



Macharia v Nairobi City Water and Sewerage Company (Cause E908 of 2024) [2025] KEELRC 2274 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELRC 2274 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E908 OF 2024**

**L NDOLO, J
JULY 31, 2025**

BETWEEN

LUCY NJAMBI MACHARIA CLAIMANT

AND

NAIROBI CITY WATER AND SEWERAGE COMPANY RESPONDENT

RULING

1. This ruling determines the Respondent's Preliminary Objection, raised by notice dated 17th March 2025.
2. The substance of the objection is that this Court lacks jurisdiction to hear and determine the following claims, as the cause of action is statutorily time barred, by virtue of the provisions of Section 90 (now 89) of the *Employment Act*:
 - a. Salary discrimination and interest as pleaded in paragraphs 5 and 6 of the Statement of Claim;
 - b. Masters appreciation and interest as pleaded in paragraph 7 of the Statement of Claim;
 - c. House allowance and interest as pleaded in paragraph 8 of the Statement of Claim;
 - d. Interest on salary arrears as pleaded in paragraphs 9 and 17 of the Statement of Claim;
 - e. Compensation for acting for five (5) years as pleaded in paragraphs 10 and 19 of the Statement of Claim.
3. The Respondent further states that the Court lacks jurisdiction to hear and determine the claim for refund of alleged excess pension contributions to the Local Authorities Pension Fund (LAPTRUST) and interest thereof as pleaded in paragraphs 14 and 15 of the Statement of Claim.



4. The objection was urged by way of written submissions. In its submissions dated 29th April 2025, the Respondent adopts the following definition of a preliminary objection set out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696:

“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 the contract giving rise to the suit to refer the dispute to arbitration.” (Law JA)

“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.” (Sir Charles Newbold, P)

5. The Respondent’s objection is based on Section 89 (previously Section 90) of the *Employment Act*, which provides as follows:

89. 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.

6. The Respondent relies on the Court of Appeal decision in *The German School Society & another v Ohany & another* [2023] KECA 894 where a distinction in the limitation period applicable to continuing injury claims was made in the following terms:

“Undeniably the...provision in peremptory terms bars civil actions or proceedings based or arising out of the *Employment Act* unless the same is commenced within three years next after the act, neglect or default complained of. However, where there is a continuing injury or damage, the action must be brought within twelve months after the cessation thereof.”

7. The Court of Appeal in *The German School v Ohany* (supra) adopted the following explanation by the Supreme Court of India in *Balakrishna S.P. Waghmare v Shree Dhyaneswar Maharaj Sansthan* AIR 1959 SC 798 as to what constitutes a continuing wrong or injury:

“It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such character that the injury caused by itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.”

8. According to the Respondent, the claims on salary discrimination, Masters appreciation, house allowance, salary arrears and acting allowance all fall within the continuing injury segment of Section 89 of the *Employment Act* and ought to have been brought within twelve months.



9. The Respondent asserts that all these claims are statute barred. In its submissions, it gives diverse dates which it considers as the respective accrual dates for the listed claims.
10. On her part however, the Claimant submits that all these claims did not crystallise until her exit from the Respondent's employment.
11. In light of the sharply divergent positions taken by the parties regarding the accrual dates of the subject claims, it seems to me that the legal issue of jurisdiction raised by the Respondent is entangled with contested matters of fact and as held by Ojwang J (as he then was) in *Oraro v Mbaja* [2005] KEHC 3182 (KLR) a legal issue that is entangled with contested facts, loses the character of a pure point of law and cannot sustain a Preliminary Objection.
12. Regarding the claim on excess pension contribution to LAPTRUST, the Respondent challenges the jurisdiction of this Court on the strength of the Supreme Court decision in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others* [2019] eKLR where it was held that disputes by pensioners are beyond the jurisdiction of this Court.
13. With tremendous respect however, the Claimant's claim in this regard relates to alleged excess deductions made by the Respondent, on account of her pension contributions. This in my view, falls within the purview of the employment relationship between the parties and is not a pension claim in any way.
14. In her written submissions dated 24th March 2025, the Claimant referred to the decision in *Susan Mang'oli v Kenya Medical Research Institute & another* [2020] eKLR where Wasilwa J held that the employer's failure to remit pension dues to the employee's pension scheme was not a dispute about pension but a breach of the employment contract.
15. Overall, I find and hold that the Respondent's objection has not met the threshold of a Preliminary Objection as defined in law.
16. The objection raised by notice dated 17th March 2025 is therefore overruled with costs in the cause.
17. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Ojienda for the Claimant

Mr. Muthee for the Respondent

