



Kenya Tertiary & Schools Workers Union v Board of Management Nyakongo Boys High School (Cause E086 of 2021) [2022] KEELRC 3928 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3928 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E086 OF 2021
CN BAARI, J
SEPTEMBER 22, 2022

BETWEEN

KENYA TERTIARY & SCHOOLS WORKERS UNION CLAIMANT

AND

BOARD OF MANAGEMENT NYAKONGO BOYS HIGH SCHOOL RESPONDENT

RULING

1. The ruling herein relates to a preliminary objection raised by the respondent in their response to the statement of claim dated January 28, 2022.
2. The contention is that the claim is statute barred under the provisions of section 4(1) of the *Limitation of Actions Act* and section 90 of the *Employment Act*, 2007, and therefore, the court lacks jurisdiction to entertain the claim. The respondent further contends that the claimant lacks capacity to commence this proceeding on behalf of the grievant.
3. On the request of the parties, the preliminary objection was addressed by way of written submissions. Both parties lodged their written submissions.

The Respondent's Submissions

4. It is submitted for the respondent that the claim herein was filed on December 16, 2021, and that it is alleged that the grievant's services were terminated in October, 2017. The respondent further submits that the three years elapsed in October, 2020, hence the claim does not conform to the mandatory time of limitation under section 4(1) of the *Limitation of Actions Act* and section 90 of the *Employment Act*, 2007, and must fail and the preliminary objection upheld. The respondent placed reliance in *Fred Mudave Gogo v G4s Security Services (k) Ltd* (2014) eKLR for the holding that a claim commenced after three years after the act, neglected or default complained of, failed for failure to conform with the mandatory time limitations.



5. On the issue of the claimant's capacity to sue on behalf of the grievant, it is submitted that sections 54 (3) and (6) of the [Labour Relations Act](#), demands that for a union to have the *locus standi* in dealing with trade disputes, such a union must have recognition agreements or any negotiations for and on behalf of members and their employers and without the recognition agreement the union lacks standing to institute suit for and on behalf of the grievant.
6. It is further submitted for the respondent that in the present claim, the claimant has not demonstrated, even on prima facie basis, that there was any recognition agreement, or any relationship, as required by law, to enable it represent the grievant. The respondent submits that the claimant lacks standing to institute this claim on behalf of the grievant.

The Claimant's Submissions

7. The claimant submits that the mandate of this honourable court is to exercise and administer her judicial authority devoid of the undue regard to procedural technicalities within the meaning of article 159 (1) and (2) (d) of the [Constitution](#) of Kenya and as read together with section 20 of the [Employment and Labour Relations Court Act](#).
8. The claimant's further submission is that the Employment and Labour Relations court as established under article 162(2) of the [Constitution](#) of Kenya, 2010 is a superior court and hence, has the due jurisdiction to determine the suit.

Determination

9. I have considered the claimant's statement of claim, the preliminary objection and the rival submissions. The issues for determination are whether the suit herein is statute barred, and whether the claimant has capacity to sue for the grievant (Mr Johnson Mokuua) like she has.
10. The legal position on preliminary objections was well laid down in *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696, where the court held 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. 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... a preliminary objection is in the nature of what used to be a 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.”
11. The preliminary objection in this suit, being a plea of limitation premised on section 4(1) of the [Limitation of Actions Act](#) and section 90 of the [Employment Act](#), 2007, is a pure point of law, and which if proved, has the potential to dispose of the suit without the need for a further hearing.
12. Section 4 (1) of the [limitation of actions](#) provides thus:-

“ The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

 - a. actions founded on contract;.....”



13. Further, section 90 of the *Employment Act* 2007, provides as follows on filing of employment related claims;

“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.”

14. The claimant’s statement of claim is dated July 17, 2021 and filed in court on December 16, 2021. Paragraph 12 of the claim states as follows: -

“That on October 6, 2017, the grievant requested for one week leave of absence and which leave was granted and when he reported back to work, he sought audience with the principal but was not accorded the same and that was chased away from work instead.”

15. Arising from the foregoing paragraph, it is not in doubt that the grievant on whose behalf the claim was lodged, left the service of the respondent within the month of October, 2017.

16. This being a claim arising out of a contract of employment, the same should have been filed within 3 years from the date the cause of action accrued as stipulated under section 90 of the *Employment Act*, 2007. The cause of action in the matter accrued the moment the grievant was, as he says, ‘chased away from work’. The grievant’s claim became enforceable the moment he was chased from work. In *Elinathan Kitiro Mwamburi v Telkom Kenya Limited* (2014) eKLR, it was held that once a termination occurs, time starts running.

17. The date when time starts to run, was settled by the holding of the Court of Appeal in the case of *David Ngugi Waweru v Attorney General & Another* (2017) eKLR, where the court stated that the time of dismissal or termination is the time contained in the letter of termination/dismissal and not the time of conclusion of internal disciplinary mechanisms.

18. In the claim before court, no termination or dismissal letter has been produced and the time of the termination adopted by this court is based on the time line given in the claimant’s statement of claim, and which is indicated at paragraph 14 of this ruling.

19. The court extensively dealt with the issue of limitation in the case of *Hilarion Mwabolo v Kenya Commercial Bank* (2013) eKLR where the court held:

“.. the cause of action under section 90 of the *Employment Act*, 2007 accrues from the date of termination as stated in the termination letter....” In a further case of *Anne Waithira Kimani v Stephen Ndungu Njenga* (2013) eKLR, the court held that the cause of action arose when the resignation took effect.

20. In *Attorney General & another v Andrew Maina Gitinji and another* [2016] eKLR, Waki JA (as he then was) in upholding a Preliminary Objection based on Section 90 of the *Employment Act*, held as follows:

“...The respondents had a clear cause of action against the employer when they received their letters of dismissal on October 2, 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose



on February 2, 2010 and that the claim was filed on June 16, 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013, and I so hold.”

21. I find and hold that the grievant’s claim having accrued in October, 2017, was time barred by October, 2020. The suit herein was lodged on December 16, 2021, one year after the accrual of the cause of action.
22. The issue of the claimant’s capacity to sue falls by the way side.
23. The upshot is:
 - i. The respondent’s preliminary objection is upheld
 - ii. The claimant’s memorandum of claim filed on December 16, 2021, is struck out for being statute barred.
 - iii. Parties shall bear their own costs of the suit
24. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Abura Present for the Claimant

Mr. Gekonge Present for the Respondent

Ms. Christine Omollo-C/A

