



**Kenya Building, Construction, Timber & Furniture Industries Employees Union v Bhabar & Bhabar Ltd (Cause 336 of 2017) [2023] KEELRC 3157 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3157 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 336 OF 2017  
AK NZEI, J  
NOVEMBER 30, 2023**

**BETWEEN  
KENYA BUILDING, CONSTRUCTION, TIMBER & FURNITURE  
INDUSTRIES EMPLOYEES UNION ..... CLAIMANT  
AND  
BHABAR & BHABAR LTD ..... RESPONDENT**

**JUDGMENT**

1. Vide a memorandum of claim dated 26/4/2017 and filed in Court on 10/5/2017, the Claimant sued the Respondent and pleaded that one Ali Nyasi Kokota (hereinafter referred to as the “grievant”), the Claimant’s member since 2013, had been employed by the Respondent, earning a daily wage of ksh. 550.
2. The Claimant further pleaded that upon the Claimant recruiting the grievant and other unionisable employees of the Respondent, the Claimant send check-off forms to the Respondent and sought recognition upon attaining the required numbers, but the Respondent refused to cooperate. That the Claimant reported a dispute to the Minister on or about 5/4/2012, giving rise to Mombasa ELRC Cause No. 77 of 2014.
3. It was the Claimant’s further pleading that the pendency of the said case led to discrimination of the grievant by the Respondent, and eventual termination of the grievant by the Respondent on 28/4/2014. That the dispute on the Claimant’s termination went for conciliation but the process failed, hence the suit herein.
4. The Claimant set out his claim against the Respondent as follows:-
  - a. wages for days worked in August 2014 (550x27 days).....ksh. 14,850



- b. payment in lieu of notice (550x26 daysx2 months).....ksh. 29,700
  - c. cash payment for leave (550x26 days x13 years).....ksh. 185,900
  - d. service gratuity (550x14 days x13 years).....ksh. 100,100
  - e. maximum (12 months) compensation for unlawful termination of employment.
  - f. costs.
5. Other documents filed by the Claimant alongside the Memorandum of claim included his written witness statement dated 26/4/2016 and a certificate of unresolved dispute issued by the Conciliator on 29/1/2015, among other documents.
  6. The Respondent defended the suit vide an undated memorandum of Response filed in Court on 15/2/2018 and subsequently amended on 10/12/2020. The Respondent admitted having employed the grievant as a casual on and off from 2003 to 2014, but denied having terminated his employment. The Respondent pleaded that the grievant absconded his work and even went away with the Respondent's tools. That the Respondent reported the incident to the labour office.
  7. The Respondent also filed a witness statement of one Manpreet Singh Bhabra dated 25/2/2020 and a list of documents dated 24/2/2021, listing some five documents. The listed documents included the Respondent's Certificate of Incorporation issued on 28/5/2003, among other documents.
  8. Trial opened before me on 28/6/2022 when the grievant testified and was cross-examined by the Respondent's Counsel. The grievant adopted his written witness statement dated 26/4/2016 as his testimony and produced in evidence the documents referred to in paragraph 5 of this judgment. The grievant further testified that he was employed by the Respondent in the year 2000, and worked for a total of thirteen (13) years as a plumber, earning ksh. 550 per day, which was paid in cash weekly. That the grievant signed a voucher on being paid, which the Respondent retained. It was the grievant's further testimony that in April 2014, he went to bury his father and on returning back to work, he was told that there was no work, and that he should go and wait to be called back but was never called. The grievant denied having absconded work or having taken away the Respondent's equipment. He told the Court that he had never been charged with stealing.
  9. Cross-examined by the Respondent's Counsel, the grievant testified that his father died in July 2014 and that he returned back to work still in July 2014, upon which he was taken round in circles until August 2014. That he was not terminated in April 2014 as stated in his witness statement. Re-examined, however, the grievant testified that he had, indeed, been terminated in April 2014, and that he had gone for his father's burial in April 2014. The grievant denied being aware of this Court's Cause No. 77 of 2014.
  10. Both the Respondent and its Counsel did not attend Court on 9/2/2023, a date fixed in Court in the presence of both parties and their respective Counsel. The Court closed the Respondent's case and directed that both parties do file written submissions, with the Claimant filing first and serving the Respondent. The Respondent did not file any submissions, and did not attend Court on the date fixed to confirm filing of submissions and fixing of a judgment date, though shown to have been duly served.
  11. Having considered the pleadings filed and evidence adduced by the grievant, issues that emerge for determination, in my view, are:-
    - a. whether the suit herein is competent
    - b. whether the grievant's employment was unfairly terminated.



- c. whether the Claimant is entitled to the reliefs sought.
12. On the first issue, it is clear from the Claimant's pleadings that there was never a recognition agreement between the Claimant and the Respondent, and neither was there any Collective Bargaining Agreement between the Claimant and the Respondent. In such a situation, the Claimant could not purport to institute a suit on behalf of its alleged members against the Respondent. The Claimant should have first sorted out the pending issue of its recognition by the Respondent.
13. It follows that the Claimant's suit herein is incompetent, and ought not to have been filed by the Claimant herein, in the first place.
14. Further, still on the first issue, according to the Claimant's pleadings and evidence adduced by the grievant, the alleged cause of action herein is pleaded to have arisen on 28/4/2014 when the Claimant's employment is pleaded to have been terminated by the Respondent. The suit herein was filed on 10/5/2017. This was well beyond the three (3) years statutory limitation period provided for under Section 90 of the Employment Act 2007 which 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 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.”
15. Simply put, the Claimant's suit herein is statute-barred, incompetent and therefore bad in law.
16. In view of the foregoing findings, it will be legally pointless to delve into the second and the third issues as this will be a mere academic exercise which I will not engage in. Being incompetent, the claimant's suit must fail, and is hereby dismissed with no order as to costs; save for the costs assessed and ordered to be paid during the proceedings herein. These costs include ksh. 2,100 ordered on 14/10/2021 to be paid to the Respondent by the Claimant, and ksh. 13,600 ordered on 9/3/2022 to be paid/refunded to the claimant's Counsel by the Respondent. These costs shall be paid within thirty (30) days of this judgment, unless the same have already been paid.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> NOVEMBER 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

