



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kaburu & 3 others v Kihingo Village Waridi Gardens Management (Cause E370 of 2023) [2024] KEELRC 13309 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13309 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E370 OF 2023  
CN BAARI, J  
NOVEMBER 28, 2024**

**BETWEEN**

**FRANKLINE KABURU ..... 1<sup>ST</sup> CLAIMANT  
ANN WANJIKU ..... 2<sup>ND</sup> CLAIMANT  
DERRICK KOOME ..... 3<sup>RD</sup> CLAIMANT  
DENNIS MAKAU ..... 4<sup>TH</sup> CLAIMANT**

**AND**

**KIHINGO VILLAGE WARIDI GARDENS MANAGEMENT ..... RESPONDENT**

**RULING**

1. Before Court is the Respondent's Notice of Preliminary Objection dated 28<sup>th</sup> May, 2024 in opposition to the Claimant's Memorandum of Claim dated 5<sup>th</sup> May, 2023.
2. The Preliminary Objection is premised on three grounds namely;
  - i. That the Claimants' claim offends the Statute of Limitations and the doctrine of laches as the alleged cause of action arose on or about 30<sup>th</sup> March, 2020, and any claim arising from it ought to have been filed on or before 1<sup>st</sup> April, 2023. The Respondent avers that the Statement of Claim was filed on 5<sup>th</sup> May, 2023, which is outside the timeline provided for in law;
  - ii. That there is no employer-employee relationship between the parties herein; and
  - iii. That the Claimants lack locus standi against the Respondent.
3. On the first ground, the Respondent avers that the Claimants are estopped by virtue of Section 90 of the *Employment Act* and Section 4(1) of the Limitations of Actions Act which requires civil actions or proceedings which arise out of contract of service (employment contract) to be brought within 3 years after the fact.



4. The Respondent further contends that the Claimants' statement of claim having been filed inordinately late, ought to be struck out.
5. On the second ground, the Respondent argues that there is no employer-employee relationship between the parties herein, as the Respondent appointed FAPCL Group as its Estate Agent vide a letter dated 15<sup>th</sup> May, 2019 and it assumed the management of the Estate under the control of Kihingo Village (Waridi Gardens) Management Limited.
6. The Respondent states that when FAPCL Group took over the management of the Respondent, the Claimants were not on the payroll of the Respondent, and did not transition to the payroll being handled by the appointed agent FAPCL group.
7. The Respondent avers that all its employees are normally on its payroll and are paid through their respective bank accounts; the Respondent denies paying employees salaries by way of cash or petty cash as alleged by the Claimants.
8. The Respondent further claims that it complies with all the required laws on effecting statutory deductions upon its employees.
9. The Respondent denies having employed the Claimants and avers that they were not on its payroll, therefore, there is no duty placed on the Respondent to remit statutory deductions for them.
10. The Respondent further avers that the Claimants having no employer-employee relationship ought to be estopped from suing a party who is stranger to their contract.
11. It is further averred that the Respondent never remitted any union fees to KUDHEIHA and do not have any recognition agreement or Collective Bargaining Agreement(CBA) with them. The Respondent therefore contends that the Union lacks locus to sue on behalf of the Claimants.
12. The Respondent further states that the Claimants were the employees of one Mr. Ndungu Gechenji as he paid their salaries and remitted their statutory dues as and when they fell due.
13. It is the Respondent's case that the Claimants' Claim is bad in law, fatally defective and ought to be struck out with costs.
14. Submissions were filed for both parties.

### **The Respondent's Submissions**

15. The Respondent submitted that vide a letter dated 29<sup>th</sup> March, 2021, the Claimants wrote to KUDHEIHA claiming that their salaries were in arrears as from March 2020. Subsequently in another letter from KUDHEIHA addressed to the Respondent, the Union noted that from March, 2020 the Claimants' salaries had not been paid.
16. It submits that in another letter dated 2<sup>nd</sup> June, 2021, KUDHEIHA wrote to the Respondent's Advocate, noting that from March, 2020 the Claimants were denied access to the company's premises.
17. The Respondent submits further that the documents submitted by the Claimants indicate that their last payment was made in March, 2020 and therefore, they ought to have filed their claim on or before 1<sup>st</sup> April, 2023. The Respondent avers that the statement of Claim was filed on 9<sup>th</sup> May, 2023 outside the timelines provided by Law.
18. The Respondent contends that Section 90 of the *Employment Act* stipulate that any claim under the Act should be filed within three (3) years of the accrual of the cause.



19. It is the Respondent's submission that the alleged cause of action arose on or about 31<sup>st</sup> March, 2020, and any claim arising therefrom, should have been filed on or before 1<sup>st</sup> April, 2023.
20. The Respondent placed reliance on the holdings in the cases of John Kiiru Njiri -vs- University of Nairobi [2021] eKLR and Silas K Tanui - Vs- Teachers Service Commission (TSC) [2021] eKLR among others which noted inter alia that Section 90 of the *Employment Act* is coached in mandatory terms and once the limitation period set by the Act has lapsed, the Court is not clothed with the discretion to enlarge the time set by statute.
21. On the claim that there is no employer-employee relationship between the parties, the Respondent reiterates its averments contained in the Preliminary Objection and submits that the Claimants were not on its payroll having not been employed by the Respondent thus, there is no duty placed on the Respondent to remit statutory deductions of employees that it has never employed.
22. On the issue of locus standi against the Respondent, the Respondent submits that the Claimants do not have a contractual employer-employee relationship therefore, they ought to be estopped from suing a stranger to their contract.
23. Further, relying on the holding in the case of Communication Worker's Union -vs- Safaricom Limited (2014) eKLR, the Respondent submits that it has neither had a Recognition Agreement nor a Collective Bargaining Agreement with the Claimants' union - KUDHEIHA, therefore the Union lacks locus to sue on behalf of the Claimants.
24. The Respondent reiterates that the Claimants were under the direct control of Mr. Ndungu Gechenji who is their presumed employer and not the Respondent.
25. The Respondent seeks that the Claimant's Statement of Claim dated 5<sup>th</sup> May, 2023 be struck out with costs for being bad in law and fatally defective.

### **The Claimants' Submissions**

26. It is the Claimants' submission that whether or not there existed an employer-employee relationship between themselves and the Respondent, is an issue that requires factual evidence that can only be adduced at the trial stage, and cannot be determined through a Preliminary Objection. They had reliance in the case of Karimi-vs- Financial Access East Africa Limited(Cause E487 of 2023 to buttress this position.
27. The Claimant further submits that a Preliminary Objection would not be sustainable where evidence is required to be adduced to establish the facts. They submit further that a Preliminary objection can only be maintained on pure points of law that sprout from the pleadings.
28. On the issue of locus standi, the Claimants submits that they were members of the Union as guided by Section 52 of the *Labour Relations Act*, 2007, which allows every employee to be represented by a Trade Union as enshrined in Article 41 of the Constitutional of Kenya 2010, read with Section 12 of the *Employment and Labour Relations Court Act*.
29. On the issue of whether the Claim is time barred, the Claimant submits that the Respondent refused to remit statutory deductions from September 2019 and salaries were not paid from March, 2020 by the Claimants were still delivering service until November, 2020, when they were locked out of the Respondent's premises.



30. It is submitted that Ndungu Gechenji and Gitahi Gethenji happen to be brothers and Directors of the Respondent, and had property conflict amongst themselves leading to mismanagement and communication breakdown which affected their employees including the Claimants.
31. It is the Claimants' case that the new Director, Gitahi Gechenji had intentions to terminate the Claimants who were initially engaged by Ndungu Gechenji indirectly, and for no clear reasons to avoid paying their salary arrears and dues for long service.
32. The Claimants claim that the Respondent are ignoring the documents filed by the Claimants i.e pay slips and appointment letters showing the employment relationship between the Claimants and the Respondent.
33. Further, the Claimants submit that Section 10 (6)7 of the *Employment Act*, 2007 requires that employers to keep record of its employees for a period of years after employment.
34. It is the Claimants' prayer that the Preliminary Objection be dismissed with costs and the matter be disposed in a full hearing.

### **Analysis and Determination**

35. I have considered the notice of Preliminary Objection and the submissions by both parties. The issue for determination is whether the Objection is merited.
36. It is trite law that a preliminary objection must only raise issues of law and not facts. The principles that the Court is enjoined to apply in determining the merits or otherwise of a Preliminary Objection were set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696 where the court opined :-

“ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

37. Further, at page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

37. The Objection herein, is premised on the ground that the claim as filed is statute-barred per Section 90 of the *Employment Act*, which demands that employment related claims must be filed within three years from the date of accrual of the cause of action.



38. Section 90 of the *Employment Act*, 2017 provides:-

“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.(emphasis added)

39. The Respondent asserts that the cause of action arose in March, 2020 when the Claimants’ salaries were stopped and therefore, the suit is statute barred as it was commenced after the lapse of the limitation period of 3 years. Conversely, the Claimants’ contention is that they delivered services to the Respondent until November, 2020 when they were denied entry to the Respondent’s premises, thus intimating that the cause of action arose in November, 2020, therefore, their claim is within the limitation period.

40. By the parties’ assertions foregone, it is clear that the time when the cause of action herein accrued, is firstly an issue of fact, and which fact is in dispute. The dispute on the accrual of the cause of action is one that can only be determined by a full interrogation of the facts of the case and evidence to be adduced by the parties in a full hearing, and not one that can be conclusively addressed at a preliminary stage by way of an objection.

41. In *Oraro -vs- Mbaja* [2005] eKLR 141, the Court observed that:-

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection. anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.” (emphasis own)

42. It then follows that the issues subject of the objection herein, do not meet the threshold required of a Preliminary Objection.

43. On the issue of whether there is an existing employer-employee relationship between the Claimants and the Respondent, the Court concurs with the Claimants that the existence of an employment relationship is equally a matter of fact that should be substantiated by way of documentary evidence. Further, just like the issue of limitation, this similarly is a contentious issue which cannot be resolved solely by a Preliminary Objection. In *Karimi v Financial Access East Africa Limited (Cause E487 of 2023)* [2024] KEELRC 1243 (KLR) it was held that:-

“A preliminary objection can only be taken in clear cut cases and not where facts have to be ascertained. In this case, the Court will have to ascertain the employment relationships herein and whether the Claimant was an employee of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent or whether there was actually no employment relationship between the Claimant and the 2 Respondent. This preliminary objection was unnecessary and is dismissed with costs to the Claimant.”



44. On locus standi of the Union, the Respondent argues that the Union lacks locus on the basis that it does not have a Recognition Agreement or Collective Bargaining Agreement with the Respondent. Conversely, the Claimants argue that as members of a union, they are entitled to representation in accordance with Section 52 of the *Labour Relations Act*, 2007, and Article 41 of *the Constitution* of Kenya, which guarantees every employee's right to representation by a trade union.
45. Firstly, I note that no union has purported to be a party to this suit, the same having been instituted by the Claimants in their own names. Secondly, it is clear that the issue of union membership is not an issue of law but of fact that can only be ascertained through production of evidence, meaning that just like the other two issues, it is not a suitable matter for determination through a preliminary objection and cannot thus be conclusively determined at a preliminary stage.
46. In light of the foregoing, the Court finds that the Preliminary Objection does not raise pure points of law. Matters concerning the employment relationship, union representation, and the exact date when the cause of action accrued are facts that are disputed and merit a full hearing.
47. In the end, the Respondent's Preliminary Objection dated 28<sup>th</sup> May, 2024 is for dismissal and is hereby dismissed with costs to the Claimants.
48. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance:

Ms. Mwendwa present for the Claimants

Mr. Otieno present for the Respondent

Ms. Esther – C/A

