



**Magena & 4 others (Suing for themselves and on behalf of 132 other Claimants)
v Njuca Consolidated Company Limited (Employment and Labour Relations
Cause E018 of 2023) [2023] KEELRC 2746 (KLR) (3 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2746 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E018 OF 2023
ON MAKAU, J
NOVEMBER 3, 2023

BETWEEN

ALFRED NYAKUNDI MAGENA 1ST CLAIMANT
STANLEY KIPRONOH KIRUI 2ND CLAIMANT
JAMES NGUGI THUKU 3RD CLAIMANT
ELIJAH MUGAKA 4TH CLAIMANT
PETER KARUGA NJERU 5TH CLAIMANT
SUING FOR THEMSELVES AND ON BEHALF OF 132 OTHER CLAIMANTS

AND

NJUCA CONSOLIDATED COMPANY LIMITED RESPONDENT

RULING

Introduction

1. This ruling relates to the respondents notice of preliminary objection date 25th July 2023 which prays for striking out of the suit herein on the following grounds: -
 - a. That the suit is statute barred pursuant to Section 90 of the *Employment Act*.
 - b. The Claimants' right to sue has lapsed and as such they lack the capacity to bring any cause of action against the Respondent.
2. The facts leading to the suit are that the claimants are current and former employees of the respondent. They commenced this suit on 11th July,2023 seeking an aggregate sum of Kshs.67,946,707 being unpaid salary arrears. They also prayed for general damages, costs and interests. It is the claimants' case



that they have not been paid their salaries since 2019 and they have accused the respondent for breach of contract, employment laws and the [constitution](#).

Submissions

3. Mr. Wachira, counsel for the Respondents submitted that under section 90 of the [Employment Act](#), the suit ought to have been filed within 3 years from 2019 meaning by 2022. Consequently, waiting until July 2023 rendered the suit is statute barred. To support his submission, he relied on the case of [Fred Mundari v G4S Security](#) [2014] eKLR, where the Court held that Claims based on the [Employment Act](#) have to be filed within 3 years.
4. As regards the issue of capacity to sue by the Claimants, he relied on Order 4 Rule 3 of the [Civil Procedure Rules](#) which in his view requires that all the other Claimants must have given authority by signing. He stated that the Claimants had no proof of authority to plead on behalf of the others. In support, he relied on the case of *John Kariuki and 347 others v John Mungai Njunge & 8 Others* where the Court held that a party suing in a representative capacity must avail written authority in order to avoid any mischief. He submitted that the authority to sue in this case is not signed by all the claimants and for that reason prayed for the suit to be dismissed.
5. Mr. Ngaira learned counsel for the claimants opposed the preliminary objection contending that it does not raise pure points of law as enunciated in the case of *Mukhisa Biscuits Manufacturing co. Ltd v West End Distributors Ltd* [1969] E.A 696. He urged the court to find that the objection is incompetent because it is grounded on facts.
6. As regards the issue of limitation period, Mr. Ngaira submitted that the claim is based on a continuous breach by the employer since 2019 until now. He stated that some of the employees are working while others have since left employment. He urged that under section 90 of the [Act](#) the suit is not statute barred and urged the court to give the claimants an opportunity to demonstrate that they have been subjected to servitude.
7. He submitted that Article 159 of the [constitution](#) obliges the court to do substantial justice and therefore urged the court to dismiss the objection. He stated that in the preliminary objection the case requires proof by evidence. He contended that the Respondent's counsel gave evidence from the bar that the Claimants were not aware of the suit.
8. Ms. Yano who appeared jointly with Mr. Ngaira for the claimants, added that it would be tragic to allow the objection because there are issues of human rights violation for the 138 Claimants. She contended that the authority to sue was duly signed by all the claimants as evidenced by the copies on record marked "1A,B,C,D". She further submitted that the claimants have already published a notice of the suit at the respondent's premises.
9. Mr. Waweru in his rejoinder submitted that the objection is based on the [Act](#) and not on the [constitution](#). He stated that there are only 27 signatories in annexure A and 47 in annexure B, and therefore maintained that the other claimants have not signed the authority to sue.

Issues for determination and analysis

10. Having considered the Memorandum of Claim, Notice of Preliminary Objection and the rival submissions by counsel, the issues that fall for determination:
 - a. Whether the objection meets legal threshold.
 - b. Whether the suit is statute barred.



- c. Whether the claimants have authority to institute representative suit.

Threshold for a preliminary objection.

11. In the case of *Mukisa Biscuits manufacturing co. Ltd v West End Distributors Ltd* [1969] EA 699 the court held that:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

12. In view of the foregoing celebrated precedent, the threshold for a preliminary objection is that the objection must stand on a solid rock of a pure point(s) of law and not facts. In the instant case, the objection is on ground that this court lacks jurisdiction which meets the said threshold of a pure point of law. Likewise, the second point is also a pure point of law because it does not need evidence to establish. All what is required is to check whether all the claimants have signed the authority to be represented by fellow claimants. Besides if the same succeeds the suit will be disposed of and save judicial time.

Jurisdiction

13. Section 90 of the *Employment Act*, 2007 provides that:

“Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), 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.”

14. The respondent’s case is that the three-year period within which the claimant ought to have file suit lapsed in 2022 but they filed it out of time in July 2023. However, the claimants contend that the suit is not statute barred because the breach by the respondent is continuous and up to now it has not stopped. The objection springs from the following paragraphs of the Memorandum of Claim:

- “3. At all material times to this suit the claimants were and are still employees with the respondent since the year 1999 some have since left while others are still in employment in various employment capacities.
4. At all material times to this suit some claimants worked for the respondent and lost their jobs, some are still working but the respondent (sic) not meet its obligation of paying them.
5. The claimants being past and present employees whom they are representing in this suit have not been paid their salaries since the year 2019 to date.”



15. From the onset, I must observe that the above pleading is not elegantly drawn, and it lacks material particulars. One cannot tell which claimant is in employment currently and who has left. It is not pleaded when the former employee left. It is also impossible to tell whether the claim for Kshs. 67,946,707 had already accrued in 2019 or it includes salary up to the date of filing the suit. Consequently, it is not safe to allow the preliminary objection on ground of limitation of time. Doing so might send away innocent claimants whose claims are not stale.

Authority to institute representative suit.

16. The respondent alleges that all the claimants have not given authority for the representative suit to be initiated. I have, however, perused the four copies marked 1 A, B, C & D and confirmed that most of the claimants have signed the authority. The gaps in the said four copies are because the respective persons signed in the alternative copies. The claimants have also published notice of the suit on the respondent's premises to alert the concerned employees about the representative suit and so far no objection has been raised.

17. The respondent relied on the case of *Ndungu Mugoya & 473 others v Stephen Wang'ombe & 9 others* [2005] eKLR where court held that:

“This court cannot be certain that all the 473 plaintiffs authorized the 1st plaintiff to file this suit on their behalf. Neither can the court be sure that all the said plaintiffs are actually aware of the court proceedings filed in their name. In the absence of written authority, by the 473 co-plaintiffs, the 1st plaintiff cannot have authority to act or plead on behalf of the other plaintiffs merely by his stating that he has such authority. The authority has to be obtained from each of the 473 co-plaintiffs before the plaintiff can depone that he has authority to appear or act for such plaintiffs.”

18. I entirely agree with the above decision that a party who wishes to file suit on behalf of another must first obtain a written authority from the person. This is important to avoid the mischief of a person's benefits being defrauded or cases where a person is condemned to settle costs or other reliefs that may be awarded by the court without the person's knowledge.

19. However, in my view, a whole suit cannot be rendered incompetent just because only a few out of 138 claimants have not signed the authority. The suit remains competent for the persons who have given a written authority. In this I see no reason for denying those who have signed the authority, their day in court. However, the paper work appears untidy. It could have been done differently. All in all, I am satisfied that there is sufficient authority given for initiating representative suit for those who signed the Authority paper.

Conclusion

20. I have found that the claimants' pleadings are deficient of material particulars and as such it is impossible to make a conclusive opinion whether or not, the suit is statute barred. I have also found that there is on record sufficient authority allowing the claimant to institute a representative suit. Consequently, the notice of preliminary objection is dismissed with no order to costs.

21. In order to do justice to all the parties and save on judicial time, I grant the claimants leave of 21 days to amend their pleadings and provide the missing material particulars. The respondent will have 21 days after service with the amended Claim to file defence as required by the law.

22. The suit is fixed for mention for pre-trial directions on 25th January, 2024.



DATED, SIGNED AND DELIVERED AT NYERI THIS 3RD DAY OF NOVEMBER, 2023.

ONESMUS N MAKAU

JUDGE

Order

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

