the date of crystallization of all these losses remained that of the Circular 17 of 2018, which the Employment and Labour Relations Court found to be unconstitutional.
48. Granted that the claimant's losses and claims accrued from the date of implementation of Circular 17 of 2018 on 1<sup>st</sup> August, 2018 the provisions of Section 89 of the *Employment Act* are relevant.
  49. Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.
  50. Clearly, nothing prevented the claimant from instituting a suit within 3 years of the Circular, if he felt aggrieved by it either on 1<sup>st</sup> August, 2018 or at anytime thereafter.
  51. By simple arithmetic, the claimant's suit became statute barred on 31<sup>st</sup> July, 2021, and even assuming that the injury or damage was continuing, (which has not been pleaded), the action must be filed within 12 months of the cessation.
  52. Strangely, the instant suit was filed on 26<sup>th</sup> September, 2024, almost 6 years later.
  53. Flowing from the foregoing, the court is persuaded that the claimant's case herein is statute barred by dint of Section 89 of the *Employment Act*.
  54. Concerning res judicata, while the respondent's counsel submitted that the suit was res judicata four (4) others cases preceding it by dint of Section 7 of the *Civil Procedure Act* and numerous case law on the issue, counsel for the claimant did not isolate it as an issue for determination but submitted that the issue required production of evidence in Order to ascertain whether the issues on the previous cases and the instant suit are similar.
  55. The 1<sup>st</sup> respondent's counsel submitted that the issues raised by the claimant were litigated in Nairobi ELRC Cause No. 85 of 2018 consolidated with Nairobi ELRC Petition No. 97 of 2018.
  56. In that case, the court declared the transfer of teachers to SDVTT unconstitutional and quashed the same on 1<sup>st</sup> March, 2019.
  57. Several other suits have been filed in court on the same issue or in the original decision of Abuodha J.
  58. For instance, in *Rose Nyambura Chege & 4 Others V Teachers Service Commission and 3 Others* [2021] eKLR the Petitioners sought Orders in furtherance of the decision by Abuodha J. Rika J held that the court was functus officio and dismissed the Application dated 8<sup>th</sup> June, 2021 on the premises that the matters being litigated had been disposed and execution of the judgment stayed and the matter appealed against.
  59. In *Evans Morara Nyangongo V Teachers Service Commission & 3 others* [2023] KEELRC 1820 (KLR) Hon. Justice Wasilwa J held that the suit before her was res judicata as it related to Circular 17 of 2018 and dismissed the application for review for want of merit.
  60. Similarly, in Nairobi ELRC Cause No. 521 of 2019 on union membership, *Kepher Ogwi Langi V KUPPET & 3 Others* [2021] eKLR, Maureen Onyango J found the consent order dated 15<sup>th</sup> July, 2019 unlawful, null and void and set it aside. An appeal is pending before the Court of Appeal and stay of execution in force. Vide ruling dated 14<sup>th</sup> June, 2024 in Civil Application No. E248 of 2022.



61. In Kisumu ELRC Petition No. 7 of 2022, Nyangongo & another Cabinet Secretary Ministry of Education & Others [2024] KEELRC 836 (KLR), the Petitioners were challenging Circular 17 of 2018 and sought orders for declaration that they were employees of the TSC not Public Service Commission (PSC), the transfer contravened their constitutional rights and an unfair constructive dismissal, special, exemplary and aggravated damages and certificates of service.
62. The court held that the issue of the circular had been determined by a court of concurrent jurisdiction and an appeal filed in Court of Appeal and the issue was res judicata.
63. The court declared the transfer of the Petitioners to the PSC illegal and unconstitutional, directed reinstatement of the Petitioners with immediate effect and costs be borne by the respondents jointly and severally.
64. Section 7 of the *Civil Procedure Act* states: -
- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
65. In John Florence Maritime Services Ltd & another V Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR the Supreme Court stated as follows:
66. We restate the elements that must be proved before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked, in a civil matter, the following elements must be demonstrated:
- a. There is a former judgment or Order which was final.
  - b. The Judgment or Order was rendered by a court having jurisdiction over the subject matter and the parties; and
  - c. There must be between the first and second action identical parties subject matter and cause of action.
67. Whereas Cause No. 85 of 2018 and Petition No. 97 of 2018 centred on the Circular by the TSC the Petition No. 7 of 2022 was on the Circular as well as damages and compensation and certificate of service.
68. Yet the transferred employees were still in employment pending the hearing and determination of the appeal as is the claimant herein.
69. The upshot of the foregoing is that the court is satisfied that the instant suit is res judicata the decisions in suits heard and determined before it in particular, Nairobi ELRC Cause No. 85 of 2018 as consolidated with Nairobi ELRC Petition No. 97 of 2018, Abuodha J., Nakuru ELRC Petition No. E021 of 2022 Wasilwa J., Kisumu ELRC Petition No. 7 of 2023 and the Ruling by Rika J. in Rose Nyambura & 4 others V TSC & 3 Others (Supra).
- All these decisions were made by courts of concurrent jurisdiction.
70. Finally, as regards the enjoinder of the 1<sup>st</sup> respondent in this suit, the court is in agreement with the submissions of the 1<sup>st</sup> respondent that the 1<sup>st</sup> respondent is not the Teachers Service Commission, which is a duly established and constituted Constitutional Commission with Commissioners who are



responsible for its operations and management and who make decisions on its behalf. The Secretary of the Commission is the head of the secretariat and the Accounting Officer and is not personally liable for the decisions, acts or omissions of the commission unless the conduct of the Secretary is ultra vires the powers and functions of the commission or has acted mala fide.

71. In *Vincent Mariita Omao V Secretary/Chief Executive Officer, Teachers Service Commission & 2 Others (Supra)* this court expressed the view that the 1<sup>st</sup> respondent there in and herein, ought not to have been enjoined in the suit as the Secretary to the Commission is not personally liable for its acts, omissions or default and struck out the suit against the Secretary to the Commission and the same would have applied to this court if the suit would have survived the 1<sup>st</sup> respondents Notice of Preliminary Objection.
72. In the end, the court is satisfied that the 1<sup>st</sup> respondent's Notice of Preliminary Objection dated 12<sup>th</sup> March, 2025 is merited and the claimants suit herein is struck out for want of jurisdiction and being res judicata previous decisions of this court.

Parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 6<sup>TH</sup> DAY OF MAY, 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.

