



**Mwaro v Judicial Service Commission & 3 others (Petition
E019 of 2022) [2023] KEELRC 2550 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2550 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E019 OF 2022
M MBARÚ, J
OCTOBER 19, 2023**

BETWEEN

BENSON BAYA MWARO PETITIONER

AND

JUDICIAL SERVICE COMMISSION & 3 OTHERS RESPONDENT

RULING

1. The petitioner has herein filed two Notices of Preliminary Objections, one dated 7 August 2023 and the other dated 25 September 2023.
2. The petitioner had filed application through Notice of Motion dated 25 August 2023 which was allocated a mention date on 25 September 2023 and on the due date, the petitioner was heard in open court and allowed to attend at the registrar to be assisted in being mapped into the CTS to be able to upload his documents and to serve the respondents.
3. Since his attendance in open court on 25 September 2023, the petitioner has failed to honour any further court attendances despite being served with Notices. Efforts to reach him through the address of service, emails and court directions to attend have all gone without his response. This is highlighted to give emphasis on the proceedings gone into on 25 September 2023 when the petitioner attended open court and was given guidance in this matter.
4. His application dated 25 August 2023 is not prosecuted.
5. The subject of the ruling herein is with regard to the two notices of Preliminary Objections.
6. The first Notice dated 7 August 2023 is seeking for orders that;

... the petitioner shall at the hearing of the application for interim reliefs dated 13th December 2022 raise a preliminary objection on the grounds that;



1. The main interim remedy sought of reinstatement in the application is untenable and the court lacks jurisdiction to award the same by virtue of section 12(2)(vii) of the *Employment And Labour Relations Court Act*.
2. This application is time barred as it was not determined within 90 days from the filing contrary to section 8 of the fair administrative actions act 2015.
3. That any remedy granted to this application at the moment will further infringe on the applicants' constitutional rights and fundamental freedoms as enshrined in article 41 and 47 of *Constitution* as it will hinder the award of the alternative remedy of general damages for the loss of permanent and pensionable employment.
4. This application will prejudice and embarrass the applicant when final orders are granted in the main suit.

... the petitioner prays that the application for interim reliefs dated December 13, 2022 be stayed pending hearing of the main suit.

7. The respondents attended the hearing of these objections. The respondents conceded to this notice save that the petitioner has filed application and counter-application and should pay costs.
8. The second notice dated 25 September 2023 is based on the grounds that;

... the petitioner shall at the hearing of the application for interim reliefs dated 13th December 2022 and the hearing of the main suit dated 1st December 2022 raise da preliminary objection on the following grounds;

1. The main interim remedy sought of re-instatement in the application is untenable and the court lacks jurisdiction to award the same by virtue of section 13(3)(vii) of the *Employment And Labour Relations Court Act*.
2. The application dated December 13, 2022 is time barred as it was not determined within 90 days of filing contrary to section 8 of the *Fair Administrative Action Act, 2015*.
3. That any remedy granted in the application dated 13th December 2022 and in the man suit dated 1st December 2022 respectively will further infringe on the applicants' constitutional rights and freedoms as enshrined in articles 41 and 47 of *Constitution* as it will hinder the award of the release of withheld salaries, benefits and allowances and the alternative remedy of general damages for the loss of a permanent and pensionable employment.
4. That I have a legitimate expectation to be reinstated back to employment before January 8, 2023 thus I did not calculate in the main suit the leave allowances upon termination as per section 28(1)(b) of the *Employment Act, 2007*.
5. That the application dated 13 December 2022 and the remedy of special damages to repay KCB loan in the main suit dated December 1, 2022 will prejudice and embarrass the petitioner.



... the petitioner prays that the application for interim reliefs dated December 13, 2022 and the main suit dated 1st December 2022 be stayed pending hearing and determination of the application dated September 25, 2023.

9. The respondents' counsel attended and submitted that the objections by the petition contradict the petition as both seek to strike out his own application and that the court lacks jurisdiction to hear the petition. The objections defeat the purpose of the petition and for that reasons, the objections by the petitioner should be allowed by striking out his application dated 13 December 2022 and his petition. The failure by the petitioner to attend and prosecute his various objections and application should be sanctioned with award of costs to the respondents.

Determination

10. The petitioner is acting in person but he stands out as one who is able to appreciate the law and the need to file this petition to secure his rights. He has filed several applications particularly the ones he mentions dated December 1, 2022, application dated 13 December 2022 and application dated 25 August 2023. All filed seeking to assert his rights by application of Article 41 and 47 of Constitution.
11. The petitioner has further filed the two Notices of Preliminary Objects the subject of this ruling. This is evidence that he appreciates the law and largely is conversant with matters to do with his petition even though he is not a legal practitioner and acts on his own.
12. The first notice of 7 August 2023 is concerned with the fact that under Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011 the remedy of reinstatement cannot issue after 3 years after employment has ceased. This much the petitioner has conceded and he notes that the court is hence denied jurisdiction to award.
13. For this, the petitioner has written and extracted his own orders in this regard. This is his wish.
14. The remedy of reinstatement is removed from the petition.
15. The other limb to the objections is that the application is time barred as it was not determined within 90 days from filing contrary to Section 8 of the Fair Administrative Actions Act. The petitioner opted to file this petition to assert his rights. His application of Section 8 of the Fair Administrative Action Act and that under Section 8 thereof his rights are lost is an interpretation that cannot be assigned to this court. His objections are that his claim is time barred. This assertion, though not correct, in the petitioner prosecuting his petition, he should be allowed the latitude to urge his case.
16. These two issues addressed, the objections that the court lacks jurisdiction to address the remedy of reinstatement and that his application ought to have been heard within 90 days, the orders sought in the application dated 13th December 2022 are lost and that application should be left to settle save, this being his petition, the respondents now forced to attend court to allow the petitioner urge his objections, he should meet the costs dues.
17. On the objections dated 25 September 2023 the additional difference to the previous objections are that the petitioner had a legitimate expectation to be reinstated back to employment before the 8th January 2023 and hence he did not calculate in the main suit the leave allowance upon termination as per section 28(1)(b) of the Employment Act, 2007.
18. The purpose of preliminary objections is single and precise. These should be for the purpose of raising pure points of law. On the pleaded facts, without need to call evidence, the matter can be addressed



instantly. This is the gist of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* {1969} EA the court held that;

A preliminary objection consists of a point of law which has been pleaded, or which is clear by clear implication out of pleadings ...

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

19. Preliminary objections should hence be direct and without need for call of evidence. Preliminary objections should not apply to amend pleadings or for the petitioner to get the opportunity to address matters that ordinary should arise during the hearing.
20. The petitioner is seeking to abandon his claim for an order of reinstatement on the basis that this is time barred and after 8 January 2023, he lost such a claim and instead, to be allowed to introduce the prayer for leave allowance upon termination of employment and that the remedy of special damages to repay KCB loan in the main suit dated December 1, 2022 will prejudice and embarrass the petitioner.
21. As noted above, preliminary objections should not apply as a point to amend pleadings. If the objections are allowed, largely the petitioner as the right-holder herein shall effectively have comprised a large portion of his petitioner without recourse.
22. As noted above, this is the petitioner's case, he desires to have his objections allowed. The respondents have not made any objections save to urge that costs be awarded.

Accordingly,

1. the objections dated 25 September 2023 counters and compromises objection dated 7 August 2023;
2. The same is hereby allowed and the remedy of reinstatement is removed and not available to the petitioner;
3. The remedy of leave allowances upon termination of employment and payment of special damages for KCB loan repayments is not available to the petitioner; and
4. Application dated 13 December 2022 is hereby dismissed;
5. The petitioner shall meet costs due to the respondents at Kshs 5,000 each all at Kshs 20,000 and these to be paid before allocation of new dates.
6. Where no action is taken within the next 45 days from the date hereof, the court will bring up the matter for mention on 4 December 2023 for the petitioner to show cause why the petition should not be dismissed for want of attendance and prosecution.
7. The Deputy Registrar, ELRC Mombasa shall serve the petitioner through his last noted address.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

