



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1227 OF 2017

JIMNAH MUCHIRI.....CLAIMANT

VERSUS

AGRCULTURAL SOCIETY OF KENYA.....RESPONDENT

JUDGMENT

1. The Claimant is a member of the Agricultural society of Kenya, the Respondent herein. Although the Respondent was sued as a legal entity, it is indicated in the Statement of Reply that the organization is a non-legal person. It acts through trustees. As such, its proper characterization ought to have been “The Registered Trustees of the Agricultural Society of Kenya”.

2. Notwithstanding this objection relating to capacity, the parties did not pursue this issue further either in evidence or submissions. It is therefore safe to assume that the issue was abandoned.

3. The Claimant filed the initial Statement of Claim dated 23rd June 2017. Later on, he filed an amended Statement of Claim dated 14th January 2021. However, on 10th May 2021, the court record shows that the Claimant’s advocates applied to withdraw the amended Statement of Claim.

4. Under rule 14 of the Employment and Labour Relations Court (Procedure) Rules, 2016, amendments to pleadings without leave of the court are only permissible before pleadings close. Once they close, any amendment must be with the leave of the court. Therefore, the amended Statement of Claim placed on record in this matter without leave of the court was as a matter of law invalid.

5. In their written submissions, the Respondent’s lawyers have rightly raised a red flag regarding the validity of the amended Statement of Claim on record. This is because it does appear that the Claimant has premised parts of his case on the amended document despite having applied to withdraw it and despite the fact that the document is in any event invalidly on record for want of leave by the court. It is therefore important to clarify at the outset that the court will consider the Claimant’s case based on the initial Statement of Claim as opposed to the purported amended Statement of Claim which was withdrawn.

6. In his Statement of Claim, the Claimant asserts that he has been a member of the Respondent organization for over 40 years. At paragraph 4 of the Statement, the Claimant states that he has risen through the ranks of the Respondent institution as a volunteer/appointee pursuant to the Respondent’s council resolutions.

7. It is the Claimant’s case that on 9th September 2011, he received a letter from the national chairperson of the Respondent asking him to step aside from his position at the Respondent society. This was in order to permit investigations into accusation regarding alleged unwarranted conduct by the Claimant.

8. The Claimant asserts that ever since he got this communication and stepped aside, he has never been notified of the results of the alleged investigations. And neither was he paid his entitlements. This is despite several follow ups on the matter by the Claimant either directly or through his lawyers.

9. Thus, the Claimant prays for several orders including:-

- a) An order declaring his suspension as unprocedural, unfair and unreasonable.
- b) A declaration that the Respondent breached the Claimant’s constitutional and statutory [obligations].
- c) An alternative prayer for payment of terminal dues computed at Ksh. 4,108,000/=.

d) An order compelling the Respondent to issue the Claimant with a Certificate of Service.

e) An order for interest on the sums to be awarded and costs of the claim.

10. The Respondent filed a detailed response to the claim basically denying all that the Claimant had pleaded. In particular, the Respondent disputes the fact of having employed the Claimant. It is the Respondent's case that the Claimant, as a member of the Respondent organization, was appointed to serve the Respondent in positions of a volunteer and not an employee. As a consequence, it is the Respondent's assertion that the current claim does not lie.

11. The Respondent has taken issue with the court's jurisdiction to entertain this dispute on account of the provisions of section 90 of the Employment Act. Although not expressly pleaded, this issue is arguably covered by paragraph 25 of the Memorandum of Response to Claim where it is contended that the claim is an abuse of the court process.

12. The issue of jurisdiction has also been raised in the context of section 12 of the Employment and Labour Relations Court Act (ELRC Act). Put simply, the Respondent contends that there was no employer-employee relation between the Claimant and the Respondent within the meaning of the Employment Act. Therefore, the court lacks jurisdiction to entertain the cause as it falls outside the purview of section 12 of the ELRC Act.

13. These two jurisdictional issues have occupied the minds of the parties to the cause from the point of inception of these proceedings. Indeed, the Respondent applied to have the claim struck out for want of jurisdiction on the two counts. However, in a ruling delivered on 13th February 2019 the court observed that the issues could not be properly handled as preliminary matters as they required evidence in order to be conclusively resolved.

14. The two issues on jurisdiction are in my view critical to the survival of the rest of the claim. Consequently, they ought to be addressed first. Indeed, in recognition of their significance, counsels for the parties have submitted on them as the main matters for preliminary resolution.

15. I would start with the question of jurisdiction in terms of the limitation law. As pointed out, the court in its ruling of 13th February 2019 indicated that this issue was best handled upon taking of evidence at the full trial. As a result, the court dismissed the preliminary objection. And the Respondent has now revisited the matter in its submissions. This is after evidence has been taken.

16. The Claimant submits that since the court had disposed of the issue at the preliminary stage, it cannot be reopened. I disagree with this suggestion for the simple reason that all the court said in its ruling disallowing the preliminary objection on the point is that it was not fit to raise it at the stage it was raised. It required being resolved after taking of evidence.

17. My understanding of the law on raising of points of law is that although a party has the liberty to raise such matter through his/her pleadings, it is not a must that he/she does so in order to canvass it. In fact, this is evident from the wording of rule 14(3) of the ELRC rules. The rule does not make it obligatory for points of law to be raised through pleadings. Yet, it does not forbid the taking of points of law that are not set out in a party's pleadings.

18. But even if I am misguided in this respect, the pleadings by the Respondent are wide enough to ground the point of law taken by the Respondent. This is self-evident in paragraph 25 of the Memorandum of Response as alluded to above.

19. What then is the thrust of section 90 of the Employment Act? The provision seeks to regulate the time within which parties to a contract of employment must institute proceedings to enforce their rights under the contract. It does this by raising a three year bar to taking out proceeding to enforce rights under employment contracts. A party aggrieved by the other in relation to an employment contract must move the court for a remedy within three years of the cause of action arising. The only exception to this bar relates to situations where the transgression complained of results in continuing injury to the Claimant. In this case, one must move to seek a remedy within twelve months of the cessation of the injury.

20. From the Statement of Claim, it is clear that the Claimant's claim is premised on an alleged contract of employment. For instance, prayer i) in the Statement seeks a declaration that the Claimant's suspension from his employment was unprocedural, unfair and unreasonable. Prayers ii) and iv) in the Statement also seek orders under, inter alia, the Employment Act.

21. In his supplementary submissions, the Claimant takes the position that as this is a claim raising grievances that allege constitutional violations it is not subject to the law on limitations. To fortify his contention, the Claimant's advocates mention articles 28 and 47 of the Constitution as some of the constitutional provisions in contention.

22. I have combed through the Statement of Claim and find no plea on violation of particular provisions of the Constitution. The only instance where the Claimant makes reference to the Constitution is in the prayer section of the Claim. And even so, there is no indication of the specific provisions of the Constitution violated.

23. The law on litigations alleging violation of constitutional provisions is that the pleadings must set out the provisions of the Constitution allegedly violated with some measure of specificity (see for instance *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another [2018] eKLR*). I do not see this in the current Claim. Thus, in the court's mind, the Claimant presented this claim as an ordinary employment dispute within the meaning of the Employment Act. The Claim is therefore amenable to the law on limitation of actions.

24. From the Statement of Claim, the cause of action accrued on 9th September 2011 when the Respondent asked the Claimant “to step aside from his employment to facilitate investigation”. This is as is set out at paragraph 5 of the Statement of Claim.
25. The above reasoning as to when the cause of action accrued agrees with the Court of Appeal’s interpretation of the term “cause of action” as expressed in *Attorney General & Another vs Andrew Maina Githinji & Another [2016] eKLR*. The court said that “a cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.” In this claim, it is the suspension of the Claimant by the Respondent on 9th September 2011 which gave the Claimant the cause to complain.
26. This claim was filed in court on 30th June 2017 more than five years after 9th September 2011, the date the suspension was handed down to the Claimant. To my mind therefore, the claim, in so far as it is purportedly premised on the Employment Act and the purported contract of service generally, offends the provisions of section 90 of the Employment Act on limitation of actions.
27. That an objection on limitation goes to the court’s jurisdiction to entertain a matter is a position that has been settled by the Court of Appeal (see *Thuranira Karauri vs Agnes Ncheche [1997] eKLR*). And from this view point, it is my view that the court is deprived of jurisdiction to entertain the claim on account of limitation of time.
28. The other critical issue in relation to jurisdiction and which both parties address is whether there was an employment and labour relation dispute between the Claimant and the Respondent within the meaning of section 12 of the Employment Act to entitle the Claimant to invoke the court’s jurisdiction. The Claimant implies in his pleadings that he was in the employment of the Respondent. This he suggests when he says at paragraph 5 of the Statement of Claim that he received a letter from the national chairperson of the Respondent requesting him “to step aside from his employment to facilitate investigations....” This notwithstanding, the Claimant also recognizes that his engagement with the Respondent was in the nature of a volunteer. This, he states at paragraph 4 of the Statement of Claim.
29. On its part the Respondent is resolute that the Claimant was not its employee. That he was only a member of the Respondent organization and that in that capacity, he would be called upon to serve in its committees on volunteer basis.
30. The parties maintained their respective positions during their testimony. The Claimant stated that prior to the Respondent asking him to step aside he had served the Respondent diligently for over 30 years. Over this time he had received a number of promotions. He stated further that he suffered a lot following his unfair termination and had become diabetic as a result. It was his evidence that the termination soiled his reputation and all he desired was to be compensated for these tribulations.
31. In cross examination, the Claimant maintained that he was appointed by the Respondent periodically in 5 year sessions to serve in various committees. All the time, he would be paid allowances whenever he attended meetings. He conceded that if no meetings were convened no allowance would be paid to him. He also confirmed that the services he rendered to the Respondent were voluntary.
32. The Respondent on its part called its Human Resource manager. She adopted her statement and stated that the Claimant was not an employee of the Respondent. He was a member of the Respondent and only served in its committees on voluntary basis. He was therefore not managed under the Human Resource department which she headed but used to report directly to the chairperson of the Respondent society.
33. She stated that the Respondent was not on salary from the Respondent. As well he was not eligible to other benefits that would ordinarily flow to employees.
34. She stated that the Respondent had employees who had employment contracts setting out terms and conditions of service. The employees were subject to Collective Bargaining Agreements with trade unions that were working with the Respondent. The Claimant was not affected by any of these because he was not in the position of an employee of the Respondent.
35. In their submissions, the parties have addressed the question of jurisdiction pegged on the fact of employment of the Claimant.
36. The Claimant’s lawyers take a slightly different trajectory on the matter. They suggest that the question of jurisdiction should be considered from a broad rather narrow perspective. That the jurisdiction of the court must be understood not as merely confined to addressing employer-employee disputes but all other disputes arising from employment and labour relations.
37. While agreeing with this proposition, the court holds the firm view that for jurisdiction to be assumed by the ELRC over whatever dispute, it must be connected to the fact of employment and labour either directly or indirectly. The court should not assume jurisdiction on matters that are obviously outside employment issues under the guise of expanded jurisdiction.
38. What I understand the Judges in cases such as *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Company Ltd and another (2013) eKLR* and *Nagvi Syed Qmar v Paramount Bank Ltd Ltd (2015) eKLR* to mean by expanded jurisdiction is that the court should not just focus on matters that flow directly from the contract of employment but should also extend their jurisdiction to cover matters incidental to this relation. This is not the same thing as saying that the court should assume jurisdiction in matters outside this purview under the guise of expanded jurisdiction. It is from this lens that I propose to consider whether the claim by the Claimant falls within the court’s jurisdiction.
39. If the evidence on record is anything to go by, it appears clear to me that the Claimant was not in the employment of the Respondent. As is plain from his Statement of Claim and witness statement and as well oral evidence in court, the Claimant acknowledges that he was engaged by the Respondent in its committees on volunteer basis. Further, the Respondent’s evidence was clear that it has a Human Resource department that handles all employee issues and that the Claimant was not subject to this department. Rather, he reported directly to the chairperson of the Respondent society. He was also not entitled to all rights and benefits that accrue to employees under the Employment Act

such as salary and leave.

40. The Claimant refers to the fact of earning periodic allowances as evidence of a labour relation. While allowances are part of the totality of what constitutes remuneration, they alone do not comprise remuneration.

41. In the documents produced by the Claimant as exhibits to demonstrate that he was in the service of the Respondent, it is clear that many particulars of a contract of service enumerated under section 10 of the Employment Act are lacking from them. For instance, details of entitlements to pay, leave, pension and notice before termination are lacking. Similarly, there are no details relating to other core issues such as work hours.

42. In fact some of the documents such as the letter dated 8th January 2007 indicate that the Claimant's appointment was to serve on voluntary basis. In my judgment therefore, this is plain evidence of there having been no employment or labour relation between the Claimant and the Respondent which would entitle either party to move the ELRC court for remedies in respect of disputes emanating from it.

43. In *Richard Stanley Gathuku Kinuthia v Kenya Red Cross Society (2016) eKLR*, the court, faced with a similar situation of someone rendering volunteer service claiming termination benefits as an employee observed that the fact that a volunteer is paid some allowance does not constitute him into an employee. I agree with this holding. Accordingly, I find that the Claimant was not an employee of the Respondent so as to bring him within the purview of the ELRC court.

44. Determination

a) At the time of its institution, the matter was barred by limitation of actions as prescribed by section 90 of the Employment Act.

b) There was no employer-employee relation between the disputants to warrant the Claimant invoking the court's jurisdiction.

c) Accordingly, I find that the Claimant's prayer for a declaration that he was improperly terminated contrary to the provisions of the Employment Act is unmerited. It is thus declined.

d) The court also finds that the Claimant is not entitled to the compensatory damages prayed for in the claim.

e) Consequently, this suit is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF SEPTEMBER, 2021

B O M MANANI

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.

B O M MANANI

JUDGE