



**Kenya Union of Employees of Voluntary and Charitable Organizations
v Daystar University College (Employment and Labour Relations Cause
37 of 2008) [2024] KEELRC 407 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 407 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 37 OF 2008
K OCHARO, J
FEBRUARY 23, 2024**

BETWEEN

**KENYA UNION OF EMPLOYEES OF VOLUNTARY AND CHARITABLE
ORGANIZATIONS CLAIMANT**

AND

DAYSTAR UNIVERSITY COLLEGE RESPONDENT

RULING

Background

1. The Applicants herein moved this Court vide a Notice of Motion application dated 15th June 2022 seeking the following orders: -
 - a. The Court be pleased to extend the time of filing this application.
 - b. The Honourable Court be pleased to order the Labour Office, and not the Respondent to determine on its own the correct lawful dues the Respondent should pay the Interested Parties.
 - c. Applicants be allowed to file a bill of costs in this suit.
 - d. Costs of this application.
2. The Application is premised on the Grounds thereof and the Supporting Affidavit of one John Idagiza sworn on 15th June 2022 and the further affidavits of the other applicants, filed herein subsequently.
3. The Respondent opposed the application through the Grounds of Opposition dated 26th July 2022, and a Replying Affidavit by Ms Mueni Nyokabi Kahumbura sworn on 22nd May 2023.



4. When this matter came up for hearing of the application on 27th July 2022, this Court directed that the same be canvassed by way of written submissions. The Parties have filed their respective submissions. Consequently, this ruling is with the benefit of the submissions.

The Application

5. The application is expressed to be brought under Section 28 (3) of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya.
6. The Applicants [Grievants] states that at material times, they were employees of the Respondent who were declared redundant, prompting the Claimant [their trade union] to file the suit herein.
7. The Applicants further state that when this matter came up for hearing on the 18th of September 2008, by consent of the parties, the Court referred the matter for conciliation by the Labour Officer to determine; the validity of the Grievant's claim; whether declaration of the redundancy was procedural, and terminal dues if any that could be paid to them.
8. Subsequently, the Labour Officer prepared a report. The Report was presented to the Court. The report revealed that the declaration of the redundancy was not procedural, the Grievants were being underpaid in the course of their employment, they were not earning their entitled to house allowance, and the Grievants were entitled to compensation for unutilized leave days. Their claim for overtime compensation was declined. The Court subsequently delivered a judgment which adopted the report, and made it a basis for the computation of terminal dues to the Grievants. The Court directed the Respondent to compute and pay the Grievants their dues within 30 days of 3rd March 2009.
9. The Court directed that in the event the parties disagreed on the computation by the Respondent, then the Labour Officer would be invited to assist. The Applicants state further, as the Respondent was an interested party, the Court erred when it entrusted him with the responsibility to compute the dues. No surprise, the parties failed to agree. and the Labour Officer issued a Memorandum of Disagreement on the 27th May,2009.
10. It is stated further that the Applicants filed an application for review, urging the court to review and set aside that part of the judgment that denied the Grievants overtime compensation. The application was eventually dismissed as lacking in merit. Aggrieved with the dismissal, the Applicants lodged an appeal at the Court of Appeal vide Civil Appeal No 171 of 2013. The Appeal was dismissed on the 26th March 2020.
11. They state that delay in filing this application was accessioned by the fact that the COVID-19 pandemic set in around the time that the "High Court award was about to expire" inhibiting the timeous filing of the instant application.

The Response

12. The Respondent contends that the Claimant union was cancelled on 1st November 2017, under the provisions of Section 28[2] [b] and [d] *Labour Relations Act*. As a result, the Applicant has no locus standi to initiate any proceedings before this court.
13. The Respondent states that counsel for the Applicants is not properly on record having failed to seek leave to come on record, as they came on record after judgment in this matter.
14. It is further stated that the issues being raised by the Applicants were fully determined by the Industrial Court. The Applicants were given the liberty to revert to the Provincial Labour Officer concerning any issues on the computation of dues. The issue of computation was placed before the Provincial Labour



Officer and a report was subsequently generated. The parties could not agree during conciliation and thus a Memorandum of Disagreement was issued.

15. While the Applicants' application seeks to enlarge the time for the Labour Officer to assist in the computation, the prescribed timelines for the enlargement of time have already lapsed.
16. The Respondent asserts that its former employees were paid according to the Labour Officer's report and no further claims against the Respondent are outstanding. The Court should take note that Nelson Agoya and Ernest Okuta have since passed away. Their claims consequently abated.
17. The Applicant has not put forth any sufficient reason for the delay in bringing up the instant application. Litigation must be allowed to come to an end. The Application should be dismissed.

Submissions, Analysis and Determination

18. I have carefully considered the material placed before me by the parties, their Counsels' submissions inclusive, and the following issues emerge for determination;
 - I. Whether the instant application is competently filed.
 - II. Whether the Notice of Motion Application dated 15th June 2022, is res judicata.
 - III. Whether this Court can grant the orders sought in the Notice of Motion application.

Whether the instant application is competently filed.

19. From the onset it must be stated that the instant application is quite convoluted, and presented in the most uncandid manner. While the Applicants boldly assert that they moved to the Court of Appeal only on the issue of the Industrial Court's failure to award them the relief, overtime compensation, the Court notes that contrary to the assertion the appeal assailed the entire of the Industrial Court's judgment. In appreciating the width of the Appeal before them, the Court of Appeal stated in their Judgment;

“4. The appellants who were dissatisfied with the judgment, have filed a memorandum of appeal in which they have raised seven grounds stating that the learned Judge erred in law; by making his order based on a report that was erroneous and that did not have due regard the appellants' claims; in asking the respondents to compute the award and benefits due to the appellants; in failing to decide the appellants' claim on the merits of the claim but instead relying on a report by the by the respondents; in refusing to allow the review of the award as sought by the claimants; in giving an award based on erroneous calculations; in finding that the authorities presented to court were irrelevant in the determination of the case; in arriving at the wholly misconceived decision to rely on the respondents' calculations rather than the appellants' submissions; and in dismissing other reliefs sought by the appellants. The appellants urged the Court to allow the appeal and enter judgment as pleaded in the superior court so that the appellants are awarded general damages.”

20. This Court takes the view that by asserting as they did, the Applicants were propelled by the clever bid to blur the Court from discerning that what they are raising in the instant application was equally raised in the appeal at the Court of Appeal, and the application for review dated 26th October 2011 before Justice Mukunya.



21. I have carefully considered the order sought in prayer 2 of the instant application, and hesitate not to take the view that, evidently, it requires the Court to review the judgment of the Industrial Court, on the directions that had been given on the manner the computation of the reliefs that had been sought by and awarded to the Applicants and others, was to be carried out.
22. Having appealed to the Court of Appeal on the matter, the subject matter of the instant application, the Applicants effectively foreclosed themselves from making any application for review after their act of appealing to the Court of Appeal.
23. The Judgment herein was very clear, and as was rightly found by the Court of Appeal, the Claimant and the Applicants had the leeway to engage the services of the Provincial Labour Officer to compute the dues if the parties didn't agree on the computation by the Respondent. The liberty was not made subject to any further order of the court. I cannot see the basis upon which I am asked, "to order the Labour Officer and not the Respondent to determine on its own the correct lawful dues the Respondent should pay the Interested Parties." I cannot fathom on what basis I can grant the orders in the circumstances of this matter.
24. The application is expressed to be brought under the provisions of section 28[3] of the Limitation of Actions Act. To fully interrogate the relevance or otherwise of the provision as the chosen anchor for the applicants' application, the entire section 28 must be considered. The section provides;

“28. Application for leave of court under section 27

- [1]. An application for the leave of court for the purposes of section 27 of this Act shall be made ex parte, except in so far as rules of the court may otherwise provide in relation to applications made after the commencement of a relevant action.
- [2]. Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on the evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in the action, that evidence would in the absence of any evidence to the contrary, be sufficient_
 - (a) to establish that cause of action, apart from any defence under section [2] of this Act; and
 - (b) to fulfil the requirements of section 27[2] of this Act in relation to that cause of action.
- [3]. Where such an application is made after the commencement of relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on the evidence adduced by or on behalf of the plaintiff, it appears to the court that, if the like evidence would in the absence of any evidence to the contrary, be sufficient-
 - (a) to establish that cause of action, apart from any defence under section 4[2] of this Act; and



- (b) to fulfil the requirements of section 27[2] of this Act in relation to that cause of action.

25. In my view, the application for extension, and the leave contemplated under section 28 must relate to the matters contemplated under section 27 of the Act. The latter section provides for the extension of the limitation period in case of ignorance of material actions for negligence, nuisance or breach of duty. The section provides;

“27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.

(1) Section 4(2) does not afford a defence to an action founded on tort where—

- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and [Rev. 2012] Cap. 22 Limitation of Actions 17 [Issue 1]
- (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
- (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—

- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
- (b) in either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect— (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

- (b) the operation of any law which, apart from this section, would enable such an action to be brought



after the end of the period of three years from the date on which the cause of action accrued.”

26. The matters raised by the Applicants in the instant application are totally unconnected with those provided for under section 27.
27. In the upshot, I hold that the application is incompetent. Consequently, I consider it unnecessary to proceed to interrogate the other issues identified for determination. The application is hereby dismissed with costs.
28. Orders accordingly.

READ, DELIVERED AND SIGNED THIS 23RD DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Mr. Willy for Mr. Ligami for the Respondent.

Mr. Mugu for the Applicant.

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

