



**Kenya Plantation & Agricultural Workers Union v Kanyenyaini Tea
Factory (Employment and Labour Relations Cause E003 of 2022)
[2022] KEELRC 13546 (KLR) (15 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13546 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E003 OF 2022
ON MAKAU, J
DECEMBER 15, 2022**

**BETWEEN
KENYA PLANTATION & AGRICULTURAL WORKERS UNION .. CLAIMANT
AND
KANYENYAINI TEA FACTORY RESPONDENT**

JUDGMENT

1. The claimant is a registered trade union and it filed this suit on February 1, 2022 on behalf of its member Mr Charles Maina Njorge (herein referred to as the grievant.) The suit seeks the following reliefs;
 - a. The respondent to pay the grievant his full benefits and any accrued interests therefrom.
 - b. Cost of the suit to be borne by the respondent.
 - c. Any other relief this honourable court deems fit to grant.
2. The basis upon which the suit is brought is that the grievant was employed by the respondent as a seasonal employee from February 2001 before becoming a security guard in the respondent's premises in 2004. He then worked until November 2017; when he wrote a request to retire upon reaching 60 years but in response, he was given a letter dated June 28, 2016 purporting that he was not entitled to any terminal benefits under the collective bargaining agreement but only NSSF because he was employed under a seasonal contract.
3. The dispute was referred to the Ministry of Labour for conciliation but it was not resolved hence this suit.
4. The respondent filed defence on April 12, 2022 contending that the grievant was employed on a seasonal contract basis and denied owing the grievant any terminal benefit. However, it admitted that there was an attempt to resolve the dispute through a conciliator but it failed.



5. The respondent further averred that the suit is time barred under the provisions of section 90 of the *Employment Act*.
6. The suit was disposed of by written submissions on the strength of the pleadings, written witnesses' statements and documentary evidence filed.
7. The claimant's witness in the matter is the grievant and his statement is dated January 18, 2022. His testimony basically reiterates the facts pleaded in the memorandum of claim as summarized above. These facts are fortified by copy of collective bargaining agreement, copy of pay slips, letters dated November 27, 2016, June 28, 2016, letter dated March 23, 2019, letter dated April 25, 2019, copy of letter dated August 19, 2019, copy of conciliation report dated September 16, 2020 and certificate of disagreement dated September 2020.
8. The respondent filed written statement by its factory assistant Ms Peris Wanjiru Mwangi dated April 11, 2022. The witness stated that the grievant was a seasonal employee having been engaged under various contracts until his services were terminated vide the letter dated June 28, 2016. He further stated that the grievant was paid all his salary due to him under the collective bargaining agreement. He also stated that the grievant is not entitled to terminal dues since the employer remitted NSSF contributions for the grievant. Therefore, the witness saw no merit in the current suit and prayed for it to be dismissed with costs.
9. The second defence witness is Ms Milkah Nzilani Nzioka whose testimony is a duplicate of the statement by the respondent's first witness. He also saw no merits in the claimant's suit and prayed for it to be dismissed with costs.
10. The respondent fortified its defence by filing the letter dated June 28, 2016, letters of engagement dated April 1, 2016, September 1, 2015, April 1, 2015, 1st November 2014, 1st July 2014, January 1, 2014, January 1, 2013 and the CBA for 2015-2016.

Submissions

11. The claimant submitted that the grievant was employed by the respondent in 2001 and worked continuously and uninterrupted until 2006 as a casual employee as evidenced by pay slips and NSSF records filed before this court. It was argued that during that period, the grievant's employment had converted into permanent employee pursuant to section 37 of the *Employment Act*. It fortified the foregoing submission by the decision of the court in *Rashid Odhiambo Allogoh & 245 Others vs Haco Industries Limited (2015) eKLR*, *Silas Mutwiri vs Haggai Multi-Cargo Handling Services Limited (2013) eKLR* and *Chemelil Sugar Company vs Ebrahim Ochieng Otuon & 2 Others (2015) eKLR* where it was held that the continuous casual employment had morphed into permanent employment.
12. In view of the foregoing matters, the claimant maintained that the grievant is entitled to the reliefs sought in the instant suit. Reliance was placed on the decision in *Tom Franx Mzaliwa Osiro v Kenya Power & Lighting Company Limited (2021) eKLR* where it was held that upon the employer's acceptance of a request for early retirement the claimant was entitled to payment of the entire retirement package due to him under the staff regulations.
13. Likewise, the claimant herein maintained that the grievant's request for retirement was approved by the employer on January 24, 2017 and it only fair that he be paid his retirement benefits in full for the diligent service to the respondent for 15 years. The claimant dismissed the respondents defence as an attempt to deny the grievant his right to retirement benefits. It observed that the respondent has not denied that the grievant worked continuously and uninterrupted from 2001 to 2006.



14. The respondent submitted from the onset that the suit is time barred as it was filed more than 5 years from the date when the cause of action arose. It was observed that the cause of action arose on January 27, 2017 and the suit was filed on February 18, 2022. Consequently, the court was urged to strike out the suit with costs. Reliance was placed on [*John Kiiru Njiiri vs University of Nairobi \(2021\) eKLR*](#) where the court upheld a preliminary objection on the same grounds.
15. As regards the nature of the grievant's employment, the respondent submitted that no evidence has been tendered to support the alleged conversion to permanent and pensionable terms. It was argued that the respondent had several seasonal contracts signed by the grievant during his tenure of service. Finally, it was submitted that the collective bargaining agreement cited cannot assist the claimant's case because it allowed for engagement on seasonal contracts. For emphasis, reliance was placed on the decision in [*Geoffrey Cheruiyot Kirui vs Mogogosiek Tea Factory Co Ltd \(2022\) eKLR*](#) where the court dealt with a similar dispute.

Analysis

16. Having carefully considered the pleadings, evidence and submissions filed and I found the facts of the case fairly straightforward. The issues for determination:-
 1. Whether the suit is time barred.
 2. Whether the claimant is entitled to the reliefs sought

Time barred suit

17. The claimant pleaded that the grievant's request for retirement at 60 years was approved by the employer on January 27, 2017 while the respondent averred that the separation occurred on June 30, 2016 when his seasonal contract lapsed. The above discrepancy notwithstanding, it is evident that the separation occurred latest on January 27, 2017.
18. Section 90 of the Employment 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 of or in the case of continuing injury or damage within twelve months next after the cessation thereof.'
19. The dispute herein is brought under the [*Employment Act*](#) and the collective bargaining agreement cited herein and therefore it is governed by the provisions of section 90 above. It means that the three years within which to file suit lapsed on January 27, 2020 but the suit was filed on February 1, 2022. Consequently, the court finds and holds that the suit is time barred by dint of section 90 of the Act since it was filed more than 5 years from the date when the cause of action arose.
20. The effect of the foregoing holding is that the court lacks jurisdiction and the suit is dismissed with costs for offending section 90 of the [*Employment Act*](#).

DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF DECEMBER, 2022.

ONESMUS N. MAKAU

JUDGE

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties 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

