



Kenya Engineering Workers Union v AKS East Africa Limited (Cause 523 of 2017) [2024] KEELRC 1585 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1585 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 523 OF 2017
SC RUTTO, J
JUNE 21, 2024**

**BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
AKS EAST AFRICA LIMITED RESPONDENT**

JUDGMENT

1. The Claimant Union brought the instant suit on behalf of the grievant whom it avers, is its member. According to the Claimant, the issue in dispute is failure by the Respondent to pay the grievant, Mr. William Paul Ouko, his final dues.
2. Upon being served with the Memorandum of Claim, the Respondent filed a Notice of Preliminary Objection dated 15th May 2017. The grounds set out in the Objection is that the Claim has been brought out of time and that the same lies defeated by effluxion of time as per Section 90 of the *Employment Act*.
3. Further to filing the Notice of Preliminary Objection, the Respondent filed a Statement of Response and Counterclaim through which it denied the Claimant's assertions. The Respondent contended that it is the grievant who left employment without adhering to the law governing the employment contract. Through the Counterclaim, the Respondent prays for the sum of Kshs 41,506/= against the grievant.
4. When the matter came up for hearing on 5th March 2024, neither the Respondent nor its Advocate was present in Court. Being satisfied with the return of service, the Court directed that the matter proceeds, the Respondent's absence notwithstanding.



Claimant's Case

5. The grievant herein testified in support of his case. He sought to adopt his witness statement to constitute his evidence in chief.
6. It was the grievant's evidence that during his working period, he could be sent to different stations away from his normal working station, Nairobi.
7. He further averred that the cause of the trade dispute was that his employer could pay allowances for some days and stop paying any allowance. That further, the Respondent was not remitting his N.H.I.F and N.S.S.F dues.
8. He further stated that in the month of July 2010, he worked in Kapsabet for 30 days; in September and October 2010, he worked in Kisii for 60 days; in March and April 2011, he worked in Kitengela for 30 days; in October and December 2012, he worked in Malaba and Busia Counties for 54 days and in February 2013, he once again worked at Kitengela & Machakos counties for 20 days.
9. That in all the foregoing instances, he was not paid any allowances.
10. The grievant further stated that while working at Bungoma, he was arrested and taken to Bungoma Central Police Station for lack of a working permit. He stayed in a police cell for five (5) days. He seeks compensation against the Respondent for wrongful prosecution.
11. That when he returned from Bungoma, he asked the Respondent to pay him his allowance and salary. The Respondent started creating unnecessary blame and locked him out of employment verbally and without any written warning.
12. He further averred that on 13th May 2013, the Respondent ordered him not to enter the company premises or its site at Mlolongo. The grievant contended that the Respondent did not explain to him the cause of his termination.
13. After locking him out of the employment, the Respondent complained that he had not paid the laborers at the site.
14. After close of the trial, the Claimant filed written submissions.

Analysis and Determination

15. The trial notwithstanding, the question of limitation of time has not escaped the Court's attention and being an issue of law, cannot be ignored. From the grievant's narration of events, the employment relationship was severed on 13th May 2013, when he was ordered by the Respondent not to enter the company premises or its site in Mlolongo.
16. The record bears that the instant suit was filed on 17th March 2017. By simple arithmetic, the intervening period is almost four (4) years. Section 90 of the *Employment Act* which is relevant in this case, is couched as follows: -

[90] 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.
17. Fundamentally, a mandatory time bar of three (3) years is placed on matters arising out of the *Employment Act* or on a contract of service, as the one herein.



18. Therefore, a matter becomes time-barred if it is not filed within three (3) years from the date the cause of action arose. In this case, the cause of action arose on 13th May 2013, when the grievant was allegedly locked out of employment by the Respondent.
19. As was determined by the Court of Appeal in *Attorney General & another vs Andrew Maina Gitbinji & another* [2016] eKLR, a cause of action is simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. It is the date when a person becomes entitled to complain against another person.
20. In this case, that date was 13th May 2013, and from then on, the grievant had all the right to move the Court as appropriate and seek a remedy.
21. As stated herein, this matter was filed on 17th March 2017, which was almost four (4) years after the cause of action had arisen. Applying the provisions of Section 90 of the *Employment Act* to the case herein, it is unequivocal that by then, the claim was time-barred and the grievant had lost the right to bring any claim against the Respondent by operation of law.
22. It is also worth noting that the issue of limitation goes to the Court's jurisdiction. Such was the determination by the Court of Appeal in the case of *Thuranira Karauri vs Agnes Ncheche* [1997] eKLR.
23. Essentially, the issue of limitation ultimately determines whether the Court has jurisdiction to deal with the matter. In this case, as the suit is time-barred, this Court is deprived of jurisdiction to determine the same.
24. Still on the question of jurisdiction, I am bound by the finding in the celebrated case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR, where Nyarangi JA (as he then was) rendered himself thus:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
25. In view of the above binding authority, and having found that the matter herein is time-barred, I cannot help but down my tools as this Court lacks the jurisdiction to proceed further with the determination of this matter.
26. Accordingly, the Claim herein is dismissed in its entirety for being time-barred.
27. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Arika

For the Respondent No appearance



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 had 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 *Civil 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.

