



Kenya Union of Road Contractors and Civil Engineering Workers v China City Construction Group Co Ltd (Cause E075 of 2023) [2024] KEELRC 490 (KLR) (4 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 490 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E075 OF 2023**

**S RADIDO, J
MARCH 4, 2024**

BETWEEN
KENYA UNION OF ROAD CONTRACTORS AND CIVIL ENGINEERING WORKERS CLAIMANT
AND
CHINA CITY CONSTRUCTION GROUP CO LTD RESPONDENT

RULING

1. The Kenya Union of Road Contractors & Civil Engineering Workers (the Union) sued the China City Construction Group Co Ltd (the Respondent) on 2 October 2023, alleging unfair termination of employment of some 8 named Grievants.
2. When served the Respondent filed a Notice of Preliminary Objection contending that:
 - i. This Honourable Court lacks jurisdiction to admit, hear and determine the suit as it is irredeemable (sic) statute barred by dint of section 90 of the Employment Act, No. 11 of 2007 Laws of Kenya.
 - ii. This Honourable Court lacks jurisdiction to admit, hear and determine the claim as it has been filed by the Claimant outside the mandatory provisions of section 90 of the Employment Act, No. 11 of 2007 for continuity of injuries/damages which ought to be filed within twelve (12) months next after cessation thereof.
 - iii. The Claimant’s claims as constituted herein are bad in law, incompetent, fatally defective and an abuse of the Court process.
3. The Court gave directions on the Preliminary Objection on 29 January 2024, and the Respondent filed its submissions on 5 February 2024, and the Union on 23 February 2024.
4. The Court has considered the pleadings, Notice of Preliminary Objection and submissions.



5. The Grievants were allegedly dismissed on diverse dates from 4 June 2020 to 15 August 2020, and the Union moved the Court on 2 October 2023.
6. It cannot be disputed that the Union moved the Court more than 3 years and some 2 months after the causes of action accrued.
7. The Union pleaded that it reported a trade dispute to the Cabinet Secretary Labour, and the dispute went through conciliation but no evidence or records of such a report or outcome of the conciliation was placed before the Court.
8. Nevertheless, two issues arise.
9. One, whether time stops running for purposes of limitation if parties are engaged in alternative dispute resolution processes and two, whether the Court has jurisdiction to entertain an action instituted outside the period prescribed by section 90 of the *Employment Act*, 2007.
10. In *Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & Ar* (2016) eKLR, the Court of Appeal had the occasion to address itself on the question of whether time for purposes of limitation stopped running during conciliation and it held that:

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 an 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 service.

11. From the binding authority, the legal position for now remains that time does not stop running for purposes of limitation law simply because the parties are engaged in alternative dispute resolution processes.
12. On whether the Court can extend time, the Court of Appeal held in *Divecon v Samani* (1995-1998) EA 48 that:

to us, the meaning of the wording of section 4(1)is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that "the wording of section 4(1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked". (emphasis mine)

A limitation provision or statute vests or gives to a party/defendant a right, and it is not just a procedural right but a substantive right. It is the cause of action which is barred and not the remedy which is barred.

13. In this Court's view, the above position holds legally sound even in actions where section 90 of the *Employment Act*, 2007 is implicated.



Conclusion and Orders

14. In light of the above, the Court upholds the Preliminary Objection and declines jurisdiction and strikes out the Cause without any order on costs considering the social partnership between the parties.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 4TH DAY OF MARCH 2024.

Radido Stephen, MCIArb

Judge

Appearances

For Union Mr Osicho, General Secretary

For Respondent Ms Muhavi instructed by Muhavi & Associates Advocates

Court Assistant Chemwolo

