



Kenya Engineering Workers Union v Mabati Rolling Mills (Cause E062 of 2022) [2023] KEELRC 552 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 552 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E062 OF 2022**

**AK NZEI, J
MARCH 2, 2023**

**BETWEEN
KENYA ENGINEERING WORKERS UNION CLAIMANT
AND
MABATI ROLLING MILLS RESPONDENT**

RULING

1. Before me is a suit in which suit documents said to have been filed incourt do not bear a court date stamp. The court receipt that may have been issued on payment of court filing fees on filing of the suit is not on record, though court fees is shown to have been assessed at ksh. 2,030, on a date that is not indicated by whoever made that assessment.
2. The assessedcourt filing fees of ksh. 2,030 is shown to have been paid into the court’s account with KCB (Kenya Commercial Bank) at Nairobi on 15/04/2020 at 08.54.14, as the Bank Agent’s deposit slip in that regard is attached to the suit documents in the court’s record. The suit was first registered in this court’s Registry at Nairobi as Cause No. 164 of 2020, and was on July 13, 2020transferred to this court by order of the court sitting at Nairobi (Ocharo Kebira, J).
3. The date on which the court’s filing fees is shown to have been paid by the claimant, which is April 15, 2020, is the date of filing the suit herein. Section 90 of the Employment Act 2007 provides as follows:

“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 after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”



4. The respondent is not shown to have entered appearance or filed response to the claimant's claim pursuant to Rule 13 of the *Employment and Labour Relations Court (Procedure) Rules 2016*. On October 21, 2022, the respondent filed a Notice of Preliminary Objection stating:-

“Take Notice that the respondent herein shall raise a Preliminary Objection to the Claimant's suit and contend that the same is time barred by dint of section 90 of the *Employment Act*, the cause of action having arisen on 13.04 2017 and the suit having not been filed by 13.04.2020”.

5. It is pleaded in the claimant's pleadings (Memorandum of claim dated April 8, 2020) that the impugned redundancy notice took effect on April 14, 2017. According to the claimant, therefore, the cause of action arose on April 14, 2017. According to the respondent, however, the cause of action arose on April 13, 2017. I have looked at the single filed redundancy notice of one Beja Lewa Silale which forms part of the suit documents filed herein, and have noted that the same took effect on April 13, 2017. The claimant's memorandum of claim dated April 8, 2020 and filed in Court on 15th April 2020 indicates that the suit is filed by the Union claimant “on behalf of Wanjala Tiberaus Wamalwa and 41 others.” I have, however, not seen redundancy notices issued by the respondent to the remaining forty two grievants. The court cannot tell whether or not such notices, if they exist took effect on April 13, 2017, hence making the entire suit statute-barred. The court will have to look into more material before it can decide on the issue of whether or not the suit herein is entirely statute-barred.
6. It was held as follows in the case of *Mukisa Biscuits Manufacturing Co Td v West End Distributors Ltd* [1969] EA 696

“so far as I am aware, a Preliminary Objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if urged 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.”

7. Sir Charles Newbold observed as follows in the *Mukisa Biscuits case (supra)*

“...a Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was urged on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion...”

8. In the present case, the court will have to see all the redundancy notices issued by the respondent to all the grievants, or to the Union claimant pursuant to section 40 of the *Employment Act*, and to ascertain the date of their taking effect, which will be the date on which the cause of action arose regarding individual grievants. There upon, the court will be able to make an informed decision on whether or not the entire suit is entirely statute-barred.
9. Let the respondent file its pleadings, if it wishes to do so, and let the suit be fast tracked for hearing without undue delay.
10. It is my finding that the preliminary objection is premature and is without merit. The same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND MARCH 2023



AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

..... for Respondent

