



**Kenya Tertiary & Schools Workers Union (KETASWU) v Rocky Driving School (Cause 95 of 2019) [2023] KEELRC 1957 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1957 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 95 OF 2019  
CN BAARI, J  
JULY 31, 2023**

**BETWEEN**  
**KENYA TERTIARY & SCHOOLS WORKERS UNION  
(KETASWU) ..... CLAIMANT**  
**AND**  
**ROCKY DRIVING SCHOOL ..... RESPONDENT**

**RULING**

1. The Respondent lodged a Notice of Preliminary Objection dated February 27, 2023, and filed on similar date. Its contention is that the Claimant’s supplementary statement of claim has no basis in law and is fatally defective.
2. It is its further aversion that the supplementary statement of claim referred to above, is statute barred.
3. Parties sought to canvass the objection by way of written submissions. The Respondent filed submissions on May 26, 2023. The Claimant did not.

**The Respondent’s Submissions**

4. It is submitted for the Respondent that contrary to Rule 14 (7) of the *Employment and Labour Relations Court (Procedure) Rules*, the Claimant through his supplementary statement, is only seeking to introduce a new cause of action through the back door as the Court did not seek any clarification on the claim.
5. It is its further submission that the suit herein, only concerned transfer of two of the Claimant’s members, namely; Samwel Onyiego and Hassan Mugo and not their termination. The Respondent had reliance in *Central Kenya Limited v Trust Bank Limited & 5 Others* (2000) eKLR to buttress this position.



6. It is the Respondent's submission that the new cause now sought to be introduced, is already time barred on the basis that the pleadings indicate that the grievants were terminated on November 20, 2019.
7. It is submitted that the supplementary statement of claim was filed on December 16, 2019, about a month after three years since the accrual of the cause of action, rendering the claim time barred under Section 90 of the [Employment Act, 2007](#). It sought reliance in the holding of [Justice Mbaru in John Kiiru Njiru v University of Niarobi](#) (2021) eKLR to support this position.
8. The Respondent prays that the Claimant's supplementary statement of claim is struck out with costs.

### **Analysis and determination**

9. I have considered the Respondent's preliminary objection, its submissions and the parties' pleadings. The issues that fall for determination are: -
  - i. Whether the Claimant's claim is fatally defective
  - ii. Whether the suit is statute barred

### **Whether the Claimant's claim is fatally defective**

10. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, a preliminary objection was aptly described as follows: -

“...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.”

11. Rule 14 (7) of the [Employment and Labour Relations Court \(Procedure\)Rules](#), states thus:

“Where the Court, either on its own motion or on application by a party, is satisfied that a pleading does not adequately set out the particulars required by it, or for any other reason the Court requires clarification on any pleading or submission by a party, it may request the party to provide further details or file any supplementary pleading as it may consider necessary within such period as it may determine or specify and the party so requested shall provide them to the Court and the other party.”

12. I do agree with the Respondent's submission that the Claimant ought to have filed an amended statement of claim, instead of a supplementary statement of claim as it did.
13. Further, looking at both the supplementary statement of claim and the initial claim lodged by the Claimant, the latter is a completely different suit, and which then confirms the Respondent's objection. The initial suit only sought to stop transfers as well as stop intimidation and harassment of the grievants, whereas the supplementary claim seeks declaratory orders and compensation among other reliefs.
14. Where there is substantive change of circumstances such as those herein, the Claimant ought to have either sought leave to file an amended statement of claim or file a new suit all together. The supplementary statement cannot hold to meet the purpose it intended to achieve.



15. In *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No 149 of 1991 the Court held thus on amendment of pleadings: -
- i. the powers of the court to allow amendment is to determine the true, substantive merits of the case;
  - ii. amendments should be timeously applied for;
  - iii. power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
  - iv. that the proposed amendment must not be immaterial or useless or merely technical;
  - v. that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action;
  - vi. that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”
16. I thus return that the supplementary claim filed by the Claimant lacks legal basis and does not hold as an amendment of the Claimant’s claim.

**Whether the suit is statute barred\*\***

17. The Respondent contends that the suit herein is time barred. The claim is premised on a contract of service which by law has a limitation period of three years. Section 90 of the *Employment Act, 2007*, states:
- “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 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.”
18. In *Gathoni v Kenya Co-operative Creameries Ltd* Civil Application No 122 of 1981, Potter, J observed in obiter that:
- “The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”
19. The issue of the grievants’ termination, arises from the supplementary statement of claim where it is averred that the grievants were terminated from service on November 20, 2019. The supplementary statement was filed on December 13, 2022, about 23 days after the lapse of the three years limitation period.



20. The Court of Appeal in *Attorney General v Andrew Maina Gitbinji & Another* (2016) eKLR, held that once the employee received the termination letter, the termination took effect and the cause of action accrued, and that was the date time began to run.

21. In *Samson Leteipa Ole Kimongo v Inspector General, National Police Service & 2 Others* [2022] eKLR, Justice O. Makau opined: -

“...The suit herein is against officers and an organ of the government of Kenya and therefore the petitioner ought to have commenced his suit within three years from February 25, 2002 when he was dismissal. The said period lapsed on 24.2.2005, but he filed the suit on June 4, 2021, more than 19 years from the date of the impugned dismissal. In the circumstances, I find and hold that the suit is time barred by dint of section 3(2) of the PALA Act and it is therefore incompetent.”

22. In light of the foregoing, I find and hold that the Claimant’s claim is statute barred.

23. I conclude by striking out the Claimant’s suit in its entirety with costs to the Respondent.

24. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 31<sup>ST</sup> DAY OF JULY, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

Appearance:

N/A for the Claimant

N/A for the Respondent

