



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. E016 OF 2021**

**JOHN OCHIENG ODIE.....CLAIMANT**

**VERSUS**

**THE HON ATTORNEY GENERAL.....1<sup>st</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY, STATE**

**DEPARTMENT OF BROADCASTING AND TELECOMMUNICATIONS.....2<sup>nd</sup> RESPONDENT**

**THE SECRETARY, PUBLIC SERVICE COMMISSION OF KENYA.....3<sup>rd</sup> RESPONDENT**

**DIRECTOR OF PENSIONS.....4<sup>th</sup> RESPONDENT**

**RULING**

1. John Ochieng Odie (the Claimant) sued the Respondents on 10 February 2021, and he stated the Issue in Dispute as:

Unlawful denial of all accrued retirement benefits arising under contract of employment due to misinterpretation and misapplication of employment contract documents, statutory provisions and violation of fundamental rights and freedoms in the Bill of Rights.

2. The Respondents filed a Joint Response on 10 March 2021 and a Notice of Preliminary Objection on 12 November 2021 contending:

(1) THAT the suit is time-barred as it offends the mandatory provisions of section 90 of the Employment Act No. 11 of 2007 on time limitation as the Claimant was employed by the state department of justice on 20<sup>th</sup> June 1990 and transferred his service to KNEC on 1/12/2008. He, therefore, seized (sic) being a civil servant. Any action against the Respondents should have been brought on/before 1/12/2011. 10 years have since lapsed.

(2) THAT the suit is an abuse of the court process being raised by the Claimant are the same issues which were litigated under Industrial Cause No. 722 of 2009, John Odie v KNEC. Particularly the issue of award of general damages, loss of employability and loss of pension rights.

3. The Claimant filed Grounds of Opposition to the Objection on 15 November 2021, and the Respondents filed their submissions on 14 December 2021.

4. The Claimant filed his submissions on 16 December 2021.

5. The Court has considered the Objection and submissions.

**Res judicata**

6. The Respondents challenged the competency of the Cause on the ground that the questions of pension, damages for loss of employability and general damages were the subject of litigation and judgment in Nairobi Cause No. 772(N) of 2009, *John Ochieng Odie v Kenya National Examinations Council*.

7. The Court has reviewed the judgment in the said suit and established that the cause of action therein related to alleged breaches by the

Kenya National Examinations Council during the time the Claimant served with the Council.

8. In the instant suit, the Claimant is seeking reliefs including pension for the period served under the Public Service Commission before the transfer of service to the Kenya National Examinations Council and therefore *res judicata* does not arise.

### **Limitation**

9. In support of the objection that the Cause was time-barred, the Respondents asserted that since the Claimant transferred his service from the Public Service Commission to the Kenya National Examinations Council effective 1/12/2008, then the cause of action arose on that date, and the suit should have been commenced on or before 1 December 2011, but that it was lodged with the Court on 10 February 2021, after the lapse of the limitation period.

10. The Respondents cited *Maersk Kenya Ltd v Murabu Chaka Tsuma* (2017) eKLR and *Samson O. Ngonga v Public Service Commission & 5 Ors* (2013) eKLR.

11. On his part, the Claimant took the position that pension was an accrued fundamental right that could not be taken away or lost and that the decision declining to pay the pension was made on 26 November 2019, and therefore time could only start running from that date.

12. The Public Service Commission issued a Certificate of Service to the Claimant indicating the period of service as 20 June 1990 to 1 December 2008.

13. Section 6 of the Pensions Act sets out the circumstances upon which pension may be granted (eligibility). Some of the conditions include retirement from the public service, minimum 10 years of service and having attained the age of 50-years.

14. The Claimant transferred his service from the Public Service Commission to the Kenya National Examination Council effective 1 December 2008.

15. By the time the Claimant was transferring his service, he had met the 10-year service threshold, but he had not yet retired or separated from the *other public service*. He had also not attained the minimum 50-year old eligibility criteria.

16. It, therefore, cannot be that the Claimant could have lawfully claimed pension in 2008. He was not eligible for payment of pension, and time could not have started running then.

17. The Court also notes that on a date which is not clear from the form filed in Court, the Claimant made a *Claim for Retirement Pension on Transfer of Service* to the Permanent Secretary, Treasury (from the public service), and the Accounting Officer issued a Certificate on 26 January 2009.

18. At this time, the Claimant was 47 years old and would thus not have qualified for pension for the period served under the public service.

19. Consequently, time for purposes could not have started to run from that date.

20. The Claimant became eligible for the payment of pension for the period served under the Public Service Commission upon retirement from the Kenya National Examinations Council, and attainment of at least 50 years (he was born on 4 March 1962 and reached 50 years on 4 March 2012).

21. On 4 March 2019, the Claimant applied for his pension and, in a letter dated 26 November 2019, informed him that by dint of section 6(1)(b) of the Pensions Act, he did not qualify for the pension.

22. In the view of the Court, time for purposes of limitation started to run from 26 November 2019, and since the Cause was filed on 10 February 2021, the Claimant was within time.

23. Before concluding, the Court would urge the parties to make genuine attempts to settle the dispute outside Court as had been suggested by the Respondents on 16 November 2021.

### **Conclusion and Orders**

24. Arising from the above, the Court finds the Notice of Preliminary Objection without merit and is dismissed with costs being in the cause.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 2<sup>nd</sup> day of February 2022.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant in person

For Respondents Sarah A Jumma, Senior Litigation Counsel, Office of the Hon Attorney General

Court Assistant Chrispo Aura