



**Baya v Attorney General & another (Cause E908 of 2023)
[2024] KEELRC 2369 (KLR) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2369 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E908 OF 2023
JK GAKERI, J
SEPTEMBER 30, 2024**

BETWEEN

PATRICK KAHINDI BAYA CLAIMANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT

RULING

1. Before the Court for determination are two Preliminary Objections by the 1st and 2nd Respondents dated 22nd May, 2024 and 19th July, 2024 respectively.
2. The 1st Respondent's Preliminary Objection is essentially that since the 2nd Respondent is a legal entity with capacity to sue and be sued in its name as it is an Independent Commission established by the Constitution of Kenya, 2010, the 1st Respondent is not a party to the suit and cause of action has been alleged against it to warrant it being a party to the suit.
3. That the powers of the 1st Respondent in representation are circumscribed by Article 156(4)(b) of the Constitution of Kenya.
4. The 1st Respondent argues that the suit as drawn is defective and bad in law and its name ought to be struck off from the suit and prays for its expunction.
5. The 2nd Respondent's Preliminary Objection is that the claim herein offends Section 3(2) of the Public Authorities Limitation Act and the Statement of Claim is scandalous, frivolous and vexatious.



Response

6. When the matter came up for mention for directions, the Court directed the 1st and 2nd Respondents to serve the respective Preliminary Objection and the Claimant to respond and for parties to file and exchange two (2) page submissions and ruling reserved for 24th September, 2024.
7. By 19th August, 2024, the Claimant had not responded to the Preliminary Objections and neither of the parties had filed submissions as directed on 23rd July, 2024.

Analysis

8. As to whether the objections meet the threshold of a Preliminary Objection, the reference point is the test enunciated by the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696* where Law JA stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and which if argued as a preliminary point will dispose of the suit. Examples are an objection to jurisdiction of the court, 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. . .”

9. Similarly, in *John Musakali V Speaker County Assembly of Bungoma & 4 others (2015) eKLR*, the Court stated as follows;

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that the facts are agreed by both sides. Once raised, the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained that would not be a suitable Preliminary Objection on a point of law.”

10. See also *Oraro V Mbaja (2005) KLR 141*.
11. Since the 1st Respondent raises the question whether it ought to be a party to the suit on the ground that the 2nd Respondent is a constitutional commission subject only to *the Constitution* and not subject to direction or control of any person or authority under Article 249(2) of *the Constitution* of Kenya, and is a body corporate with attendant powers and capacities and no claim or relief has been made or relief sought against the 1st Respondent, the court is satisfied the objection meets the threshold of a Preliminary Objection.
12. The 2nd Respondent raises the question of limitation of time under the Public Authorities of Limitation Act.
13. The court is equally persuaded that the objection meets the threshold of a Preliminary Objection.
14. Concerning the 1st Respondent, it requires no gainsaying that the 1st Respondent is the principal legal adviser to the Government and his representation function is restricted to the national government in Court or in any other legal proceedings to which the national government is a party other than criminal proceedings.
15. Relatedly, the National Police Service Commission is a body corporate whose powers and functions are defined by law and it follows that the Attorney General cannot be sued on its behalf.



16. More significantly, and as adverted to elsewhere in this ruling, the Claimant has not made any claim against the 1st Respondent or prayed for any relief against it.
 17. In the upshot, the Claimant's suit against the 1st Respondent lacks any legal basis and it is accordingly struck out with costs.
 18. On limitation of time, Section 3 of the [Public Authorities Limitation Act](#) provides;
 1. . . .
 2. . . . No proceedings founded on contract shall be brought against the Government or a Local authority after the end of three years from the date on which the cause of action accrued.
 19. Documents provided by the Claimant reveal that he was interdicted from duty vide letter dated 24th August, 2015 effective 21st August, 2015 on account of a criminal case where he was charged with two counts of;
 1. Conspiracy to defeat justice under Section 117(a) of the Penal Code.
 2. Neglect of official duty under Section 128A(c) of the Penal Code.
 20. The interdiction was to subsist till determination of the criminal case.
 21. According to the Claimant, he was acquitted on 4th May, 2018 but remained on interdiction until retirement.
 22. Based on the 2nd Respondent's letter dated 19th January, 2021, it is unclear as to when the Claimant was supposed to retire, a fact to be determined at the hearing.
 23. As a consequence, it is unclear as to when time started running and whether it had run to the full by November 14, 2023 when the instant suit was filed.
 24. In the upshot, the 2nd Respondent's Notice of Preliminary Objection is unsustainable and is dismissed and the Claimant's suit against the 1st Respondent is struck out.
 25. Parties shall comply with pre-trial procedures.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2024

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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI

JUDGE

