



**Kitsapha v Teachers Service Commisisons & another (Cause  
71B of 2022) [2023] KEELRC 804 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 804 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 71B OF 2022  
M MBARÚ, J  
MARCH 28, 2023**

**BETWEEN**

**CHARLES WILLIAM KITSAPHA ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISIONS ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PENSIONS ..... 2<sup>ND</sup> RESPONDENT**

*(Formerly Mombasa CMEELRC No E048 of 2021)*

**RULING**

1. The ruling herein relates to preliminary objections filed by the respondents through notice dated March 12, 2021 on the grounds;

The 1<sup>st</sup> respondent will raise a preliminary objection on a point of law at the hearing of the claimant's statement of claim dated January 25, 2021 on the following grounds;

- a) This court lacks jurisdiction under the law to entertain, interrogate and determine the claim as the same is time barred, the substratum thereof having been filed outside the provided time limit.
- b) The claimant herein is filed out of time allowed under section 90 of the *Employment Act*. Hence the court lacks jurisdiction to entertain the matter in its current form.
- c) The petition is bad in law, frivolous, vexatious and amounts to gross abuse of the court process.

2. The respondents submitted that the claim herein is time barred and the court lacks jurisdiction in terms of section 90 of the *Employment Act*, 2007 (the Act) and should be dismissed with costs.



3. The statement of claim was filed on January 25, 2021 and the claimant was seeking for the computation of accrued pension benefits from the date of retirement upon termination of employment on June 17, 2016 after a disciplinary hearing. It is since 5 years and the claim offends the provisions of section 90 of the Act under which provisions, the claim herein ought to have been filed within 3 years as held in Cause No 447 of 2017 David Muchira Mathenge v Kenya Power & Lighting Co Ltd. The claim relating to employment and payment of terminal dues is regulated under section 87(c) of the Act which regulates disputes with regard to injury of a person and which under the provisions of section 90 should be filed within 3 years from the date the employment relationship ended as held in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR.
4. To file a claim outside time denies the court the discretion to address it or to extend time to file it out of time, which application has not been made by the claimant. Without jurisdiction, the court should dismiss the claim with costs.
5. The claimant submitted that in the statement of claim filed on February 4, 2021 he is raising serious constitutional issues arising from denial of his rights and entitlement to pension dues for years worked with the respondent as a permanent and pensionable employee from the year 1975. These retirement dues should be paid as held in Henry Kamau Ngare v Teachers Service Commission & another [2016] eKLR. There is no limit within which one can make a claim with regard to deprivation of constitutional rights to one's property which has no limitation and can be addressed any time. Section 90 of the Act only addresses labour claims and not constitutional rights.
6. The claimant submitted that he was interdicted on June 10, 2015 and dismissed on April 25, 2016 over alleged defilement and which matter was pending in court and he has since been acquitted. By the time the 1<sup>st</sup> respondent made a decision to terminate his employment, the criminal case was still ongoing. Upon acquittal, the claimant applied for a review through letter dated February 28, 2018. He then filed this suit on February 4, 2021 which is within the 3 years period required under section 90 of the Act.
7. The claimant submitted that the 2<sup>nd</sup> respondent has had no problem in paying the pension dues but is only waiting for formal communication from the 1<sup>st</sup> respondent. parties had entered into a mediation where the 1<sup>st</sup> respondent agreed to pay the claimant the Widows and Children Pension Claim (WCPS) and the payment process has already been initiated and the 1<sup>st</sup> respondent is now estopped from refusing to pay the entire pension as held in Peter Jogs Mwangi & 3 others v General Motors EA Limited & 3 others [2018] eKLR because every enacted law should address the subject matter as required as held in Obadiab Mutisya Kitonyi v Attorney General [2018] eKLR and the objections made should be dismissed with costs.

### **Determination**

8. In the memorandum of claim filed on January 25, 2021 the claim is that the claimant was dismissed by the Teachers Service Commission, 1<sup>st</sup> respondent on April 25, 2016. Termination of employment arose after a disciplinary hearing.
9. These facts are not contested by the claimant save to urge the court that there was an on-going criminal case against him where he was acquitted and upon which he applied to the 1<sup>st</sup> respondent for a review of the decision to dismiss him from service through letter dated February 25, 2018 and so by filing his claim on January 25, 2021 he is within the 3 years period contemplated under section 90 of the Act.



Section 90 of the Act is couched in mandatory terms that;

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.

And section 4(1) of Limitation of Actions Act is that;

10. The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
  - (a) actions founded on contract; (emphasis mine)
  - (b) actions to enforce a recognizance;
  - (c) actions to enforce an award;
  - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
  - (e) Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
11. The cause of action arose with termination of employment and not upon the letter seeking review of the same and the criminal proceedings where the claimant was acquitted cannot apply to extend time as the principles applicable in internal disciplinary proceedings and criminal hearings are different as held in James Mugeru Igati v Public Service Commission of Kenya [2014] eKLR.
12. In addressing a similar matter, the court in the case of Gathoni v Kenya Cooperative Creameries Ltd [1982] 2 KLR 104:

The law on limitations of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.
13. The act of termination of employment is the cause of action. It cannot change following criminal proceedings and an acquittal or upon the claimant filing for a review of the subject decision.
14. Even where the claimant were to claim that the 1<sup>st</sup> respondent has accepted to pay part of his pension benefits, which acceptance is not attached in these proceedings, the Supreme Court of Kenya Petition No 3 of 2016 – Albert Chaurembo Mumba & 7 others v Maurice & 148 others; Staff pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another v Ann Wangui Ngugi & 524 others [2018] eKLR the court held that the Retirement Benefits Act is the statute which provides for the establishment of retirement benefits schemes, regulates their operations and in addition, provides for disputes resolution mechanisms arising from the operation of such schemes. Any pension claims such as the claimant is seeking to address herein ought to be addressed under such framework and not as herein done.
15. Accordingly, the claim being time barred pursuant to the provisions of section 90 of the Employment Act, 2007 the court is denied the requisite jurisdiction to proceed any further. The claim herein is dismissed. Costs to the respondent.



**DELIVERED IN OPEN COURT AT MOMBASA THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

**M. MBARŪ JUDGE**

**In the presence of:**

**Court Assistant: Japhet Muthaine**

**..... and .....**

