



**Onyango v Maseno West Sacco Society Ltd (Cause 20 "A" of 2013)
[2024] KEELRC 603 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 603 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 20 "A" OF 2013
S RADIDO, J
MARCH 13, 2024**

BETWEEN

JOHNSON ODUOR ONYANGO CLAIMANT

AND

MASENO WEST SACCO SOCIETY LTD RESPONDENT

JUDGMENT

1. Johnson Oduor Onyango (the Claimant) sued Maseno West Sacco Society Ltd (the Respondent) on 19 February 2013, alleging breach of contract.
2. The reliefs sought by the Claimant were:
 - (a) Unpaid salaries from the month of October 2008.
 - (b) Severance pay for the years worked.
 - (c) 3 months' salary in lieu of notice.
 - (d) Costs of this suit with interest thereon at court rates.
 - (e) Any other relief the Court deems fit to grant.
3. The Respondent filed a Response on 21 June 2013, and this prompted the Claimant to file a Reply to the Response on 2 July 2013.
4. On 3 November 2016, the parties proposed and the Court agreed that the Cause proceeds on the basis of the record and written submissions to be filed.
5. The Court delivered a judgment on 4 May 2017, in which it ordered that the Claimant be reinstated to work.



6. The Claimant was aggrieved with the judgment and he filed an application seeking review of the judgment on the ground that he had not sought the order of reinstatement.
7. Since the application was not opposed, the Court (differently constituted) instead of allowing the application went ahead to deliver a new judgment on 8 June 2018.
8. The Claimant was aggrieved again, and he lodged an Appeal to the Court of Appeal.
9. On 26 May 2023, the Court of Appeal allowed the Appeal and directed the application for review to be heard by a different judge other than the 2 judges who had handled the Cause.
10. When the parties appeared before this Court on 5 October 2023, the Court allowed the review application.
11. The Claimant then suggested that the parties explore an out-of-court settlement but an agreement was not reached.
12. On 11 December 2023, this Court directed that the Cause be heard afresh, and the hearing was conducted on 6 February 2024. The Claimant and the Chair of the Respondent testified.
13. The Claimant filed his submissions on 13 February 2024 and the Respondent on... (should have been filed and served on or before 1 March 2024).
14. The Court has considered the pleadings, evidence and submissions.

Limitation/statute bar

15. The Respondent raised a plea of limitation in paragraph 9 of the Statement of Defence.
16. In his submissions, the Claimant contended that it was not open to this Court to revisit the issue of limitation because it had been raised previously and had been declined.
17. It is true that the Court (differently constituted) heard the limitation plea and in a Ruling delivered on 22 October 2014 found the objection without merit.
18. However, on 11 December 2023, the Respondent had proposed that the Court render a fresh judgment, but the Court instead directed that the Cause be heard afresh.
19. This Court is therefore of the view that it can revisit the question of limitation.
20. The Claimant explained in the submissions that the issue of limitation did not arise because the parties had been engaged in litigation in Cooperative Tribunal Case No. 16 of 2009 which was terminated in 2012, and a direction was issued that the dispute over terminal dues be lodged with this Court.
21. The Claimant acknowledged in the Memorandum of Claim that he was dismissed on 7 October 2008. He initiated the action against the Respondent on 19 February 2013. That is, some 5 years after the cause of action had accrued.
22. At the material time, the *Employment Act*, 2007 had come into effect (it came into force on 6 June 2008).
23. By dint of section 90 of the Act, the Claimant ought to have commenced action within 3 years. He moved the Court after the lapse of the prescribed limitation period.
24. It is of no relevance that the parties were battling before a different forum which in any case did not have jurisdiction over the instant dispute.



25. The action was statute/time-barred and the Court so finds.
26. But on the assumption that the Court is wrong on that conclusion, the Court will look at the heads of claim for unfair termination of employment and breach of contract.

Unfair termination of employment

27. The Claimant pleaded unfair termination of employment at paragraphs 5, 7 and 8 of the Memorandum of Claim, but he did not seek any of the primary reliefs appurtenant to an unfair termination of employment dispute, save for salary in lieu of notice (the Claimant tried to amend the Memorandum of Claim but even in the draft amended Memorandum of Claim, none of the primary reliefs was set out and the Court declined to allow the amendments).
28. The Court will, therefore, not embark on an endeavour that is not supported by the pleaded reliefs.

Breach of contract

- Unpaid salaries for October 2008

29. The Claimant pleaded that he served the Respondent until 7 October 2008. During oral testimony, he stated that he was earning Kshs 15,140/- per month and that he was not paid the earned wages for October 2008.
30. The Respondent's witness admitted that the Claimant was not paid the earned wages.
31. The Court would in the circumstances have allowed this head of the claim.

Severance pay

32. Under the *Employment Act*, 2007, severance pay is due upon termination of employment on the ground of redundancy.
33. The Claimant did not lay any foundation for the award of severance pay and the head of the claim was for dismissal.

Salary in lieu of notice

34. The Claimant sought the equivalent of 3-months' salary in lieu of notice.
35. The Claimant did not lay an evidential foundation to this head of the claim by producing a contract providing for payment of 3-months' salary in lieu of notice nor draw the attention of the Court to the legal framework providing for the same as opposed to the 1-month contemplated by section 35(1)(c) of the *Employment Act*, 2007.

Conclusion and Orders

36. Flowing from the above the Court finds and declares the action herein statute barred by dint of section 90 of the *Employment Act*, 2007, and the Cause is struck out with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 13TH DAY OF MARCH 2024.

RADIDO STEPHEN, MCIARB

JUDGE



Appearances

For Claimant Otieno, Yogo, Ojuro & Co. Advocates

For Respondent K'owinoh & Co. Advocates

Court Assistant Chemwolo

