



**Odie v Attorney General & 3 others (Cause E016 of 2021)
[2022] KEELRC 13527 (KLR) (14 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13527 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E016 OF 2021
S RADIDO, J
DECEMBER 14, 2022**

BETWEEN

JOHN OCHIENG ODIE CLAIMANT

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF INFORMATION, COMMUNICATION
AND TECHNOLOGY, STATE DEPARTMENT OF BROADCASTING &
COMMUNICATION 2ND RESPONDENT**

SECRETARY, PUBLIC SERVICE COMMISSION OF KENYA 3RD RESPONDENT

DIRECTOR OF PENSIONS 4TH RESPONDENT

JUDGMENT

1. John Ochieng Odie (the claimant) sued the 4 respondents on February 10, 2021, and he stated the issue in dispute as:

Unlawful denial of all accrued retirement benefits arising under the contract of employment due to misinterpretation and misapplication of employment contract documents, statutory provisions and the violation of fundamental rights and freedoms in the bill of rights.
2. The respondents filed a joint response on March 10, 2021, prompting the claimant to file a reply on March 15, 2021.
3. On November 12, 2021, the respondents raised a preliminary objection asserting time-bar, and the Court rendered itself on the objection on February 2, 2022.



Background

4. The petitioner was appointed as a District Officer sometime in 1990. On or around June 27, 2006, the petitioner was promoted to Senior Assistant Secretary and was upgraded to Undersecretary in 2007.
5. On October 31, 2008, the Kenya National Examinations Council appointed the petitioner as a Deputy Secretary, Administration. The appointment was to be effective from December 1, 2008 and was on permanent and pensionable terms.
6. With the appointment, the Ministry of Information and Communications wrote to the Kenya National Examinations Council on January 4, 2009 to inform it that the Public Service Commission had approved the Council's request for the petitioner's transfer of service.
7. On January 26, 2009, the Accounting Officer Ministry of Information and Communications sent the petitioner's application/claim for retirement pension to the National Treasury.
8. In the interlude, the Permanent Secretary and Head of the Public Service issued a circular on March 20, 2009, notifying all concerned that the retirement age in the public service had been increased to 60 years from 55 years.
9. In the meantime, the petitioner faced a disciplinary hearing by the Kenya National Examinations Council, and on May 22, 2009, his employment was terminated.
10. The petitioner sued the Council (Nairobi Cause No 772(N) of 2009, John Ochieng Odie v Kenya National Examinations Council. The court found the termination unfair and awarded him compensation.
11. Upon the termination of employment by the council, the petitioner applied to the Ministry/Public Service Commission to be re-appointed to service.
12. The Permanent Secretary, Ministry of Information and Communications pleaded with the Ministry of Provincial Administration on June 4, 2009 to have the claimant transferred back to the civil service, but the request was declined, and the claimant was informed on September 30, 2009 that the Ministry of Provincial Administration had refused to approve his request for re-deployment to the civil service from the Kenya National Examinations Council.
13. The claimant appealed to the Public Service Commission.
14. The Commission rejected the request through a letter dated November 3, 2010.
15. The claimant sought a review of the decision, but the Commission declined to uphold the request and notified the claimant of the decision on April 29, 2011.
16. On or about December 29, 2016, the claimant wrote to the Director of Pensions informing him that he was in the process of lodging his claim for pension upon transfer of service since the Kenya National Examinations Council had failed to pay his pension.
17. The Pensions Department responded on January 10, 2017, informing him that his retirement documents had yet to be received. The claimant was advised to request the Ministry of Information and the Council to provide the relevant documents.
18. The claimant wrote to the Ministry on February 6, 2017 requesting it to furnish the Director of Pensions with the relevant documents.



19. The claimant lodged a complaint against the Council with the Retirement Benefits Authority on February 13, 2017
20. On May 16, 2017, the claimant wrote to the Pensions Department indicating that the Ministry had informed him it had provided the relevant documents through a letter dated May 9, 2017. The claimant urged the department to process his pension from June 22, 1990 to September 25, 2009.
21. The pensions department did not act, and the claimant sent a reminder on March 1, 2018 and indicated he would sue.
22. The claimant sent a reminder to the Ministry of Information on March 4, 2019 to provide the Director of Pensions with the documents he had requested. The Ministry responded on April 9, 2019, asking the claimant to provide certain records.
23. The claimant furnished the Ministry with the records through a letter dated May 20, 2019, and on January 28, 2021, he notified the Honourable Attorney General of his intention to sue. The memorandum of claim was lodged with the court on February 10, 2021.
24. The cause was heard on May 24, 2022, June 23, 2022, and September 20, 2022. The claimant and an Assistant Director, Human Resources, testified.
25. The claimant filed his submissions on September 26, 2022 and the respondents on November 21, 2022.
26. The court has considered the pleadings, evidence, and submissions.

Limitation

27. Despite the court having determined the question of limitation in its ruling delivered on February 2, 2022, the respondents raised the issue again in their final submissions.
28. The respondents urged in the submissions that the causes of action advanced by the claimant had been lodged in court outside the 3 years prescribed by section 90 of the *Employment Act, 2007*.
29. Pension is payable monthly and, therefore, accrues monthly.
30. The court is consequently of the view that limitation should not be determinative with respect to the claim for pension.

Reinstatement

31. The claimant asserted that the failure by the respondents to reinstate him to the civil service after the termination of his employment by the council was unlawful because the decision was unreasonable and violated his right to protection against unemployment and legitimate expectation.
32. The claimant referred the court to article 23(1) of the *Universal Declaration on Human Rights* and articles 10(2) and 47(1) and (2) of the *Constitution, 2010*.
33. The claimant was of the view that since the Permanent Secretary, Ministry of Information, had recommended his reinstatement, it was insincere and unconstitutional for the respondents not to effect the recommendation.
34. Legitimate expectation arises when a party has made a promise to another. The claimant did not prove that the respondents had promised him reinstatement after the transfer of service from the civil service to the Council.



35. When the claimant applied for employment by the Council, he was aware or ought to have been aware of the consequences. The retirement age at the time was 55 years.
36. One of the consequences was that the respondents could, under the prevailing framework, approve the transfer of service.
37. The respondents approved the transfer of service. The effect of the transfer of service was that the claimant would not lose his accrued pensionable service, but he ceased being a civil servant or an employee of the Public Service Commission.
38. The court is, therefore, unable to find any unreasonableness or illegality in the decision of the respondents to decline to accept back the claimant after he separated with the Council.
39. It is also not lost to the court that the claimant moved the court on February 10, 2021 to challenge decisions made by the respondents on September 1, 2009 and September 30, 2009.
40. If the claimant believed that the decision was unlawful, he should have presented this dispute to the Court within the three years prescribed by section 90 of the *Employment Act, 2007*.

Pension Benefits

41. The claimant was appointed into office on or around June 20, 1990. He transferred his services from the civil service to the Council effective December 1, 2008. The respondents approved the transfer of service.
42. The claimant's initial requests for pension were declined on the ground that by virtue of section 6 of the *Pensions Act*, he was not eligible for the pension benefit.
43. However, after a lot of to and fro, the Cabinet Secretary, Ministry of ICT Innovation and Youth Affairs, on April 9, 2021, requested the claimant to provide certain documents to facilitate the processing of his pension.
44. On June 17, 2021, the Cabinet Secretary wrote to the claimant once again to provide a duly filed clearance form to confirm he had no government liability as of November 30, 2008 and a copy of his ATM card to facilitate the processing of his pension.
45. When the developments were brought to the attention of the court, it directed the parties to attempt out of court settlement. The claimant, however, insisted that the offer from the respondents was an afterthought and that the dispute should be left to the adjudication of the court.
46. A court of law should not make orders in vain. The substance of the dispute herein has been overtaken by the decision of the respondents to process the claimants' pension for the years of service with the civil service.
47. The processing of the pension requires any person claiming a pension to provide certain records. The claimant herein should provide the records sought so that his pension can be processed.

Conclusion and Orders

48. Considering that the respondents decided to process the claimant's pension before the hearing of the cause, the court declines to grant the more 18 remedies sought by the claimant.
49. The claimant rebuffed the offer from the respondents to settle the dispute. He filed a needlessly verbose submission running into 99 pages. The court orders each party to bear own costs.



DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 14TH DAY OF DECEMBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

Claimant in person

For respondents Ms Jumma, Senior Litigation Counsel, Office of the Hon Attorney General

Court Assistant Chrispo

