



Lugusa & 69 others v TSS Grain Millers Ltd & 2 others (Cause 137 of 2022) [2024] KEELRC 1884 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1884 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 137 OF 2022**

**AK NZEI, J
JULY 18, 2024**

BETWEEN

JOHN LUGUSA & 69 OTHERS & 69 OTHERS & 69 OTHERS & 69 OTHERS & 69 OTHERS CLAIMANT

AND

**TSS GRAIN MILLERS LTD 1ST RESPONDENT
USTAWI GRAIN MILLERS LTD 2ND RESPONDENT
PONANGIPALI VENKATA RAMANA RAO 3RD RESPONDENT**

RULING

1. Before me is the Applicants’ Chamber Summons dated 21st December 2023. The Applicants seek the following orders:-
 - a. That this Court be pleased to grant leave, for avoidance of doubt, to the Applicants to file a suit against the Respondents out of time.
 - b. That the annexed suit be deemed to have been properly filed and ripe for service upon the Respondents.
 - c. That costs of the application be in the cause.
2. The application is based on the supporting and supplementary affidavits of Owino Oenga Advocate sworn on 21st December 2023 and 6th March 2024 respectively. It is stated in the said affidavits:-
 - a. that the Applicants were in 2016 declared redundant by the 1st Respondent in a manner that was inconsistent with Section 40 of the *Employment Act* 2007, and that a suit filed by the Applicant’s Trade Union, being Mombasa ELRC Cause No. 463 of 2016, was struck off for



failure to exhaust the conciliation process and want of statutory compliance with particular provisions of the [Insolvency Act](#).

- b. that conciliation failed and statutory compliance was obtained vide a Ruling delivered by the High Court on 2/12/2020 in Misc. Cause No. 62 of 2019 (Bakery Confectionery Manufacturing & Allied workers Union (K) v TSS Grain Millers Limited).
 - c. that the Applicants honestly believed that their Union was in conduct of their matter but recently realized that the Union was no longer pursuing the matter.
 - d. that the Applicants have not received their terminal dues and that the 1st Respondent company has already been sold to the 2nd Respondent company; and that unless the Court urgently intervenes, the Applicants stand to lose their rightful terminal dues despite having worked diligently for the 1st Respondent.
3. The application is opposed by the 3rd Respondent vide his replying affidavit sworn on 20th February 2024. It is stated in the said replying affidavit:-
- a. that the Applicant's application is bad in law, fatally defective, incurably incompetent and should be dismissed.
 - b. that Section 89 of the [Employment Act](#) (formerly Section 90 of the [Employment Act](#)) amended the [Limitation of Actions Act](#) (Cap 22) to specifically provide for a limitation period of 3 years in actions based on breach of contracts of service or arising out of the [Employment Act](#) 2007.
4. Section 89 (formerly Section 90) of the [Employment Act](#) provides as follows:-

“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 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.”

5. It is unambiguously clear from the foregoing statutory provision that this Court is not vested with jurisdiction to extend time for filing of suits arising from breach of contracts of service or based on the [Employment Act](#). The limitation period of three years provided for in the said section is absolute, and once it lapses on any party regarding any cause of action to which the Act applies, the door to seeking redress is permanently shut on that party. The Court of Appeal stated as follows in the case of [Beatrice Kabai Adagala v Postal Corporation of Kenya](#) [2015] eKLR:-

“Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the [Employment Act](#) which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years.

As this Court stated in the case of [Divecon Limited v Samani](#) [1995-1998] EA P. 48, a decision relied upon by Radido, J in [Josephat Ndirangu v Henkel Chemicals \[E.A\] Limited](#) [2014] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the Applicant satisfies the requirements of Sections 27 and 28 of the [Limitation of Action Act](#).”



6. Still on the same issue, the Court of Appeal stated as follows in the case of *G4S Security Services [K] Limited v Joseph Kamau & 468 others* [2018] eKLR:-

“ 22. The statutory framework on the conciliation process is as provided for by the provisions of the *Labour Relations Act*, 2007. Section 62(3) of the *Labour Relations Act*, 2007 provides that a trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within 90 days of the dismissal or any longer period that the Minister, on good cause, permits. It is not clear exactly when the Respondents reported this matter for conciliation.

23. Time does not stop running on the commencement of conciliation or other alternative dispute resolution mechanisms provided for under the *constitution* or any other law. This is fortified by the decision of this Court in the case of *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza and Another* [2016] eKLR which held as follows:-

“While there is no doubt that Section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be Court based and conducted within the law.

Time does not stop running merely because parties are engaged in out of Court negotiations. It was incumbent upon the Respondents to bear in mind the provisions of Section 90 of the *Employment Act* even as they engaged in the negotiations.

The claim went stale three years from the date of the termination of the Respondents’ contracts of employment.”

7. The upshot of all the foregoing is that orders sought in the Applicants’ Chamber Summons dated 21st December 2023 are not capable of being granted. The application must fail, and is hereby dismissed. For avoidance of doubt, the suit documents filed alongside the application are hereby struck off, and the Court file herein is hereby ordered closed.

8. Each party will bear its own costs of the proceedings herein.

9. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH July 2024

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

