



**Kenya Chemical Workers Union v Polypipes Industries Limited (Cause 307 of 2020) [2022] KEELRC 13339 (KLR) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13339 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 307 OF 2020  
SC RUTTO, J  
NOVEMBER 25, 2022**

**BETWEEN**

**KENYA CHEMICAL WORKERS UNION ..... CLAIMANT**

**AND**

**POLYPIPES INDUSTRIES LIMITED ..... RESPONDENT**

**RULING**

1. The claimant has brought the instant suit on behalf of Mr Bernard Nzuma Muthini, who it avers worked for the respondent for 30 years. The crux of the claimant's case is that the respondent refused to pay the grievant's retirement benefits having retired him on March 10, 2017. It is for this reason that the claimant seeks the following reliefs on behalf of the grievant:
  - i. That this Honourable Court be pleased to give orders that, the grievant be paid his remaining balance immediately by the Respondent by issuing him with one cheque to cover the balance of Kshs 326,376 which is payable to him.
  - ii. That this Honourable Court orders that, he be paid for the time he has been out of employment awaiting payment of his retirement benefits, as the Respondent could not have retired him if they did not have money to clear with him.
  - iii. That, this Honourable Court orders that he be paid the retirement benefits with interest as the Respondent has been trading with his money for a period of more than three years, while he continues to suffer.
  - iv. That, this Honourable Court grant the grievant maximum compensation for the suffering he has endured since he was retired by the Respondent.
  - v. That, the Respondent pay the costs of this suit.



2. The respondent entered appearance on June 3, 2022 and filed a notice of preliminary objection dated June 8, 2022, which is premised on the following grounds:
  - i. The Honourable Court has no jurisdiction to hear and determine this suit by dint of the provisions of the [Retirement Benefits Act](#) as well as section 90 of the [Employment Act](#).
  - ii. The claimant has no locus standi to bring this suit on behalf of Mr Bernard Nzuma Muthini.
3. It is that preliminary objection comes up for determination.
4. On July 4, 2022, the Court directed that the objection be canvassed through written submissions. It is worth mentioning that the claimant did not file written submissions as the same were not on the Court's physical record at the time of writing this Ruling and could not be traced on the online portal.

### Submissions

5. The respondent submitted that a dispute over retirement benefits falls outside the original jurisdiction of this Court. The respondent further submitted that it was unlawful for a trade union to substitute itself with a grievant and to assume the standing of an employee in a personal dispute. That by bringing the present suit, the claimant has invited the Court to arrogate itself jurisdiction that it does not possess.
6. Citing section 12 of the [Employment and Labour Relations Court Act](#), the respondent submitted that Mr Bernard Nzuma is not considered a grievant. To buttress this argument, the respondent asked the Court to consider the determination in the case of [Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others \(2019\) eKLR](#). On this score, the respondent submitted that the Employment and Labour Relations Court, has no jurisdiction to hear and determine a dispute relating to the computation and or payment of retirement benefits. That further, such a dispute on retirement benefits falls within the ambit of the dispute resolution mechanism under section 46 to 48 of the [Retirement Benefits Act](#).
7. It was the respondent's further submission that the claimant lacked locus standi to institute the suit. That the mere fact that the claimant is registered to represent unionisable employees in the chemical and allied industry does not entitle it to an automatic locus standi to substitute all the unionisable employees in that industry and to institute suits in its own name on matters that are personal and not collective in nature. To support this argument, the respondent cited the case of [Kenya Shoe & Workers Union v Modern Soap Factory Ltd \(2017\) eKLR](#).

### Analysis and determination

8. The issues for determination can be distilled as follows:
  - a. Whether the Court has jurisdiction to hear and determine the suit.
  - b. Whether the claimant union has locus standi to bring the instant suit on behalf Mr Bernard Nzuma Muthini.
  - c. Whether the suit is time barred.

### Jurisdiction

9. This Court's jurisdiction flow from Article 162(2) (a) of [the Constitution](#). Section 12 (1) and (2) of the [Employment and Labour Relations Court Act](#) gives further effect to Article 162(2) (a) and grants the Court jurisdiction to determine disputes relating to employment and labour relations including:



- (a) disputes relating to or arising out of employment between an employer and an employee;
  - (b) disputes between an employer and a trade union;
  - (c) disputes between an employers' organisation and a trade unions organisation;
  - (d) disputes between trade unions;
  - (e) disputes between employer organizations;
  - (f) disputes between an employers' organisation and a trade union;
  - (g) disputes between a trade union and a member thereof;
  - (h) disputes between an employer's organisation or a federation and a member thereof;
  - (i) disputes concerning the registration and election of trade union officials; and
  - (j) disputes relating to the registration and enforcement of collective agreements.
10. The instant dispute revolves around payment of retirement benefits to Mr Bernard Nzuma, who is a former employee of the respondent. It is the claimant's contention that the Court lacks jurisdiction to hear and determine the dispute as it relates to payment of retirement benefits. The respondent placed reliance on the decision of the Supreme Court in [\*Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others \[2019\] eKLR\*](#).
11. I have carefully considered the decision of the Supreme Court in the aforesaid authority and find that the same is distinguishable from the instant case. This is why. In the Albert Chaurembo case, the dispute was between the members of the scheme and trustees of a pension scheme, which fell within the ambit of the [\*Retirement Benefits Act\*](#) unlike the instant case where the dispute is between the union and the employer. Indeed, it is notable that the claimant has not made any reference to a retirement benefits scheme. On this score, I wish to highlight the following passage from the said decision as it places the dispute in context:

“(146) In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the [\*Retirement Benefits Act, Trustee Act\*](#) cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the [\*Employment and Labour Relations Court Act\*](#) is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners)....We do not see how a pensioner falls within the listed category of persons and parties that can make an application or institute proceedings before the court. From the foregoing it is thus clear that the Employment and Labour Relations Court had no jurisdiction to hear and determine a dispute that relates to trustees of a pension scheme and members of the scheme particularly where the said members are no longer employees of the Sponsor. Besides, the trust so established as a pension scheme retains autonomy from both the Sponsor and the employees hence its regulation by the Authority.” Underlined for emphasis.



12. It is worth noting that in the instant case, the claimant is pursuing benefits on behalf of the Mr Nzuma pursuant to the Collective Bargaining Agreement (CBA) it executed with the respondent. Indeed, the claimant has not invoked the [Retirement Benefits Act](#) and the suit has not been brought against any retirement scheme of trustee of a pension scheme.
13. As a matter of fact, at the heart of the dispute is the interpretation of Clause 12 of the CBA executed between the claimant and the respondent as opposed to a Trust Deed and Rules of the Scheme alongside the provisions of the [Retirement Benefits Act](#).
14. To this end, I am not persuaded that this Court lacks jurisdiction to hear and determine the suit and instead, find that the suit is properly before this Court.

### **Locus standi**

15. With regards to the question of locus standi, the respondent's contention is that the claimant union cannot lawfully represent Mr Nzuma in a suit brought in its own name. The respondent further contends that the claimant has not brought the suit on the basis of Mr Nzuma's membership.
16. At the outset, it is worth pointing out that membership to a trade union is a question of fact that can only be ascertained by way of evidence. As such, that is an issue that cannot be determined at this juncture.
17. On this issue, I find useful guidance in the decision by the Court of Appeal in the case of [Modern Soap Factory v Kenya Shoe and Leather Workers Union \[2020\] eKLR](#), where the learned Judges held that:

“In our judgment, we can see no reason why a registered union, whose constitution so empowers, should not have standing to institute a claim on behalf of its members and to represent its members in court... We can see no reason therefore to fault the conclusion by the Judge that the respondent has locus standi to institute the claims on behalf of its members. That said, whether an employee is a member of a union is a question of fact. Where there is a contest as to whether an employee is a member of a union, evidence would be required to settle that question. It is not a matter that is amenable for determination on the basis of a preliminary objection. [See [Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd \[1969\] E A 696](#).]” Underlined for emphasis.
18. In light of the foregoing, it cannot be concluded at this juncture that the claimant union lacks locus standi to represent Mr Nzuma as it has in the instant case.

### **Time bar**

19. This issue was raised in the notice of preliminary objection but the respondent did not submit on the same. Nonetheless, I am enjoined to consider it.
20. On this issue, the respondent invoked the provisions of section 90 of the [Employment Act](#) which provides as follows:

“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.”



21. The import of the foregoing provision, is that matters arising out of the Employment Act or on a contract of service, as the one herein ought to be instituted within 3 years from the date the cause of action arises.
22. In defining what constitutes a cause of action, the Court of Appeal in the case Attorney General & another v Andrew Maina Gitinji & another [2016] eKLR, cited with approval the case of Letang v Cooper [1964] 2 All ER 929 at 934 where the term was defined to mean:

“ A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”
23. Thus, when did the cause of action arise in this case? the claimant avers that Mr Nzuma retired on March 10, 2017 while the respondent forwarded tabulations of his final dues on October 5, 2017, with the total sum payable being Kshs 403,142.00.
24. The claimant further avers that Mr Nzuma’s dues remained unpaid until September 29, 2018 when the respondent forwarded a cheque in the sum of Kshs 100,000.00. That to date, the respondent has never forwarded the balance of the final dues.
25. In light of the foregoing, it is evident that the cause of action arose when the respondent made payment of the benefits due to Mr Nzuma and at which point he ascertained that the same was not paid in full. It is at that juncture that Mr Nzuma had a right to complain. Before then, he had in mind the amount due from the respondent and it is more than probable, that he had a legitimate expectation that the same would be paid in full.
26. Accordingly, it is apparent that time started running on September 29, 2018 whereas the suit was filed on July 14, 2020. This was within the 3 year limitation period under section 90 of the Employment Act hence the suit is not time barred.
27. The total sum of my consideration is that the preliminary objection dated June 8, 2022 is disallowed.
28. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr Gwako- Deputy National General secretary

For the Respondent Ms. Okuta

Court Assistant Abdimalik Hussein

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

