



Kisa & another v National Police Service Commission & 3 others (Cause E931 of 2023) [2024] KEELRC 2611 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2611 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E931 OF 2023
SC RUTTO, J
OCTOBER 25, 2024**

BETWEEN

SILAS KIMTAI KISA 1ST CLAIMANT

KENNEDY KATEMBU KISO 2ND CLAIMANT

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

INSPECTOR GENERAL NATIONAL POLICE SERVICE 2ND RESPONDENT

DEPUTY INSPECTOR GENERAL ADMINISTRATION POLICE SERVICE 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. What is before me for determination is the 2nd, 3rd and 4th Respondents' Notice of Preliminary Objection dated July 1, 2024, which is premised on the following grounds: -
 1. That the instant Claim is time-barred by dint of Section 3 (2) of the [Public Authorities Limitation Act](#). Cap 39 as it offends the mandatory provisions of the above section.
 2. That the 1st Claimant herein was dismissed from the service on April 27, 2020 and he filed the instant Claim on 15th November 2023 roughly three (3) years and seven (7) months after the alleged cause of action.
 3. That the 2nd Claimant herein was dismissed from the service on 14th June, 2012 and he filed the instant Claim on the 15th November, 2023 roughly eleven (11) years after the alleged cause of action.



4. That this Honourable Court lacks the requisite jurisdiction to hear and determine this Claim in light of the provisions of the law mentioned above.
 5. That this Claim neither discloses any reasonable cause of action against the 2nd, 3rd and 4th Respondents nor has any merit. It is thus an abuse of the due process and precious time of this Honourable Court.
 6. That the Claim is incompetent and ought to be struck out with costs.
2. Upon being served with the Objection, the Claimants responded by filing Grounds of Opposition dated 2nd July 2024, in which they contend inter alia that:
1. The Notice of Preliminary Objection does not pass muster as per the edicts of the locus classicus of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited (1969) Ea. 696*;
 2. In its entirety, the Preliminary Objection is not based on the assumption that all facts pleaded by the Respondents are correct hence falling short of the test as held in the *Mukisa Biscuit case (supra)*
 3. This Honourable Court has the requisite jurisdiction to hear and determine this dispute.

Submissions

3. The Preliminary Objection was canvassed by way of written submissions. On the 2nd, 3rd and 4th Respondents' part, it was submitted that the instant suit is time barred by dint of Section 3(2) of the Public Authorities Limitations Act as the Claimants did not adhere to the statutory timelines provided to institute their claim. To this end, the said Respondents contended that this is the point of law to which their Notice of Preliminary Objection was grounded.
4. Placing reliance on the case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) eKLR*, the 2nd, 3rd and 4th Respondents further submitted that this Honourable Court lacks jurisdiction to entertain the Claim herein.
5. The 1st Respondent filed written submissions in support of the Preliminary Objection. According to the 1st Respondent, the cause of action arose on 27th April 2020 for the 1st Claimant and 14th June 2012 for the 2nd Claimant when they were dismissed. That as such, the claim challenging their dismissal ought to have been filed within three years as prescribed by Section 3(2) of the Public Authorities Limitations Act. To this end, the Court was invited to consider the case of *Daniel Kago Gachanja vs Inspector General & 2 others (2020) Eklr*.
6. The 1st Respondent further submitted that the Claimants had violated clear statutory provisions that set limitation of time which imposes clear conditions to be met before the Court can grant specific remedies.
7. It was further submitted by the 1st Respondent that the lapse in time rendered the Court without jurisdiction to adjudicate over the matter and without jurisdiction, the Court has no option but to down its tools. On this score, the case of *Bosire Ongero vs Royal Media Services (2015) eKLR* and *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) eKLR* was cited.
8. On the Claimants' part, it was submitted that they have never been dismissed and or removed from active police service. It was their position that time does not start running for purposes of computation



of limitation of time before the dismissal/ removal is communicated to the employee and receipt of the notice of termination or letter of summary dismissal.

9. According to the Claimants, the issue of whether the alleged dismissal/removal from active police service was communicated to them remains a hotly contested issue that ought to be determined by this court upon hearing the case on merit. In support of the Claimants' submissions, reference was made to the cases of Republic vs Eldoret Water & Sanitation Company Limited Ex Parte Booker Onyango (2007) eKLR and Ezekiel Nyangowa okemwa vs Kenya Marine & Fisheries Research Institute (2016) eKLR.

Analysis and Determination

10. Perhaps I should first start by describing what a proper Preliminary Objection is. The law is now settled on this issue hence I will not reinvent the wheel. In the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696, a Preliminary Objection was described in the following manner: -

“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”.

11. As per Sir Charles Nebbold, JA: -

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

12. Similarly, the Court in the case of Aytar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, determined that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

13. Indeed, it has been decided times without number that a Preliminary Objection should be based on a pure point of law and should not be marred with issues of fact.

14. As to the distinction between a question of law and fact, Mativo J (as he then was) expressed himself as follows in the case of J N & 5 others vs Board of Management, St. G School Nairobi & another [2017] eKLR: -

“14. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.

15. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from



those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations."

15. Fundamentally, for a Preliminary Objection to pass muster, the following elements ought to be satisfied: -
 - a. It should raise a pure point of law;
 - b. It is argued on the assumption that all the facts pleaded by the other side are correct; and
 - c. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
16. In the case herein, the Claimants have pleaded in their Memorandum of Claim that they were both appointed as administration police constables to the National Police Force on or about 8th November 1999. That on or about 23rd April 2008, they were accused of murder contrary to Section 203 as read with Section 204 of the Penal Code. Subsequently, they were taken through criminal proceedings in Bungoma High Court and on 14th November 2011, they were found guilty of the offence of murder and were convicted. They were each sentenced to 15 years imprisonment. Consequently, they served their respective jail terms at Kibos Main Prison and Eldoret Prison up to 14th November 2021.
17. It was the Claimants' case that while serving their respective jail terms, they were neither interdicted nor dismissed nor terminated and/or removed from active police service in accordance with the Police Force Standing Orders (now repealed) or the National Police Service. To date, they have never received any communication from the Respondents on their employment status.
18. Opposing the Memorandum of Claim, the 1st Respondent averred that the 1st Claimant was dismissed from the police force on 27th April 2020 while he was serving his 15-year jail term sentence while the 2nd Claimant's dismissal was effected vide a letter dated 14th June 2012.
19. In their response, the 2nd and 3rd Respondents averred that following the conviction of the Claimants, a decision was reached that they be dismissed from service and be deleted from the payroll.
20. In light of the foregoing rival positions, it is evident that the question as to whether and when the Claimants were dismissed from the police service is a disputed issue that cannot be determined by merely looking at the pleadings on record. As such, the facts cannot be said to be settled as the true position on the issue regarding the Claimants' termination can only be ascertained upon evaluation of the facts and evidence on record. To this extent, the Preliminary Objection by the 2nd, 3rd and 4th Respondents does not raise a pure point of law.
21. It is also notable that the 2nd and 3rd Respondents have annexed a copy of a letter of dismissal dated 27th April 2020 allegedly issued to the 1st Claimant. No doubt, the Court will be called upon to interrogate the said letter in order to determine the issue in controversy.
22. Therefore, the instant Preliminary Objection does not raise a pure point of law since the Court will be called to ascertain whether indeed, the Claimants were dismissed from the Police Service and if so, when such dismissal was effected and more importantly, how the said dismissal was communicated to them. Clearly, these issues will be drawn from the evidence to be adduced during the trial.
23. Needless to say, the Preliminary Objection raised by the Respondents has not met the legal threshold of a Preliminary Objection.



24. In view of the reasons set out above, the Preliminary Objection dated July 1, 2024, raised by the 2nd, 3rd and 4th Respondents is overruled with an order that costs will be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF OCTOBER 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimants No appearance

For the 1st Respondent No appearance

For the 2nd, 3rd and 4th Respondents Ms. Oyugi

Court assistant Millicent Kibet

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 had 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.

STELLA RUTTO

JUDGE

