



Omitita & 5 others v Kinangop Dairy Limited (Cause 846, 847, 848, 849, 850 & 851 of 2018 (Consolidated)) [2023] KEELRC 214 (KLR) (31 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 214 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 846, 847, 848, 849, 850 & 851 OF 2018 (CONSOLIDATED)**

**J RIKA, J
JANUARY 31, 2023**

BETWEEN

**KEFFA OKIOI OMITITA 1ST CLAIMANT
LILIAN WAITHIRA MURIITHI 2ND CLAIMANT
JOHN NJOROGE KIMANI 3RD CLAIMANT
JOHNN MBURU MWANIKI 4TH CLAIMANT
DAVID KING'ORI 5TH CLAIMANT
AMOS MUCHUI 6TH CLAIMANT**

AND

KINANGOP DAIRY LIMITED RESPONDENT

RULING

1. The Claims herein were consolidated through an order issued on June 4, 2019.
2. The Claimants were employed by the Respondent Dairy Company in various positions, ranging from Milk Grader, Procurement Officer, and Messenger.
3. They were summarily dismissed on October 3, 2013.
4. They were represented by their Trade Union, Kenya Union of Commercial, Food and Allied Workers, who reported the existence of a trade dispute to the Ministry of Labour, on June 3, 2015.
5. They state that a Conciliator was appointed, who upon hearing submissions from the Parties, recommended on June 6, 2016, that the Claimants are paid 1- month salary in lieu of notice; overtime for 1 year; and 3 months' salary in compensation for unfair termination.



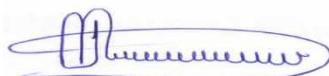
6. They filed Claims dated May 31, 2018, amended on February 4, 2020, asking the Court to adopt the Conciliator's award as an order of the Court; 3 months' salary as compensation for unfair termination; 1-month salary in lieu of notice; overtime of 1 year; a fine of Kshs 100,000 for failure to comply with Section 51[3] of the Employment Act; costs of the Claims; and any other suitable relief.
7. The Respondent filed a Notice of Preliminary Objection dated August 15, 2018, based on Section 90 of the Employment Act, which sets a time-bar of 3 years in actions based on contracts of employment, from the date the cause of action arises.
8. Termination occurred on October 3, 2013. The Claims were filed 5 years later, on May 31, 2018. This, the Respondent submits, is outside the period of 3 years allowed under Section 90 of the Employment Act.
9. The Claimants submit that they seek enforcement of the Conciliator's Report. Neither they, nor the Respondent disputed the recommendations of the Conciliator. They state that Section 12[3] of the Employment and Labour Relations Court Act, does not restrict the powers of the Court to matters under the Employment Act. The prayers in the Amended Claims, are not subject to the Claims contemplated under Section 90 of the Employment Act.

The Court Finds

10. The prayers in the Amended Statements of Claim, are based on contracts of employment. Compensation, Notice, and Overtime are claimed under the Claimants' contracts of employment. It is not correct to submit that the prayers in the Amended Claims, are not subject to Section 90 of the Employment Act. The Claimants also include a prayer for fining of the Respondent, for not complying with Section 51 of the Employment Act, which relates to grant of Certificate of Service. The Respondent would have to be charged with an employment offence, and found guilty, to be slapped with any form of a fine. The proceedings herein are civil, and the Court does not impose fines on Parties, in civil proceedings, unless under contempt of court jurisdiction.
11. It is clear that the Claimants seek remedies, under the Employment Act. They cannot therefore apply the Employment Act selectively. Section 90 is a provision within the same Act they have pleaded. It applies to their respective contracts. They were late in filing of their Claims, termination having taken place, on May 31, 2013.
12. Report of a trade dispute, and the conciliation process, did not stop time from running. This Court thought that it should, but was corrected by the Court of Appeal, in Rift Valley Railways [Kenya] Limited v. Hawkins Wagunza Musonye & another [2016] e-KLR, where it was underscored that time is never frozen, when a dispute is taken through out-of-court dispute settlement mechanism.
13. It is ordered: -
 - a. Preliminary Objection is sustained, and the consolidated Claims declined.
 - b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE JUDICIARY AND COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY, 2023.

JAMES RIKA



JUDGE

