



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1298 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

RIFT VALLEY RAILWAYS WORKERS UNION (K) CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (K) LIMITED.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

RULING

The claim herein was filed by the claimant union Rift Valley Railways Workers Union on 9th August 2018. The issue in dispute is the wrongful dismissal of Mr Munyua K. Richard, Station Master Sultan Hamoud by Management of Rift Valley Railways (K) Limited.

Rift Valley Railways (K) Limited is the 1st respondent. The claimant prays for the following remedies –

1. One moth salary in lieu of notice Kshs.41,118
2. Provident fund for years worked with
1st respondent Kshs.601,000
3. Gratuity for years worked with the
2nd respondent Kshs.822,360
4. Maximum compensation (41,118 x 12) Kshs.493,416
5. Damages for lost time (41,118 x 12 x 4) Kshs.1,973,664
6. Lump sum Kshs.749,000

Total Kshs.4,079,558

7. A declaratory order confirming the 2nd respondent's responsibility in ensuring that any and or all the benefits as shall be declared to be owed to the grievant herein are all paid.
8. That the grievant be paid his terminal dues as was recommended by the Conciliator and has been itemised above.
9. That the respondent pays all the costs of the claim.

Together with the memorandum of claim, the claimant filed a notice of motion in which it seeks the following orders –

1. That the matter be certified urgent and be heard urgently and ex-parte in the first place.
2. That service of same be dispensed with and an earlier inter- partes hearing date be set.

3. That following a Consent Order recorded between the respondents on the 21st day of July 2017, before Hon. Lady Justice C. Nzoka, terminating the Concession Agreement that the Hon. Court issues a Declaratory Order assigning the 2nd respondent any, and, or all obligations and or liabilities that may subsequently accrue.

4. That costs to same to bide the claim.

The 1st respondent did not file any response to either the claim or the application. I have noted from the record that there is no affidavit of service upon the 1st respondent.

The 2nd respondent Kenya Railways Corporation filed grounds of opposition on 5th November 2018 and a replying affidavit of SAVA KADIMA, its Human Resources and Administrator Manager sworn on 30th November 2018 and filed on 3rd December 2018. The grounds of opposition are the following –

1. The 2nd Respondent is a State Corporation established under Section 3 of the Kenya Railways Corporation Cap 397 Laws of Kenya.
2. The 1st Respondent and the 2nd Respondent entered into a concession agreement, wherein the said concession agreement was terminated herein on 21st July, 2017 pursuant to a consent order recorded in court between the applicant and the 1st Respondent.
3. The Concession Agreement at clause 1(g) thereof provides that any claims and debts (that occurred prior to the termination of the concession agreement shall remain the responsibility of the Concessionaire.
4. The applicants claim fall squarely within the provision of clause 1(g) of the Concession agreement and therefore the 2nd Respondent is not liable to the claim by the applicants. The claim and liability herein lies with the 1st Respondent.
5. This application is frivolous, vexatious and lacks merit and ought to be dismissed.
6. The application is an abuse of precious judicial time and it is the interests of justice and fairness that the instant application be dismissed with costs to the 2nd Respondent.

In the replying affidavit, Mr. Kadima deposes that –

1. The 1st Respondent and the 2nd Respondent entered into a Concession Agreement dated 23rd January 2006 which became effect on 1st November 2006.
2. That as part of the Concession Agreement, any claims and debts other than those mentioned within the concession which occurred prior to the end of the Agreement was the responsibility of the Concessionaire, the 1st respondent herein.
3. That the facts surrounding the suit herein occurred in the year 2014.
4. That the Concession Agreement was terminated on the 30th Day of July 2017 vide a consent order.
5. That the said termination of the Concession Agreement does not place any liability on the 2nd respondent as the same falls squarely upon the 1st respondent as per Clause M9, sub clause (1)(g).
6. That the applicant wants the Court to unlawfully and unprocedurally place liability upon the 2nd respondent against provisions of the concession agreement which he was privy to when the subject employee was terminated.

In addition to the replying affidavit and grounds of opposition, the 2nd respondent filed Notice of Preliminary Objection dated 28th March 2019 raising the following grounds of objection –

1. The suit does not disclose a cause of action against the 2nd Respondent as evidenced in the Claimant's Memorandum of Claim, Notice of Motion application dated 8th August, 2018 and the Supplementary Submissions dated on 19th March, 2019.
2. The Court lacks jurisdiction to re-write the terms of a valid Contract between the parties to the suit as well as a Consent Order adopted by a Court of law.
3. The suit is legally misplaced and devoid of the law.

The parties agreed to dispose of the preliminary objection by way of written submissions. In the written submissions filed by the 2nd respondent it submits that the orders sought are akin to amending a consent order between two parties by a third party who is a stranger to the proceedings. Further, that the consent is not before the court to enable the court interpret the same and apportion liability between the parties thereto.

The 2nd respondent further submits that the applicant was aware about the Concession Agreement but did not challenge the consent at the time of recording the same and has never challenged the same.

It is further the 2nd respondent's submission that all documents in the claimant's list and bundle of documents are correspondence between the claimant and the 1st respondent, the Concession Agreement was clear and provided at Clause M.9, sub-clause (1)(g) that –

Claims and debts other than those mentioned above and for which the precipitating even occurred prior to the end of this agreement remain the responsibility of the concessionaire.

It is further the 2nd respondent's submission that the Concession Agreement was in force when the dismissal which is the subject matter of the instant suit arose, the grievant's employment having been terminated on 10th January 2014 while the Concession Agreement was terminated on 21st July 2017, 3 years after the grievant's employment was terminated

The respondent relies on the decision in the case of **James Heather-Hayes -V- African Medical Research Foundation (AMREF) [2014] eKLR** where the court stated –

“It is not the duty of this court to redraw agreements by parties. The court can only come in to facilitate an interpretation and implementation of these contracts and no more.”

The respondent further relied on the decision in the case of **Republic v Cabinet Secretary for Internal Security ex parte Gragory Oriaro Nyauchi & 4 others [2017] eKLR** where the learned court quoted Aburili, J, in **Bitange Ndemo vs. Director of Public Prosecutions & 4 Others [2016] eKLR** who tried to define declaratory order as;

“A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the parties. It does not contain an order which can be enforced against the respondents, as it only declares what is the legal position. It is not a coercive remedy, and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law.

However, a declaration can also be used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided.”

The 2nd respondent submits that the suit does not meet the set standards in decisions above.

The 2nd respondent further submits that the suit is time barred as it was filed almost 4 years after dismissal of the grievant, relying on Section 90 of the Employment Act which provides that –

90. Limitations

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.

It is further the 2nd respondent's submission that the claimant lacks locus standi to initiate this suit on behalf of the grievant's son RICHARD KABURU MUNYUA, referring to the supplementary affidavit at page 35 of the claimant's bundle of documents being

the son of the grievant who is deceased.

The 2nd respondent prays that the entire claim be dismissed.

The claimant filed its submissions on 8th February 2019. It submits that the 1st and the 2nd grounds, in the preliminary objection are not grounds at all but are facts regarding the locus standi and or legality of the 2nd respondent and or the Agreement that was entered into by the respondents, and which facts the claimant does concur with. It submits that same are absolutely not grounds at all for opposing the claimant's application.

That the referenced clause in the referenced agreement has obviously been taken and read out of context apart from the said provision never at all envisaging a situation where the concession would be terminated. Further that there was a duration of time that was tagged on the clause and which duration was conditional

on the effluxion of timelines as were therein specified.

That the respondent's application has been equally taken and read out of context. It is not possible that the provisions of the Concession Agreement can override those of the Acts of Parliament and most critically those of the Supreme Law the Constitution. They remain Null and Void to the extent of their inconsistency.

That whether the application may be vexatious, frivolous and or devoid of merit is not for the respondent to determine/decide, this being an event that has to bide the due process which must then be allowed to unfold for ends of justice

Determination

I have considered the pleadings and submissions of the parties. The issues arising for determination are whether the suit is time barred and whether the claimant has locus standi.

Section 90 of the Employment Act is clear that no suit relating to employment contracts shall be filed after 3 years after the cause of action arose or in the case of continuing wrongs, 12 months from date of cessation of the wrong complained of. It is pleaded at paragraph 8 of the memorandum of claim that *“the result of the un-procedural procedure, the dismissal of the grievant therein was communicated to the grievant in a letter dated 10th of January 2014.”*

It is thus clear that the claim which according to the date stamp was received in court on 9th August 2018 was filed well after the lapse of 3 years from the date the cause of action arose, the same having lapsed on 10th January 2017. On this ground alone the suit should fail.

The court has noted from the documents filed in court by the claimant in the list and bundle of documents in support of the claim, at page 39 a certificate of death of Richard Kaburu Munya, the grievant who died on 21st January 2017 according to the death certificate. The court notes that there are no letters of administration allowing the claimant union or any other person to file suit on behalf of the estate of the deceased grievant.

The grievant on whose behalf the suit was filed died on 21st January 2017 before the filing of this suit. The son of the deceased, Dennis Mawira Kaburu swore an undated supplementary affidavit filed together with the claim herein where he deposes that–

“That He was one of the sons of the grievant herein, Mr. Richard Kaburu Munyua who is now deceased and duly authorised by the family and kilns to pursue our Father’s issue as herein.

That it is on the basis of the above that I humbly lodge this request that in the likely event that the Hon. Court shall find that my father was owed some sums, that the said sums be released to me through the claimant for onward administration of same in trust and in behalf of the family and or as shall be directed by the Hon. Court.”

It is trite that where a party wishes to file suit on behalf of the estate of a deceased person, the person must have letters of administration of the Estate. It is clear from the affidavit of Dennis Mawira Kaburu that he does not possess letters of administration authorising him to file suit on behalf of the estate of the deceased. I have also not seen any such letters of administration in the bundle of documents filed in court.

I agree with the respondent that the claimant union does not have locus standi to file suit on behalf of the said Dennis Mawira Kaburu or even on behalf of Richard Kaburu Munyua, the deceased for reasons that neither the claimant union nor the said Dennis Mawira Kaburu have letters of administration.

For the foregoing reasons the entire suit is bad in law and is accordingly struck out.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE