



**Maina v County Government of Nyeri (Cause E031 of 2022)  
[2022] KEELRC 13234 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13234 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E031 OF 2022  
ON MAKAU, J  
NOVEMBER 17, 2022**

**BETWEEN**

**LUCY WAIRURI MAINA ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF NYERI ..... RESPONDENT**

**RULING**

1. This ruling relates to the respondent's preliminary objection contained in its Statement of Response dated July 22, 2022, which seeks to have the suit struck out with costs on grounds that:
  - a. The suit is time barred by dint of section 90 of the *Employment Act*.
  - b. The court has no jurisdiction hear the suit since article 234 of the *Constitution* of Kenya and section 88 of the *Public Service Commission Act* confers the jurisdiction on the Public Service Commission.
2. The preliminary objection was disposed of by written submissions. The respondent filed on October 19, 2022 and the claimant filed on October 25, 2022.
3. On the first ground for the objection, the respondent submitted that the cause of action arose on September 6, 2018 when the claimant was released to the ministry. It was further urged that under prayer (a) the claimant seeks for withheld Sacco deductions from September 6, 2018 when she was released and her name removed from its payroll. It is the respondent's contention that the three years provided under section 90 of the *Employment Act* within which to commence the suit lapsed on September 6, 2021. Consequently, the court was urged to find that the suit is time barred and ought to be struck out because it was filed on June 27, 2022, 8 months out of time.
4. As regards the second ground for the objection, it was submitted that this court lacks jurisdiction to hear the suit because the Public Service Commission has clear constitutional and statutory jurisdiction



- to hear the matter and give remedies pursuant to article 234 920 of the Constitution and section 88(5) of the Public Service Commission Act 2017. For emphasis, reliance was placed on the case of *Secretary County Public Service Board & another v Hulbbhai Gedi Abdile* [2016] eKLR where the Court of Appeal in a similar matter held that it is the Public Service Commission which is clothed with the jurisdiction.
5. It was argued that suit violates the doctrine of exhaustion provided in section 9 of the Fair Administrative Action Act of 2015 and section 87(2) of the Public Service Commission Act of 2017 which filing of legal proceedings in any court with respect to matters that fall within the jurisdiction of the Commission. For emphasis, reliance was further placed on the case of *Nakuru County Human Rights Network (NAHURINET) v Nakuru County Government & another* [2014] eKLR, *James Tinai Murete & others v County Government of Kajiado & 22 others* [2015] eKLR and *Wilson Mutegi Nyaga & others v The County Public Service Board, Kitui County & 2 others* [2016] eKLR where the High Court declined jurisdiction on ground that the mechanism provided under section 77 of the County Governments Act, for an appeal to the Public Service Commission, had not been exhausted.
  6. Again Nduma J in the case of *Ismael Noo Onyango & another v Siaya county Public Service Board & another* [2018] eKLR declined jurisdiction but observed that this court has unlimited jurisdiction over matters employment and labour.
  7. The claimant on the other hand submitted that her suit is not time barred because the cause of action arose in August 2020 when she was paid her salary arrears and also got appraised on the status of her sacco savings and extension of the period of the loan repayment. She contends that the claim for loss and damages occasioned by her removal from the respondent's payroll on August 1, 2018 until her reinstatement in November 2019. The pecuniary loss according to her is kshs 694,216.21 which was in the form of his Sacco contribution being utilized to repay her loan as confirmed by the letter dated March 29, 2022 from the CEO New Fortis Sacco. Therefore she maintained that she had 2020, 2021 and 2022 to file her suit, which did on June 27, 2022.
  8. Further, the claimant submitted that the preliminary objection herein does not meet the legal threshold established in the case of *Mukisa Biscuits manufacturing co. Ltd v West End Distributories Ltd* [1969] EA 699 where the court held that a preliminary objection must raise a pure point of law and it is raised on the assumption that all the facts pleaded by the other side are correct.
  9. She also submitted that the objection raised does not serve the purposes enunciated by the Supreme Court in the case of *Charles Onchari Ogoti v Safaricom limited & another* [2020] eKLR where it was held that a true preliminary objection serves two purposes, firstly to shield the objector costs in terms of time and resources; and secondly to save the scarce judicial time. In her view the instant objection does not serve any of the said purposes.

## Determination

10. The issues for determination in the preliminary objection are threefold:
  - a. Whether the preliminary objection raises a pure point of law.
  - b. Whether the suit is time barred.
  - c. Whether the court has no jurisdiction to hear and determine the suit.



## Pure point of law

11. In the case of *Mukisa Biscuits manufacturing co Ltd v West End Distributories Ltd* [1969] EA 699 the court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertain or if what is sought is the exercise of judicial discretion.”

12. I have carefully considered the grounds for objection raised herein and I am satisfied that pure points of law have been raised. The respondent is contending that the suit is time barred and the court also lacks jurisdiction pursuant to the exhaustion doctrine. Such issues do not require evidence to establish nor is judicial discretion necessary to determine the same. Besides if the same succeeds the suit will be disposed of and save judicial time.

## Time barred

13. The claim herein is founded on a contract of employment between the claimant and the respondent. The suit is therefore governed by the provisions of section 90 of the *Employment Act* which states that: -

“Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (cap 22), no civil action or proceedings based or arising out of this Act or 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.”

14. The question that arises is, what is the meaning of a cause of action and when does it arise. In *Letang v Cooper* [1964] 2 All ER 929 at 934, Lord Diplock defined cause of action as follows: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

15. Again in *Drummond Jackson v Britain Medical Association* [1970] 2 WLR 688, Pearson J defined a cause of action as follow: -

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

16. As regards when a cause of action arises, *Halsbury's Laws* (4<sup>th</sup> Edition) Vol 28 paragraph 662 (page 298) states that: -

“A cause of action arises in instances of breach of contract, upon the breach, and ... if a contract is to do something at a particular time or upon the happening of a contingency and the thing contracted for is not done, the cause of action arises at the time specified, or upon the contingency happening...”



17. In this case the claimant has pleaded the following in her Memorandum of claim:
- “6. On or about September 6, 2018, the respondent purported to release the claimant to the Ministry of Interior and Coordination of the National Government. The claimant was also removed from the respondent’s payroll.
  7. The claimant states that she remained without salary as the issue of her transfer to the National Government was being addressed by the Public Service Commission who advised the respondent to reinstate the claimant’s salary and appropriately deploy her. The Public Service Board further confirmed that the claimant was employed on permanent and pensionable position of a sub-county administrator.
  8. The claimant states that she was not reinstated in the payroll of the respondent until August 2020, and she remained without a salary for 24 months on account of the malicious and ill advised actions of the respondent. The claimant states that the respondent breached her terms of employment without lawful excuse. She claims general and aggravated damages against the respondent. “
18. In addition she claims kshs 1,385,716.21 made up of 15 monthly instalments of kshs 46,100 towards the sacco loan which was not paid due to the failure by the respondent to pay her salary, accumulated loan interest caused by the withholding of her salary and lost dividends after her shares in New Fortis Sacco were forfeited to settling her Sacco Loan. (See Paragraph 10, 11 & 12 of the Memorandum of Claim).
19. Having considered the above cited judicial precedents on the definition of a cause of action and the facts of this case, I would say that the cause of action herein arose on September 6, 2018 when the claimant was removed from the respondent’s payroll. It means that her right to sue accrued from that day and because the injury complained of was continuous in nature, the right to sue continued until 12 months from the day when the injury ceased by dint of section 90 of the *Employment Act*. The suit was filed on June 27, 2022, 22 months from the date when the injury complained of ceased. Consequently, the court agrees with the respondent that the suit is time barred and for that reason the court lacks jurisdiction to determine it.

### **Jurisdiction vs exhaustion doctrine**

20. The respondent contends that this court lacks jurisdiction to entertain the suit because the internal appeal mechanism has not been exhausted. Article 234 of the *Constitution*, section 87 (2) and 88 of the *Public Service Commission Act* and section 9(2) of the Fair Administrative Actions Act were cited as the basis for the objection. The claimant did not make any submissions on the provisions cited by the respondent.
21. It is obvious that Article 234 of the *Constitution* of Kenya provides that the Public Service Commission shall have jurisdiction to hear appeals from decisions made by a County Public Service Board. In



order to give effect to the foregoing provision, the Parliament enacted section 77(1) of the County Government Act, 2012 as follows;

“Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of the disciplinary control against any public officer may appeal to the Public Service Commission against the decision.”

22. The use of the word “may”, in my view suggests an option to be exercised by the affected or dissatisfied person. However, the enactment of the *Public Service Commission Act* in 2017, the position seems to have taken a drastic change. Section 85 of the Act provides that;

“The commission shall, in order to discharge its mandate under article 234 (2) (i) of the *Constitution*, hear and determine appeals in respect of any decision relating to engagement of any person in a county government...”

23. The appealable matters are then set out under Regulation 8 of the *Public Service Commission (County Government Services Appeals Procedure) Regulations*, thus:-

“The commission may hear and determine an appeal from a public officer in a County Government Public Service regarding any decision relating to the engagement of the person in the county government, including an appeal in respect of –

- a. Recruitment, selection, appointment, promotion, re-designation, deployment and qualifications attached to any office;
- b. remuneration, and terms and conditions of service;
- c. disciplinary control including imposition of any punishment including dismissal;
- d. ...”

24. Section 87(2) of the *Public Service Commission Act* then 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 the County Public Government Public Service unless the procedure provided for under this part has been exhausted.”

25. The dispute herein springs from the claimants’ engagement in the respondent’ County Public Service. The dispute was initially determined by the Public Service Commission vide the letter dated February 13, 2019. The respondent complied with the decision by the Public Service Commission by reinstating the claimants and paying her all her salary arrears.

26. The claimant is now seeking compensation arising from her removal from the respondent’s pay roll and delay in processing her salary after the reinstatement as aforesaid. The compensation being sought in my view does not fall within the jurisdiction of the Commission. They are damages which require the exercise of discretion by the court. Consequently, I find that the second limb of the preliminary objection lacks merit and is rejected.

## Conclusion

27. Having already found that the suit is time barred, I must allow the preliminary objection with no costs.



**DATED, SIGNED AND DELIVERED AT NYERI THIS 17<sup>TH</sup> DAY OF NOVEMBER 2022.**

**ONESMUS N MAKAU**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

