



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kenya Engineering Workers Union v Farm Engineering Industries Ltd (Cause E006 of 2020) [2023] KEELRC 1129 (KLR) (10 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1129 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E006 OF 2020**

S RADIDO, J

MAY 10, 2023

BETWEEN

KENYA ENGINEERING WORKERS UNION CLAIMANT

AND

FARM ENGINEERING INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The Kenya Engineering Workers Union (the Union) and Farm Engineering Industries Ltd (the Respondent) entered into a collective bargaining agreement on or around 28 September 2015. The agreement was registered by the Court on 7 September 2016.
2. On 30 September 2020, the Union sued the Respondent and it set out the Issue in Dispute as:
Violation of the parties' collective bargaining agreement clause number 2 (Basic Minimum) for the following
 1. Wisdom Okello.
 2. George Ouma.
 3. Geoffrey Ochieng.
 4. Caleb Munyasa.
 5. Samson Onunga.
 6. Martin Oraro.
 7. Laxton Odhiambo.
 8. Samuel Vulimu.
 9. Bodas Mugami.



10. Luke Anyanzwa.
11. Peter Ouma Otute.
12. Kennedy Odhiambo.
3. The Respondent filed a Statement of Defence on 15 June 2021, and the hearing was scheduled for 6 February 2023.
4. On the morning of the hearing, the Respondent filed a Notice of Preliminary Objection contending:
 - (1) That the Claimants' claim is time-barred pursuant to section 90 of the *Employment Act*, 2007.
 - (2) That the present suit is misconceived, bad in law and fatally defective.
5. When the Cause was called out for the hearing, the advocate for the Respondent informed the Court that the Industrial Relations Officer who was on record for the Union was before the Court in Mombasa, and therefore, had requested him to seek an adjournment on his behalf.
6. The Court adjourned the hearing to 7 March 2023.
7. When the Cause was called out on 7 March 2023, the Union official informed the Court that he had not been able to reach his witness and that, therefore, he had opted to proceed by way of the record and submissions to be filed.
8. The Respondent also indicated that in the circumstances, it was ready to proceed by way of submissions.
9. The Union filed its submissions on 4 April 2023, and the Respondent on 17 April 2023.
10. The Court has considered the record and submissions.

Merits of the case

11. The Union was afforded an opportunity to prove its case by calling a witness to testify under oath and produce documents or exhibits.
12. The question, therefore, begs what is the legal significance of the failure by the Union to call a witness.
13. The starting point should be the *Evidence Act*.
14. Section 107 thereof provides as follows:
 1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person.
15. And section 109 of the same *Act* further provides:

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by law that the proof of that fact lie on any particular person.



16. In *CMC Aviation Ltd v. Crusair Ltd (No1)* (1987) KLR 103, the Court of Appeal held:

The pleadings contain the averments of the (three) parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.

As stated in the definition of “evidence” in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.

17. On the same subject, in *Karugi & Ar v. Kabiya & 3 Ors* (1987) KLR 347, the Court of Appeal held that the burden on a plaintiff to prove his case remains the same throughout the case.
18. The Union failed to call any witness and the pleadings and documents before the Court remain just mere pleadings and documents which the Court cannot give due consideration.
19. By failing to place evidence under oath before the Court, the Union failed to prove its case to the required standard and the Court so finds.
20. Before concluding, the Court must observe that a party who takes the route taken by the Union takes a risk which does not find support in the legal framework governing the operations of the Court.
21. A party intent on relying on the pleadings and submissions should always ensure that affidavit evidence is placed before the Court.

Jurisdiction

22. The Respondent challenged the jurisdiction of the Court on the basis that some of the heads of claim for underpayment advanced by the Union accrued more than 3 years prior to the commencement of court action on 30 September 2020. Section 90 of the *Employment Act, 2007* was cited.
23. The Union pitched for underpayments on behalf of the 12 Grievants from 2015, when the collective bargaining agreement was signed.
24. If the prescribed limitation provision applicable is the 3 years in the first part of section 90 of the *Employment Act, 2007*, then all the claims prior to 30 September 2017 are caught up by the law of limitations.
25. However, if the Court were to hold that the claims comprised continuing injury (failure to pay the agreed remuneration at the end of each pay period of one month) and apply the more restrictive 12 months’ limit on cessation of the breach, then, all the claims prior to 30 September 2019 would be legally untenable.

Conclusion and Orders

26. From the foregoing the Court finds no merit in the Cause, and it is dismissed with no order on costs considering the social partnership between the parties.



DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 10TH DAY OF MAY 2023.

RADIDO STEPHEN, MCIArb

JUDGE

Appearances

For Union Patrick Makale, Industrial Relations Officer

For Respondent Ms Bundi instructed by M.M. Gitonga Advocates LLP

Court Assistant Chrispo Aura

