



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.E6453 OF 2020

KENYA CHEMICAL AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

LABORATORY AND ALLIED LIMITED.....RESPONDENT

RULING

The claimant moved the court under Certificate of Urgency on 19th November, 2020.

In reply, the respondent filed Notice of Preliminary Objections and on the grounds that the suit relates to a cause of action which arose on 1st April, 2016 and his is time barred under section 90 of the Employment act and the court lacks jurisdiction and should be dismissed with costs.

The claimant has no locus standi to file this claim in respect of the employee whose employment ceased prior to the claimant entering into a Memorandum of Agreement/Recognition Agreement.

The court issued direction to the parties to address the objections made first.

The respondent submitted that the cause of action arose on 1st April, 2016 and is time barred as held in the case of **G4S Security (K) Limited versus Joseph Kamau & 468 others [2018] eKLR**. a suit filed contrary to the provisions of section 90 of the Employment Act, 2007 should be dismissed as the court has no jurisdiction.

There was no recognition of the claimant at the time the alleged cause of action arose to give them standing to urge the court as herein done. The claimant lacks the necessary *locus standi* herein and this renders the suit mute and should be dismissed with costs.

The claimant submitted that the cause of action stated on 1st April, 2016 and due to delays in presenting the matter could not comply with section 90 of the Employment Act. The claim relates to the employment benefits of the grievant and not time barred.

The claimant was recognised by the respondent on 11th January, 1996 and the grievant retired on 1st April, 2016 and has standing to urge this suit.

Retirement benefits are outlined in the collective agreements (CBA) of the parties and the delays to pay arose from the respondent.

Determination

Section 90 of the Employment Act, 2007 is couched in mandatory terms. A party must move the court within 3 years from the date the cause of action arose.

In the case of **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** the court held that;

Section 90 of the Employment Act 2007 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. (Emphasis supplied).

In arriving at the findings above the court made reference to the case of **Attorney General & another v Andrew Maina Githinji and another [2016] eKLR** where in upholding a Preliminary Objection based on Section 90 of the Employment Act, 2007 held that

...The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 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 2nd February 2010 and that the claim was filed on 16th June 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.

A party must move the court within the timeline set out under section 90 of the Employment Act, 2007 even where there are on-going negotiations or demand and promises have been made. To wait until the lapse of time render the suit time barred. This is the case in the instant suit.

Under paragraph 1 of the Memorandum of Claim the claimant avers that the grievant Jacinta Waithera Mwaibara worked for the respondent until 1st April, 2016 when she retired. There is retirement benefits claimed therefrom.

The claim should have been filed on or before the March, 2019. This was not done until 19th November, 2020 over a year late.

The claim is time barred pursuant to section 90 of the Employment Act, 2007. The court is denied jurisdiction and must stop.

Save, on the issue of the standing of the claimant to urge the suit, the claimant was recognised by the respondent vide Recognition Agreement going back to 11th January, 1996. Such gives the claimant the right to negotiate collective agreements with the respondent.

Even where there was no recognition, a recognition agreement is regulated under the Labour Relations Act to allow a trade union negotiates collective agreements but that does not bar the trade union from representing its members in the employment of the respondent in court proceedings. even where the grievant may have joined the claimant membership late or upon retirement, recognition or non-recognition of the trade union by an employer is not a bar to representation of its members in court. the import of recognition relates to a different matter unlike the issue of representation of members in court proceedings such as this. This is the purpose for which members join a trade union to benefit from its representation in court unlike when the employer is engaged in negotiations for a CBA, the negotiating trade union must be recognised so as to sit at the negotiations table.

As such, the claimant has the requisite standing to move the court where the claim is not time barred.

Accusingly, the suit is time barred, the same is hereby struck out. Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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