

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 387 OF 2019

PHITALIS OTERE OSANGIR & 111 OTHERS.....CLAIMANTS

VERSUS

KENYA ENGINEERING WORKERS UNION.....RESPONDENT

RULING

1. Before me is a preliminary objection to the effect that the Claimants' claim offends Section 90 of the Employment Act, 2007 on limitation of time hence it ought to be struck out. The Claimants assert in their submissions in opposition to the preliminary objection that the main suit, the negligence claim was filed within the required 3 year period as per Section 4 of the Limitation of Actions Act, cap 22. The Claimant asserts that the Respondent continuously acted negligently in failing to address the plight of the Claimants as and when complaints against Devki Steel Mills Limited, the Claimants' former employer, were forwarded. They submitted that the cause of action which is the subject of the claim for negligence against the Respondent lastly arose on 20th December 2017 and that the suit was filed on 18th June 2019 which is a period of about a year and a half since the last cause of action of negligence claim. The Claimants submitted that Section 90 of the Employment Act cannot apply in the suit herein due to the fact that there was no employee and employer dispute between the Claimants and the Respondent. The Claimants assert Section 3 of the Act provides for the application of the Act which does not include the governing of the relationship between the trade union members and the registered trade union, the Claimants and the Respondent herein. The Claimants submitted that the Respondent owed a statutory duty of care and that the Respondent breached the statutory duty of care and as a result the Claimants suffered damages. The Claimants relied on the case of **Gibb Africa Limited v David Kiplagat Rotich [2019] eKLR** where the Court held that there was no employee-employer relationship and therefore the provisions of Section 90 of the Employment Act did not apply. The Claimants submitted that by virtue of the provisions of the Constitution of Kenya 2010 the dispute was within the purview of the Employment and Labour Relations Court Act as the court is not limited to only dealing with matters concerning employer-employee relationships as was held in the case of **Daniel Kipkoech Kenduiwo v County Government of Uasin Gishu [2017] eKLR**.

2. The Respondent's submissions were not on file as at the time of penning this Ruling. In brief, the objection is in respect of Section 90 of the Employment Act. The Claimants asserts that this is inapplicable to their claim as the dispute is in relation to a statutory duty of care the Respondent owed the Claimants. The Employment Act relates to and is intended to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing. The Labour Relations Act on the other hand is an Act of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratisation of trade unions and employers organisations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes. The law as I see it was never crafted whether in the realm of the Employment Act or in the Labour Relations Act to place the Union in the place of an employer. In the claim before me, it is the Claimants prayers that the Respondent do pay the Claimants for the lost continuing injuries being annual leave, public holidays, housing allowance, overtime, unpaid rest days, service pay, notice pay, general damages, exemplary damages, milk allowance, night shift allowance and leave travelling allowance as well as a certificate of service. The Claimants were misguided in filing the claim as framed since if they were aggrieved by the conduct of the Respondent, a suit seeking employment remedies from the Union was not the proper recourse. The upshot of the foregoing is that the suit is devoid of merit and is struck out. Each party is to bear their own costs for the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2021

Nzioki wa Makau

JUDGE