



**Marigo v Permanent Secretary, Ministry of Interior & Coordination Of National Government
& 2 others (Cause 94 of 2015) [2022] KEELRC 1640 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1640 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 94 OF 2015**

**S RADIDO, J
MAY 25, 2022**

BETWEEN

SAMSON MAKUBO MARIGO CLAIMANT

AND

**PERMANENT SECRETARY, MINISTRY OF INTERIOR & COORDINATION
OF NATIONAL GOVERNMENT 1ST RESPONDENT**

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. Samson Makubo Maringo (the claimant) sued the Permanent Secretary, Ministry of Interior & Coordination of National Government, the Public Service Commission, and the Hon Attorney General (the respondents) on 26 March 2015, alleging unlawful retirement and breach of contract (payment of withheld salaries, pension, and pension arrears).
2. The respondents filed a Defence to the Claim on 20 July 2015.
3. The parties thereafter made several appearances before the court, and on 14 March 2016, the court declined jurisdiction on the ground that the proper forum was the Retirement Benefits Authority.
4. On 20 April 2016, the claimant moved the court to review its order on jurisdiction.
5. The Claimant also filed an Appeal in the Court of Appeal against the order declining jurisdiction on 19 December 2016.
6. The Court of Appeal heard the Appeal and, in a judgment delivered on 19 June 2020, set aside the order of this court that it did not have jurisdiction and directed that the Cause be heard afresh, including on the questions of jurisdiction and res judicata.



7. When the parties appeared in court on 27 January 2022 for directions, the Respondents informed the court that they were ready to process the claimant's dues as had been ordered by the High Court in Kisii, but they could not because there was no Certificate of Order against the government.
8. In order to expedite the hearing of the substantive Cause, the court ordered the respondents to file and serve their witness statements and documents ahead of the hearing on 8 March 2022
9. On 18 February 2022, the respondents filed a Notice of Preliminary Objection contending:
 - (1) That the suit is a *res judicata* and offends the mandatory provisions of section 7 of the [Civil Procedure Act](#), cap 21 Laws of Kenya.
 - (2) That the claimant filed Kisii High Court Civil Suit No. 42 of 2002 with the same parties, and judgment was delivered in his favour on September 6, 2007.
 - (3) That the suit is an abuse of the court process.
 - (4) That the suit is incompetent and ought to be struck out with costs to the respondents.
10. The claimant filed a replying affidavit in response to the Preliminary objection on 2 March 2022.
11. When the Cause was called for hearing on the scheduled date, the Respondents brought to the attention of the Court the Preliminary Objection.
12. The court directed that the Objection be taken as part of the hearing on the merits.
13. The claimant testified and was cross-examined.
14. The respondents opted not to lead any evidence, and indicated they would file submissions.
15. The claimant filed his submissions on 5 April 2022, and the respondents filed their submissions on 6 May 2022.
16. The claimant identified 3 Issues for determination:
 - i. Whether the claimant's retirement was unlawful and unconstitutional?
 - ii. Whether the claimant is entitled to the orders sought herein?
 - iii. Whether the claimant is entitled to the costs of the suit?
17. The respondents set out 2 Issues in contention:
 - i. Whether the matter is *res judicata*?
 - ii. Whether the claimant is entitled to the relief sought?
18. The court has considered the pleadings, evidence, and submissions.

The facts

19. The claimant was informed of retirement in the public interest effective from 1 September 1996 through a letter dated 25 January 2001.
20. The claimant contested/appealed the decision to retire him retrospectively through a letter dated 12 November 2001, and on 10 August 2009 the Public Service Commission notified him that it had reviewed the decision to retire him in the public interest and substituted thereof, reinstatement and retirement on age grounds effective 1 July 2007.



21. The letter further informed the Claimant that he would be paid accrued salaries up to 30 June 2007, and that he would be eligible for pension benefits under the *Pensions Act*.
22. The claimant was requested to submit certain documents to facilitate the processing of the pension payment.
23. The respondents did not process the pension and the Claimant complained to the Public Service Commission and on 4 March 2010, the Commission requested the Permanent Secretary, Public Service to process the pension.
24. On 4 April 2011, the Commission advised the claimant that the Permanent Secretary had forwarded the pension claim to the Pensions Department on 28 September 2010.
25. The Commission further informed the claimant that withheld salaries during interdiction from 5 July 1995 to 21 August 1996 had been paid, and that since he had reached retirement age, he would not be paid any accrued salaries after 1 September 1996.
26. On a date which is not clear from the record, the Permanent Secretary requested the Public Service Commission to consider authorising the payment of the claimant's salaries from 1 September 1996 to 30 June 2007.
27. The Public Service Commission conveyed to the Permanent Secretary, its rejection of the request through a letter dated 31 October 2012.
28. The Permanent Secretary thereafter notified the claimant of the rejection of the request through a letter dated 5 December 2012.
29. On 18 January 2013, the Commission on Administrative Justice in response to a letter from the Permanent Secretary, Provincial Administration indicated that the Claimant had admitted receipt of his pension, but was still claiming salary arrears from 1 September 1996 to 30 June 2007.

Limitation

30. Although the parties did not raise or submit to the question of limitation, it starkly rears its head from the pleadings.
31. The respondents informed the claimant of the substitution of the decision to retire him in the public interest with retirement on age grounds through a letter dated 10 August 2009.
32. Under section 90 of the *Employment Act* which was applicable at the material time, the Claimant had 3-years within to challenge the decision. He moved the court outside the 3-years limitation period (Cause was filed on 26 March 2015).
33. On 4 April 2011, the Public Service Commission notified the Claimant that he would not be paid from 1 September 1996 to 30 June 2007, because he had attained the retirement age and therefore had not worked during that period (letter dated 5 December 2012 reiterating the same was sent to the Claimant by the Permanent Secretary).
34. By dint of section 90 of the *Employment Act*, 2007, if the Claimant was not satisfied with the decision, he should have instituted proceedings on or before 4 April 2014.



Res judicata

35. When the claimant moved the High Court in Kisii High Court Civil Case No. 42 of 2002, Samson Marigo Makubo v Hon Attorney General, he was challenging the retirement in the public interest through a letter dated 25 January 2001 but backdated to 1 September 1996.
36. Among the reliefs sought by the claimant were:
general damages for unlawful dismissal and loss of pension; special damages and exemplary damages.
37. In the instant Cause, the remedies sought by the claimant were:
withheld salaries and allowances from 1 September 1996 to 30 June 2007; pension and pension arrears from 1 July 2007.
38. The High Court found in favour of the claimant and ordered that he paid his pension. Pension accrues month on month and in so far as the claimant is seeking pension arrears, the court is not ready to dismiss this head of the claim on the ground of res judicata.
39. The heads of claims for withheld salaries and allowances from 1 September 1996 were not part of the dispute before the High Court and this court has addressed them under the subtheme of limitation.

Abuse of court process

40. Concurrent with the High Court case, the claimant appealed against the retirement in the public interest to the Public Service Commission.
41. It is apparent that the claimant was prosecuting parallel proceedings against the retirement in the public interest before different fora, the High Court, and the Public Service Commission.
42. This court cannot speculate why the High Court was not informed of the parallel proceedings by either the claimant or the Hon Attorney General.
43. Fortunately for the claimant, the suit before the High Court succeeded.
44. The appeal before the Public Service Commission also succeeded and on 10 August 2009, the Public Service Commission upheld the appeal and substituted the retirement in the public interest with retirement on age grounds.
45. In this court's humble view, the claimant was under a duty to disclose to the High Court that he had an active appeal pending before the Public Service Commission on the same subject matter and by failing to disclose the fact, he exposed to judicial process to embarrassment.
46. The court finds the claimant was abusing the court process by maintaining parallel proceedings.

Unlawful retirement

47. The Public Service Commission, upon an appeal by the claimant converted the retirement in the public interest with retirement upon attainment of retirement age.
48. The claimant did not place before the court any evidence that he was retired before he had attained the prescribed retirement age at the material time (his age was stated to be 55 as of 1 July 2007).
49. The Court cannot, therefore, find any unlawfulness in the decision of the Public Service Commission to retire the Claimant on age grounds.



Withheld salaries and allowances

50. The claimant anchored this head of the claim in the letter dated 10 August 2009 from the Permanent Secretary, Provincial Administration, and Internal Secretary.
51. This head of the claim was a direct derivative of the contractual relationship between the claimant and the Public Service Commission.
52. The Public Service Commission made the promise on 10 August 2009. The claimant commenced legal action claiming breach on 26 March 2015, more than 3-years after the time prescribed by section 90 of the *Employment Act*, 2007.
53. The relief is caught up by the law of limitation.

Pension

54. For a pension to be processed or paid, the beneficiary is required to make an application and supply certain employment records.
55. The Respondents informed the claimant through the letter of 10 August 2009 that he was eligible for pension, and there is a suggestion in the letter dated 18 January 2013 from the Commission on Administrative Justice that the claimant had acknowledged receipt of his pension.
56. It cannot, therefore, be correct that the claimant has not received a pension since 1 July 2007.
57. Since pension is payable monthly, it is in the interest of the claimant to follow up with the respondents and the Department of Pensions to ensure that any accruing pension is paid when falling due.

Conclusion and Orders

58. Flowing from the above, the court finds no merit in the Cause and further declines to grant any of the reliefs sought by the claimant.
59. The Cause is dismissed.
60. Each party to bear their own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 25TH DAY OF MAY 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

Claimant in person

For Respondents Ms Essendi, Principal Litigation Counsel

Court Assistant Chrispo Aura

