



**Public Transport Operators (Puton) Union v Kagwi (Cause E344 of 2022) [2023] KEELRC 655 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 655 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E344 OF 2022  
JK GAKERI, J  
MARCH 15, 2023**

**BETWEEN  
PUBLIC TRANSPORT OPERATORS (PUTON) UNION ..... CLAIMANT  
AND  
MR. EVANS WALTER KAGWI ..... RESPONDENT**

**RULING**

1. Before the court for determination is a preliminary objection by the respondent dated January 12, 2023 that;
  1. Mathew K. Sajero (grievant) is not a member of the Public Transport Operations Union (PUTON), the claimant herein and lacks capacity to sue on behalf of the grievant.
  2. The claimant is not entitled to the relief sought as it has no locus standi.
  3. The suit is time barred.
2. The preliminary objection is expressed under section 2 and 12 of the *Labour Relations Act* and section 90 of the *Employment Act*, 2007.

**Claimant's response**

3. In its response dated January 20, 2023, the claimant union states that workers and employers had the constitutional right to associate and the grievant Mr. Mathew Sejero exercised the right to join the union in February, 2015 and paid union dues directly and the union had locus standi to commence these proceedings.
4. The claimant attached four receipts as evidence of payment. In July 2016, Kshs.600/=, August 2017 Kshs.700/=, and February 2019 Kshs.1,000/=.



5. It is urged that the grievant is entitled to the reliefs sought as the claimant has capacity to represent him.
6. The claimant avers that the suit is not time barred as alleged by the respondent and falls within the provisions of section 90 of the [Employment Act](#), 2007.
7. It is the claimant's case that the grievant's employment was terminated in May 2019 and the dispute was reported to the Ministry of Labour on September 16, 2019 after several demand letters and reconciliation is construed as part of instituting civil action against the Respondent and the dispute could only be referred to court after the issuance of a certificate of service under section 73 (1) of the [Labour Relations Act](#), 2007.
8. The Claimant further avers that the suit was filed within 3 years as the running of time begins upon issuance of the certificate of unresolved dispute and the suit was filed in May 2022 and termination was in May 2019.
9. That under section 73(1) of the [Labour Relations Act](#), a dispute may only be referred to court after the same is unresolved after the certificate is issued.
10. That the claimant union has locus standi to represent the grievant and the preliminary objection has no merit and should be dismissed.

#### **Respondent's submissions**

11. As regards the grievant's membership to the claimant union, counsel for the respondent submitted that the statement of claim was reticent of the grievant's union membership and no membership number is mentioned or register of members exhibited and the documents attached as evidence of membership had no authentication.
12. As regards limitation, counsel relied on section 90 of the [Employment Act](#) to urge that the suit was statute barred as the statement of claim on record stated that the grievant "worked diligently until May 3, 2019 when the respondent unjustifiably and unfairly terminated his employment service" and the statement of claim was dated May 24, 2022 and was filed on May 25, 2022 and the action was time barred.
13. Counsel urged that section 73(1) of the [Labour Relations Act](#), 2007 does not oust or qualify the provisions of section 90 of the [Employment Act](#) which is couched in mandatory terms.
14. That there was nothing in section 73(1) of the [Labour Relations Act](#) to suggest that time for filing of a civil action started running after reconciliation.
15. Reliance was made on the Court of Appeal decision in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA 696 on the nature of a Preliminary Objection.
16. Finally, counsel submitted that based on the pleadings by the claimant, it lacked capacity to sue on behalf of the grievant and the suit was filed out of time.

#### **Claimant's submissions**

17. Subject to a few additions, the claimant's submissions rehashes its reply to the respondent's preliminary objection.
18. The claimant submitted that the respondent cited no law which the grievant had breached by failing to disclose union membership.



19. The claimant further urged that the respondent had the opportunity to file the preliminary objection earlier and that it was an afterthought.

### Determination

20. The issues for determination are;
- i. Whether there is a competent preliminary objection before the court and depending on the answer to (i);
  - ii. Whether the suit before the court is time barred.
21. It cannot be gainsaid that the Court of Appeal decision in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (supra)* is the highest water mark in the determination of the contours of a preliminary objection.
22. The often cited words of Newbold P. and Law JA are spot on.
23. According to Law JA;
- “So far as I am aware, a preliminary objection consists of a pure 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 on 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.”
24. Newbold P. stated as follows;
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and on occasion, confuse issue. This improper practice should stop.”
25. The Court of Appeal expressed similar sentiments in *Nitin Properties Limited v Singh Kalsi and another* (1995) eKLR as was the Supreme Court of Kenya in *Hassan Ali Jobo and another v Suleiman Said Shabal and 2 others* (2014) eKLR.
26. Having established the beacons of a preliminary objection, I will now proceed to apply the law to the facts of the instant suit.
27. The respondent urges that since the grievant is not a member of the union, the claimant lacks capacity to sue on his behalf, an allegation the claimant counters and attaches payment receipts and a membership card.
28. Clearly, this is a contested factual issue provable by availing of evidence by the parties to prove or disprove the same.
29. In the court’s view, whether or not the grievant is or was a member of the claimant union is a question of fact as courts have variously held.
30. It is undeniably not a pure point of law which is the essence of a preliminary objection.



31. The second objection is that the Claimant's suit is statute barred. This is one of the examples given by Law JA in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (supra) and thus qualifies as a preliminary objection. It implicates the court's jurisdiction to hear and determine the suit.
32. For the above-stated reasons, it is the finding of the court that the respondent has a competent preliminary objection before the court for determination.
33. This case turns on whether the claimant's suit is time barred.
34. As to whether the claimant's suit is statute barred, parties have adopted rival positions for different reasons. While the claimant argues that the suit was not statute barred by virtue of the provisions of section 73(1) of the *Labour Relations Act*, 2007 and the fact that the termination of employment was in May 2019 and the suit was filed in May 2022, the respondent contests the two grounds.
35. The claimant alleges that since the dispute was referred to a Conciliator, vide letter dated July 10, 2020, which the claimant considers as part of the judicial process, time did not start running until the conciliator's certificate was prepared and in this case, it is dated September 9, 2020.
36. The claimant's reasoning is based on the provisions of section 73(1) of the *Labour Relations Act*, 2007 which makes reference of a dispute to court.
37. Section 73 of the *Labour Relations Act* provides;
  1. If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.
38. In light of the foregoing provision, the claimant's argument may be faulted in the following respects. First, and as correctly submitted by the respondent, section 73(1) neither excepts nor modifies or qualifies the provisions of section 90 of the *Employment Act* which governs limitation of actions in all matters filed under the Act, as is the claimant's case.
39. Closely related to the foregoing, section 73(1) of the *Labour Relations Act*, 2007 is couched in permissive terms. There is no obligation on the parties to refer the trade dispute to the court.
40. More significantly, section 73 (1) is unambiguous that reference to the court is in accordance with the rules of the court which arguably encompass limitation of the duration within which actions may be filed in the court.
41. The court is of the view that if parties consensually opt for alternative dispute resolution mechanisms, they cannot thereafter come to court and allege that those other mechanisms failed after the law of limitation locked them out of the court system. The two systems are complementary and the allegedly wronged party must make the choice. Courts of law are available to litigants at any time of their choice within the prescribed duration.
42. Moreover, ADR is now part of the dispute resolution framework in civil litigation, after a suit has been filed.
43. Section 90 of the *Employment Act*, 2007 provides;

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 is general shall lie or be instituted unless it is commenced within three (3) years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after cessation thereof.



44. Notably, the foregoing provision is couched in mandatory terms and applies to all civil actions or proceedings based or arising out of the [Employment Act](#) or contract of service.
45. It is not in dispute that the claimant is alleging that the grievant was an employee of the respondent from 2001 to May 2019, a contract of service. Puzzlingly, although the Claimant admits that the grievant's employment was terminated in May 2019 and the suit was filed in May 2022, it is reticent on the actual dates which are determinative of this matter.
46. As correctly submitted by the respondent paragraph 2 of the statement of claim dated May 24, 2022 and the grievant's statement of even dated are unequivocal that the claimant's employment was terminated on May 3, 2019.
47. When did time start running against the claimant's claim?
48. The Court of Appeal addressed this issue in [Nyabuto Arambe Abusa v Kenya Power and Lighting Co. Ltd](#) (2017) eKLR. The learned Judges stated as follows;

“On the question of when time starts running, it is the accrual date of the cause of action that determines it. This was settled in our recent decision of *Attorney General and another v Andrew Maina Githinji and another* (2016) eKLR, Waki JA with whose decision Kiage JA agreed, examined the same issue and stated as follows:

“9 when did the cause of action in this case arise” put another way when did the respondents become entitled to complain or obtain a remedy from their employer through the court”. On the other hand the AG contends that it was on the date of the respondent's dismissal while the respondents insist it was after their criminal trial was exhausted.

There does not seem to be a direct authority from this court on the issue, but the Employment and Labour Relations Court has pronounced itself on the matter in several cases, sometimes in conflicting fashion. In many of them however, it has been held that the cause of action for wrongful/unfair termination arises once a claimant is terminated from employment. I will refer to a few of them by way of illustration . . .

This court has however, taken a different view on this matter in the case *Hilarion Mwabolo v Kenya Commercial Bank Ltd* (2013) eKLR to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the termination letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal doe not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.”

49. In Nyabuto's case supra, the court found the accrual date to be June 27, 2007 as communicated by letter dated June 25, 2007.

“It follows therefore that the cause of action which his claim is based accrued on June 27, 2007 and that is the date when time began to run as against the appellant's claim.”

50. The court is further guided by the sentiments of the Court of Appeal in [Ben Kiplagat Tunduny v Standard Chartered Bank Limited](#) (2019) eKLR in its construction of section 90 of the [Employment Act](#).

“This means that the appellants' claim having arisen from a contract of service, it had a limitation period of three (3) years from the date the cause of action arose. While it is not



disputed that the appellant's employment ceased on 22<sup>nd</sup> December, 2008 and this is the date when the appellant's cause of action arose . . .

The limitation period is specifically provided for under the Employment Act and there is no provision under that Act of extension of that time . . .”

51. From the foregoing authorities of the Court of Appeal, it is discernible that the date of accrual of a cause of action in termination of employment is the date indicated on the letter of termination.
52. Similarly, it is not in dispute that the claimant's action is based on and arises out of the Employment and the Limitation period was 3 years from the date the cause of action accrued.
53. By his own admission, the claimant asserts that his employment was unfairly terminated on May 3, 2019 and the statement of claim was filed on May 25, 2022 more than three years after the cause of action accrued which rendered the claim statute barred in the context of section 90 of the Employment Act as submitted by the respondent.
54. In the end and for the above-stated reasons, it is the finding of the court that it has no jurisdiction to hear and determine the claimant's suit as it is statute barred.
55. Accordingly, the respondent's preliminary objection dated January 12, 2022 is merited and the claimant's suit is struck out for being statute barred with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF MARCH 2023**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**DR. JACOB GAKERI**

**JUDGE**

