



**Okere v County Government of Kakamega & another (Employment and Labour Relations Cause 17 of 2023) [2023] KEELRC 2523 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2523 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 17 OF 2023**

**JW KELI, J  
OCTOBER 18, 2023**

**BETWEEN**

**ISMAEL ANGI OKERE ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF KAKAMEGA ..... 1<sup>ST</sup> RESPONDENT**

**KAKAMEGA PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Claimant on 18<sup>th</sup> November 2022 filed the claim dated 17<sup>th</sup> November 2022 supported by the verifying affidavit of even date seeking:-
  - a. Total Unpaid Basic Salary(Section 4& 6 of the C.B.A) Kes. 331, 202.70;
  - b. Total unpaid leave allowance(section 4 C.B.A) Kes 16,560.10;
  - c. Total Unpaid leave allowance on house Allowance, kes 138, 600;
  - d. imprest erroneously deducted in February 2016- 77,939.30;
  - e. Medallion awards(section 51 C.B.A) Kes 50,000;
  - f. Pension that was to be contributed by Employer Kes 49, 680.40;
  - g. unpaid Acting Allowance as an auditor of Kes. 1,545,000/-;
  - h. Certificate of Service;
  - i. unremitted contribution to the Pension scheme by employer out of the underpaid basic salary amounting to kes 49,680/-; and
  - j. Any other and or further relief this Honourable Court deems fit to grant.



2. The Claim was accompanied by the Claimant's list of witnesses dated 17<sup>th</sup> November 2022 and the Claimant's witness statement and list of documents of even date and his bundle of documents(a-jj ).
3. The Respondents in objection to the Claim filed a Memorandum of defence dated 27<sup>th</sup> December 2022 and received in court on 5<sup>th</sup> January 2023. The Respondents also filed a list of witnesses dated 6<sup>th</sup> June 2023, witness statement of CPA David Mboya, the List of documents of even date and its bundle of documents received in court on 7<sup>th</sup> June 2023.
4. The Claimant filed a Reply to the Respondents' Memorandum of defence dated 26<sup>th</sup> January 2023 and filed on even date.
5. Vide an application dated 14<sup>th</sup> July 2023 and filed on 20<sup>th</sup> July 2023, the court on 24<sup>th</sup> July 2023 allowed the amendment of the Memorandum of Defence dated 14<sup>th</sup> July 2023.
6. Subsequently, the Respondents filed the instant Notice of Preliminary Objection dated 30<sup>th</sup> June 2023 and received in court on the 3<sup>rd</sup> July 2023, seeking to strike out the Claimant's claim on the following grounds:-
  - a. That honourable Court lacks jurisdiction to hear and determine this claim by virtue of Section 77 of the County Government Act, and Section 87 of the [Public Service Commission Act](#).
  - b. The suit is incompetent, bad in law and is otherwise an abuse of the due process of the court pursuant to Section 90 of the [Employment Act](#).
7. The Claimant filed a Replying affidavit in response to the Respondents' Notice of Preliminary Objection dated 10<sup>th</sup> July 2023 and filed on 11<sup>th</sup> July 2023.
8. The court on 24<sup>th</sup> July 2023 directed that the Notice of Preliminary Objection be canvassed first by way of written submissions.

### **Written Submissions**

9. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' written submissions were filed by Makokha Wattanga & Luyali Associates and dated the 24<sup>th</sup> July 2023 and received in court on 26<sup>th</sup> July 2023. The Claimant's written submissions were drawn and filed by Marisio Luchivya & Company Advocates and were dated 14<sup>th</sup> August 2023 and received in Court on 18<sup>th</sup> August 2023.

### **Determination**

10. The issue for determination was whether the Notice of Preliminary Objection by the Respondent dated 30<sup>th</sup> June 2023 was merited. The Jurisdiction of the court must be addressed on priority basis when challenged guided by the decision of the court of Appeal in Owners of Motor Vessel "Lillian S" -vs- Caltex Oil Kenya Limited (1989)eKLR.
11. The gist of the objection is that the issues raised in the Claim are subject of appeal before the Public Service Commission pursuant to the provisions of Sections 77 of the [County Governments Act](#), 2012 and Section 87 of the [Public Service Commission Act](#),2017 and that the claim is statute barred by virtue of section 90 of the [employment Act](#), 2007.
12. The Respondents submit that the jurisdiction of the court has been invoked prematurely by the claimant as his claim raises issues on retirement benefits which are subject of an appeal to the Public Service Commission, under section Section 77 of the County Government Act, 2012.



13. The Respondents submit that the law is clear and the Claim violates the provision under Section 87 (2) of the [Public Service Commission Act](#) No. 10 of 2017 (‘the [Public Service Commission Act](#)’) which provides that:-
 

“ A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government Public Service unless the procedure provided for under this part has been exhausted”.
14. The Respondents argue that under section 59(j) of the County Government Act, the 2<sup>nd</sup> respondent has a right to seek a review of its salaries from the Salaries and Remuneration Commission and if the Claimant was dissatisfied with the retirement benefits, he ought to have appealed pursuant to provisions of section 77 of the county Government Act.
15. The Respondents submit that the court lacks jurisdiction to entertain the Claim and even then the Claimant ought to have filed his appeal before the Public Service Commission within Ninety days and did not need wait until his retirement from public service to file his the same.
16. The respondent argues that jurisdiction is paramount and where there exists a forum to hear a matter that process must be exhausted. To buttress his assertion the respondent has relied on various decisions namely:-Samuel Kamau Macharia & Another Versus Kenya Commercial Bank Limited and 2 others, Application No. 2 of 2011(2012)eKLR; Hussein Wanyama Mulebo & 5 others v County Public Service Board & 2 others (2022) eKLR; Ismael Noo Onyango & Another v Siaya County Public Service Board & Another (2018) eKLR; Secretary County Public Service board and Another V Hulbhai Gedi Abdulla(2017) eKLR; National Assembly V James Njenga Karume (1992) eKLR.
17. The Respondent further submits that the claimant’s claim is time barred as the claim was filed in 2022 after the Claimant retired from public service claiming for underpayment, annual leave , house allowance , and acting allowance. The Respondents submit that the issues affecting his salary ought to have been raised within a period of 3 years from the cause of actions or within twelve months next after the cessation thereof and in default thereof the claimant’s claim cannot be sustained. To buttress this point, the respondent Relied on decisions in George Hiram Ndirangu V equity Bank Limited (2015) eKLR.
18. On the other hand, the claimant averred that he filed his complaint with the Respondents on 1<sup>st</sup> April 2021 and who verbally replied to him denying his claim, which prompted him to file his complaint with the public Service Commission which issued its decision on 9<sup>th</sup> December 2021 and the claimant being thereof dissatisfied applied for review on 25<sup>th</sup> March 2022.
19. The Claimant thereof avers that he has exhausted all available procedures under the [Public service commission Act](#) before coming to court and that the court has the exclusive, original and appellate jurisdiction to determine matters of employment and labour by dint of Section 12 (1)(20 of the Employment and Labor Relations Court Act, Cap 234B
20. The Claimant further submits that the preliminary objection based on the ground (a) in 4 above cannot therefore stand.
21. As to the issue of the claim being statute bared the claimant submits that his retirement was on 30<sup>th</sup> December 2019 as per the Retirement notice letter (“IAO-2A”)and pursuant to section 90 of the [employment Act](#), which requires a suit to be filed within 3 years upon the cause of action arising, the Claimant submits that he filed his suit within 2 years and 11 months and within the statutory period of three years.



22. The claimant submits that the reliefs sought arose at the time of his retirement and subsisted even at the time of filing his suit on 18<sup>th</sup> November 2022. The claimant submits that under section 2 of the County Government Act, retirement is defined as the removal of an officer from public service with full separation benefits including pension benefits, gratuity or such other terminal benefits under the law or special retirement scheme as may be agreed with the employers and his claims for medallion award, certificate of service arose after his retirement.

## Decision

23. The question of jurisdiction is cardinal in the determination of disputes as was held in the landmark decision of Nyarangi JA (as he then was) in the case of the Owners of Motor vessel ‘Lillian S’ v Caltex Oil Kenya Limited (1989) eKLR to the extent that jurisdiction is everything and without it the court has no power to make one step and must down its tools.
24. The Preliminary Objection by the Respondents goes to the question Whether the court has jurisdiction to entertain the Claimant’s Claim.
25. On the first limb of the preliminary objection that the Court’s jurisdiction is ousted by the provisions of Section 77 of the County Government Act, 2012 and Section 87 of the [Public Service Commission Act](#):-, The Respondents submit that where there exists a clear procedure for redress of any grievance, the same must be followed. The respondent argues that the issues raised by the claimant Aare issues for determination by the Public Service Commission. The Respondent argues that the Claimant ought to have filed his dispute before the Public Service Commission within 90 days of the dispute arising and not after his retirement.
26. The claimant conversely argues that he filed his dispute with the Public Service commission as evidenced by the Notice of the Public Service Commission to the 2<sup>nd</sup> Respondent( IAO-1) and a decision was made on 9<sup>th</sup> December 2021 and the Claimant appealed the same on 25<sup>th</sup> March 2022 which he alleges he filed after 90 days after being directed to seek for review.
27. The court has reviewed the Claimant’s and Respondent’s bundle of documents and agreed that the claimant filed a dispute with the Public Service Commission as evidenced by the letter (IAO-1) dated 29<sup>th</sup> June 2021 which confirmed that the Claimant had indeed filed an appeal through a letter dated 15<sup>th</sup> June 2021 on the issues relating to underpayment of salary and allowances.
28. The letter dated 9<sup>th</sup> December 2022 from the Public Service Commission confirmed that an earlier decision of 9<sup>th</sup> December 2021 had been delivered on account of the claimant’s appeal.
29. A decision was delivered on 5<sup>th</sup> December 2022 and forwarded to the Claimant and the 2<sup>nd</sup> Respondent through the letter dated 9<sup>th</sup> December 2022 by the Public Service Commission relating to the claimant’s application for review of its earlier decision.
30. Therefore, the court holds that in accordance to Section 87 (2) of the [Public Service Commission Act](#), the claimant had exhausted the procedures set out under Section 86 and 88 of the Act, having raised an appeal with Commission and then proceeded to file for review of the of the decision before the Commission, and having been dissatisfied filed the instant claim before this court which has original jurisdiction to deal with all matters employment.
31. On the second issue relating to the allegation of that the Claimant’s claim is incompetent, bad in law and an abuse of the court process pursuant to section 90 of the [Employment Act](#), 2007. The Respondents argue that the claimant’s prayers are time barred as the Claimant ought to have raised the claim when he was still in employment rather than after his retirement. On the other hand the claimant



submits that the Cause of action crystallized at the date of his retirement on 30<sup>th</sup> December 2019 and the payment of his claims still subsisted at the time of filing his claim on 18<sup>th</sup> November 2022, a lapse of two years and 11 months, which was within the statutory period of limitation.

32. Section 90 of the *Employment Act* is framed in mandatory terms that a claim based on a contract of employment must be filed within 3 years. This Court is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose.

33. Section 90 of the Act provides that:-

“90. 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.”

34. On perusing the prayers in the Claimant’s Statement of Claim being (a) to (j), it is clear that the prayers are with respect to an employment contract.

35. The Respondents have submitted that the claimant’s claims for wrongful annual salary increment from 2014 to 2019, salary increment from 12<sup>th</sup> October 2012 plus two annual salary increment, annual leave allowance, house allowance for the period of 2014 to 2019; and acting allowance for the year 2015 to 2019 earned as an auditor ought to have lodged within three years from when the causes of actions arose or twelve months next after cessation and are therefore time barred.

Prayer:- (a) Total Unpaid Basic Salary (Section 4 & 6 of the C.B.A) Kes. 331, 202.70;

36. The nature of claims by the Claimant are allegations that he was underpaid over time through payment of the wrong increment, unpaid leave allowances, unpaid leave allowance on house allowance and his other allowances which he alleges remained unpaid by the respondent until and past his retirement. The claimant’s has alleged that the said prayers constitute a continuing injury.

37. The Respondent while submitting that the claimant’s cause is statute barred relied on the decision in *George Hiram Ndirangu v Equity Bank Limited* (2015)eKLR where the court defined continuing injury as:-“ the logical meaning of the phrase “continuing injury or damage” would therefore be violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues. A typical Memorandum of Claim would normally contain a claim for compensation and payment of accrued dues. In my view, “Continuing injury or damage would connote such accrued dues.”

38. The Claimant alleges that he was underpaid over time through payment of the wrong increment, unpaid leave allowances, unpaid leave allowance on house allowance and his other allowances which he alleges remained unpaid by the respondent until his retirement.

39. The Court of Appeal in *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) (HM Okwengu, HA Omondi & JM Mativo, JJA) observed that:-

“The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. “A continuing wrong” refers to a single wrongful act which causes a continuing injury. “Recurring/successive wrongs” are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. The Supreme



Court of India in *Balakrishna S.P. Waghmare v Shree Dhyaneswar Maharaj Sansthan* AIR 1959 SC 798 explained the concept of continuing wrong (in the context of the Indian Limitation Act) as follows: "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 a character that the injury caused by it 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."

The employment relationship is the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. It has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law. The existence of an employment relationship is the condition that determines the application of the labour law provisions. It is the key point of reference for determining the nature and extent of employers' rights and obligations towards their workers.

41. Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90."(Emphasis added)."
40. The court relied on the excerpt above from the Court of appeal decision in *Germany School Society* case. The Claimant alleges he continued to receive over time a wrong salary and which was based on the wrong increment from July 2013 until July 2019, apart from July 2017. He alleges that he was entitled to an annual increment of Kshs. 1805/- but his salary increment was paid at Kshs. 1450 from July 2013 until July 2019.
41. A claim for a continuing injury should be brought within a twelve months after the cessation. The alleged continuing injury relating to the payment of salary based on the wrong increment ceased in July 2019 and the Claimant continued in service until retirement in December 2019.
42. The court in *The German School Society & another v Ohany & another*(supra) held:- ".....So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of



difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified....”

43. Applying the foregoing holding by the Court of Appeal I find the Claimant was required on his retirement on 30<sup>th</sup> December 2019 when the claim crystalized with the salary payment stopping, to within twelve months to file a claim on basis of the continued injury, which ought to have been filed on or before 31<sup>st</sup> December 2020. The first prayer is therefore statute barred.

#### **Unpaid leave and house Allowance**

44. Prayers(b)Total unpaid leave allowance(section 4 C.B.A) Kes 16,560.10; and (c)Total Unpaid leave allowance on house Allowance, kes 138, 600 were based on prayer (a) which is statute barred and consequently the said claims cannot stand.

#### **Imprest erroneously deducted**

45. As regards to the prayers (d) on imprest erroneously deducted; as to whether the alleged deduction was erroneous that is a matter to be determined during hearing. The amounts deducted as imprest would have been deducted from the Claimant’s salary that he would have been rightly entitled to if at all and therefore the said claim is not subject to statute of limitation.

#### **Medallion awards(section 51 C.B.A) Kes 50,000;**

46. This claim arises from the claimant’s retirement. The claimant retired on 30<sup>th</sup> December 2019. He filed the instant suit on 18<sup>th</sup> November 2022 which was 2 years 11months short of the statute limitation period of three years, the Claim is therefore within the statute period.

#### **Unpaid Acting Allowance as an auditor of Kes. 1,545,000/-;**

47. The claimant alleged that he was deployed by the County Executive committee Member for Public service and administration through a circular of 03/03/2015 to work as an auditor at Kakamega Town and worked as such until 29<sup>th</sup> December 2019 yet he was paid under scale 6 instead of scale 5 and seeks his acting allowance for the said period of Kshs. 1,540,000/-. As early held, the claimant has alleged that he worked in the acting capacity of an auditor without receiving the acting allowance since 3<sup>rd</sup> March 2015 to 29<sup>th</sup> December 2019. The Claimant left his employment on retirement on 31<sup>st</sup> December 2019, and the period for any cause of action commenced. The Claimant filed the instant suit on 18<sup>th</sup> November 2022 which was 2 years 11months short of the statute limitation period of three years, the Claim is therefore within the statute period.

#### **Certificate of Service;**

48. The Claimant’s employment came to an end on 31 December 2019.He filed the instant suit on 18<sup>th</sup> November 2022 which was 2 years 11months short of the statute limitation period of three years, this Claim is therefore within the statute period.

#### **Pension that was to be contributed by Employer Kes 49, 680.40**

49. Section 12(2) of the *Employment and Labour Relations Court Act* states that :

“ An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organization, a federation, the Registrar of Trade



Unions, the Cabinet Secretary or any office established under any written law for such purpose.”

50. The Court holds that a pensioner is not one of the persons under the above category of persons and parties that can make an application or institute proceedings before this court. From the foregoing it is thus clear that the Employment and Labour Relations Court has no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the Sponsor. Besides, the trust so established as a pension scheme retains autonomy from both the Sponsor and the employees hence its regulation is by the Retirement Benefits Authority.

Unremitted contribution to the Pension scheme by employer out of the underpaid basic salary amounting to kes 49,680/-;

51. The Court has no jurisdiction on pension issues. The pension trust is not a party to this case. I find it is best this issue be handled by the relevant authority being the Retirement Benefits Authority and the pension trust.

### **Conclusion**

52. In the upshot the preliminary objection dated 30<sup>th</sup> June 2023 was partially successful. The court holds that the claims that are not statute barred and the court has jurisdiction are be prayers for:- (d) imprest erroneously deducted in February 2016- 77,939.30; (e) Medallion awards(section 51 C.B.A) Kes 50,000; (g)unpaid Acting Allowance as an auditor of Kes. 1,545,000/-; and (h) Certificate of Service.

53. Each party to bear own costs in the preliminary objection.

54. It is so ordered.

**RULING DATED, DELIVERED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF OCTOBER, 2023.**

**JEMIMAH KELI,**

**JUDGE.**

In The Presence Of:-

Court Assistant:- Lucy Macheso

For Claimant:- absent

For Respondent:- Absent

Court Order.

Mention date of 9<sup>th</sup> November 2023 be served for parties to take hearing date before the Judge.

It is so ordered .

**JEMIMAH KELI**

**JUDGE**

**18/10/2023**

