



Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v Board of Management, Evangelical Lutheran Church In Kenya (ELCK) Appropriate Technology Project (ATP) Training College & another (Employment and Labour Relations Claim E028 of 2022) [2022] KEELRC 13226 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13226 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS CLAIM E028 OF 2022**

S RADIDO, J

NOVEMBER 16, 2022

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS & HOSPITAL WORKERS CLAIMANT

AND

BOARD OF MANAGEMENT, EVANGELICAL LUTHERAN CHURCH IN KENYA (ELCK) APPROPRIATE TECHNOLOGY PROJECT (ATP) TRAINING COLLEGE 1ST RESPONDENT

TITUS OKODA OF EVANGELICAL LUTHERAN CHURCH IN KENYA (KISUMU DIOCESE) 2ND RESPONDENT

RULING

1. The Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers (the Union) sued the board of management of Evangelical Lutheran Church in Kenya (the respondents), and it stated the issue in dispute as:

'Refusal by the management of Lutheran Technical Training Institute to pay salary arrears and terminal benefits of six employees, namely: Caleb Onyango Agiso, John Okumu Oriwo, Margaret Atieno Agala, William Audo Odiyo, Calistus Aluoch Ndinya and Jacob Oluoch Okal contrary to the Constitution of Kenya, 2010, articles 29(d), 41(2)(a), 43, 47 and Employment Act, 2007 sections 18(2)(c) and 25.

2. The respondents filed a response on August 30, 2022 and a notice of preliminary objection contending that:



- (1) The claim herein is statutorily time-barred, the grievants having stated that they terminated their employment with the respondent way back in August 2014 due to delays in and non-payment of salaries and other grievances dating from as way back as the year 2012.
- (2) The claimant has no locus standi to institute and/or maintain this claim on behalf of the grievants.
- (3) The claim herein is incurably defective, incompetent, and bad in law on the following grounds:
 - (a) The memorandum of claim and the verifying affidavit have been drawn and executed by different persons. Whereas the memorandum of claim is stated as having been drawn by KUDHEIHA, it has been signed by one Michael Oyata as claimant/applicant. Further, the affidavit that has verified the memorandum of claim has been sworn by one Doreen Nyasio, who has not demonstrated the relationship between her and Michael Oyata.
 - (b) The verifying affidavit was sworn on June 24, 2022, but it purports to verify the memorandum of claim that was drawn and dated on June 26, 2022.
 - (c) The averments in the memorandum of claim have not been numbered consecutively, and certain pages have been printed on both sides contrary to the rules of pleading, thereby rendering it likely to embarrass the respondents in their defence and likely to delay the expeditious trial and determination of the claim
3. The union filed a response to the preliminary objection on September 15, 2022, and on September 20, 2022, the court directed the parties to file and exchange submissions.
4. The respondents filed joint submissions on October 14, 2022 and the union on August 15, 2022.
5. The court has considered the motion, objection, affidavits, and the record.
6. The grievants initially complained to the respondents about their delayed salaries on June 14, 2011.
7. The union then formally reported a trade dispute to the cabinet secretary, labour, on November 23, 2016. The cabinet secretary then appointed a conciliator.
8. The dispute was not resolved at conciliation, and a certificate of unresolved dispute was issued on March 30, 2022.
9. It is not in dispute that the grievants separated from the respondents in August 2014. By dint of section 90 of the *Employment Act*, 2007, the union ought to have commenced court action within 3-years.
10. The union only initiated court action on June 29, 2022, and the explanation was that the conciliation (alternative dispute resolution) had not been concluded.
11. The union also contended, relying on *Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers v Njabini Secondary School (2012) eKLR*, that the cause of action only accrued upon the conciliator issuing his certificate.
12. The question, therefore, is whether time stops running when an employment dispute is still under conciliation.
13. The court of appeal addressed the issue in *Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & Ar (2016) eKLR*, wherein it stated:

'While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the



law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service.

14. The court of appeal has maintained the position in other cases (see G4S Security Services (K) Limited v Joseph Kamau & 468 Ors [2018] eKLR and Attorney General & Ar v Andrew Maina Githinji and Ar (2016) eKLR).
15. These decisions are binding on this court.
16. The union commenced action way beyond the prescribed timeline of 3 years. The action(s) cannot be sustained.

Conclusion and orders

17. From the foregoing, the court must put down its pen and strike out the cause. No order on costs.

DELIVERED VIRTUALLY FROM LAMU, DATED, AND SIGNED ON THIS 16TH DAY OF NOVEMBER 2022.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Union Mr Oyata, Industrial Relations Officer

For Respondents Mr Ochich instructed by Otieno Ochich & Associates

Court Assistant Chrispo Aura

