



Kitema v Kenya Electrical Trade & Allied Workers Union (Employment and Labour Relations Cause E061 of 2021) [2024] KEELRC 2705 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2705 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E061 OF 2021**

**MN NDUMA, J
OCTOBER 31, 2024**

BETWEEN

PAUL KITEMA CLAIMANT

AND

KENYA ELECTRICAL TRADE & ALLIED WORKERS UNION . RESPONDENT

JUDGMENT

1. By a statement of claim dated 20/1/2021 the claimant sued the respondent seeking the following orders:
 - i. Kshs. 331,621,020.62
 - ii. 540 bars of soap, 2160 tissue papers, 30 T-shirts, 15 rain coats and 30 dust coats.
 - iii. Damages for breach of contract by the respondent
 - iv. Damages suffered due to the defendant's negligence/breach of duty
 - v. Costs of this suit.
 - vi. Interest at court rates on (i) and (iii) above
 - vii. Any other relief that this honourable court may deem fit and expedite to grant.
2. The claimant (CW1) testified that he was employed by the Kenya Power & Lighting Company on 17/10/1991 and became a member of the respondent union.
3. That the respondent union was bound to protect the interests of the claimant against any labour malpractices by the employer and was supposed to take up any grievances raised by the claimant against the employer at will.



4. That the Collective Bargaining Agreement (CBA) between the employer and the union provided a dispute/grievances resolution procedure. In terms thereof, in case of any issue between a unionisable employee and the company, the shop stewards would discuss the matter with the relevant supervisors where a resolution is not found the shop steward to consult the Branch Committee Member of the depot and both discuss the matter with the departmental head concerned within 72 hours.
5. If a solution is not found, matter to be referred to the Union Branch Secretary by the Branch Committee who would submit the matter to Regional Human Resource and Administration Officer and the County Labour Officer for resolution of the dispute. The two parties to constitute a disputes handling committee consisting of maximum of six and minimum of three members from each side who should endeavour to finalize the matter within 21 days.
6. If dispute is not resolved the Branch Secretary to advise the General Secretary of the union within 14 days. The General Secretary and the General Manager Human Resource and Administration would then endeavour to settle the matter. If matter is not settled, the dispute is then referred to the central joint council and if not resolved, the Managing Director and the General Secretary would consult with a view to resolve the dispute.
7. That minutes of all meetings would be kept at all levels. Meetings would have a chairperson and secretary for that purpose.
8. The claimant states that he received a letter of termination of employment on 4/2/2015 same to take effect on 10/2/2015. That the claimant started an internal appeal process by informing the shop steward who failed to take any action hence the claimant forwarded the appeal to the Secretary General by the name of Earnest Nandome.
9. That the appeal was addressed to the Chief Human Resource Manager and copied to General Secretary of the Union. The General Secretary refused to stamp the letter to acknowledge receipt but he instead authorized his secretary and security guards on 16/2/2015 to chase the claimant away.
10. The claimant states that the General Secretary failed to protect the interest of the claimant and later on when the claimant filed this suit, the General Secretary teamed up with the employer to have the suit dismissed. A union official Fidelis Matothya, filed a witness statement to the effect that he had witnessed the claimant's refusal to accept several letters from the employer. That he being a shop steward, ought to have raised the issue of letters with the employer. That at a sham disciplinary hearing one Magdalene Ndung'u and Raphael Macharia, Branch Treasurer and Assistant Branch Secretary respectively participated when the claimant was not a party nor was he invited to the hearing.
11. The claimant states that no disciplinary hearing took place as the union officials were at all material times, hostile to the claimant's case.
12. That the respondent union violated its mandate to protect the rights and interest of the claimant and sided with the employer to the loss and detriment of the claimant, hence the suit by the claimant against the union.
13. The claimant prays to be awarded as prayed.

Defence

14. The respondent filed a defence against the suit. RW1 Kosgei Kolil, National Deputy General Secretary of the respondent, union testified by adopting a witness statement dated 25/2/2021 as his evidence in chief. RW1 stated that the claimant was a member of the respondent union. That the claimant was invited to a disciplinary hearing by the employer KPLC. That the officials of the union attended the



- disciplinary hearing and they included the Treasurer and Assistant Branch Secretary. That the officials represented the claimant and acted in the best interest of the claimant and diligently represented the claimant.
15. That the employment of the claimant was terminated on 4/2/2015. The claimant filed a claim in this court being ELRC Cause No. 1747 of 2015.
 16. That the claimant hired advocates to prosecute the claim against the employer for unlawful termination.
 17. That the claimant did not seek any assistance from the respondent to prosecute the said suit.
 18. That the respondent did not receive any letter from the claimant requesting for any assistance. That the claimant merely copied appeal letters to the respondent.
 19. That the claimant failed to communicate to the respondent directly about the termination and did not request for any direct assistance from the union.
 20. That respondent's officials who testified for the employer in the ELRC Case No. 747 of 2015 did so in their individual capacity as employees of the company and not on behalf of the respondent in this matter.
 21. That ELRC Cause No. 747 of 2015 was properly heard and determined by the court in favour of the claimant who was awarded compensation. That this suit against the union is an attempt by the claimant to unjustly enrich himself.
 22. That the suit be dismissed with costs.

Determination

23. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:
 - i. Whether this suit is time barred?
 - ii. Whether the claimant has disclosed any cause of action against the respondent? and
 - iii. Whether the claimant is entitled to the reliefs sought?
24. With regard to issue (i) above, the cause of action set out in the statement of claim arose in February 2015, when the employment of the claimant was terminated and according to the claimant, the respondent union failed to represent the claimant and protect his rights and interest against the employer, the claimant being a member of the union.
25. The respondent does not deny that the claimant was its member. The respondent however denies that its officials acted against the best interest of their member, the claimant, by siding with the employer in the termination dispute between the claimant and the employer.
26. The issue of time bar was not raised by the respondent in the suit but the court is bound to consider the same suo moto, it being a matter of law that impacts the jurisdiction of the court to hear and determine the matter.



27. This is informed by the Court of Appeal decision in Owners of the Motor Vessel „Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 where the court stated:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

28. It is apparent from the pleadings that this suit was filed on 25/1/2021 against the union and the cause of action arose in the month of February 2015 on diverse dates from 4th February 2015. In particular, the claimant alleges that he served his appeal against the termination of employment on KETAWU, General Secretary on 16/2/2015 but the General Secretary refused to stamp the letter and gave instructions to his secretary and the security guard to chase the claimant away. As at 16/2/2015, the dispute by the claimant against the respondent had arisen and crystallized.

29. The jurisdiction of the court to hear and determine this dispute is in terms of section 12(1)(g) of the [Employment and Labour Relations Court Act](#), 2014 which provides:

“12(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of [the constitution](#) and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including:-

g. Dispute between a trade union and a member thereof”

The [Employment Act](#) 2007 on the other hand provides at section 90 that:-“Notwithstanding the provisions of section 4(1) of the [Limitation of Actions Act](#), 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.”

30. The dispute disclosed in this suit between the claimant and his union is a labour dispute in terms of the [Labour Relations Act](#), 2007 which Act grants jurisdiction to this court on matters related to employment and labour relations in terms of section 12(1)(g) aforesaid.

31. The parameters of filing this suit are defined strictly by the provision of section 90 of the [Employment Act](#), 2007 it being a dispute that is related to employment and labour relations.

32. Accordingly, in terms of the Court of Appeal decision in

i. Devicon versus Samani (1995-1998 EA 48);

that no court has authority to extend the time in which a suit based on contract may be filed.
And

ii. Hilano Mwabolo –vs- Kenya Commercial Bank {2013} ekLR, Nyabuto Anambe Abusa –vs- Kenya Power & Lighting Company Ltd. (2015) e KLR and Attorney General and Another



–vs- Andrew Maina Githinji and Another (2016) eKLR in which Philip Waki J.A. rendered himself thus:

“By expressly inserting Section 90, the intention of Parliament, in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice, if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the section peremptorily limits actions by the use of the word ‘shall’

33. The suit must be filed within 3 years from the date the dispute arose. The suit was however filed more than five (5) years from the date the dispute arose on 16/2/2015.
34. This court lacks jurisdiction to hear and determine the suit and the same is struck out for want of jurisdiction.
35. The court is in terms of the law mandated to down its tools and move no further.
36. In conclusion the suit is struck out for lack of jurisdiction to hear and determine the same it being statute barred.
37. There will be no orders as to costs.

DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2024

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Ngele for claimant

Mr. Onyony for respondent

Mr. Kemboi – Court Assistant

