



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 765 OF 2015

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

VERSUS

WELLS FARGO LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 9th April, 2020)

RULING

The claimant filed the memorandum of claim on 07.05.2015 alleging the unfair termination of its member Geoffrey Mwangi Muchiri (the grievant). The claimant prayed for judgment against the respondent for:

- a) The Honourable Court be pleased to quash the letter of dismissal.
- b) The declaration the sacking was unfair.
- c) Reinstatement without the loss of earning.
- d) 36 months as compensation for loss of earnings.
- e) Costs be provided.

The claimant pleaded that the respondent employed the claimant on 01.12.2000 as a Radio Technician. In 2014 there was new management which began to issue unjustified warnings against the claimant and the claimant's clean record of 14 years' service was destroyed in 5 months. The letter of summary dismissal exhibited is dated 26.11.2014 and dismissal was effective 27.11.2014.

The claimant filed the amended memorandum of claim on 06.04.2018 through Asiani Ojijo & Company Advocates and prayed for judgment against the respondent for:

- a) Salary for days worked up to 27.11.2014 Kshs. 25, 600.50.
- b) Payment in respect of 26 accrued leave days Kshs.24, 652.33.
- c) Payment in lieu of notice Kshs.28, 445.00.
- d) 12 months full salary compensation for wrongful dismissal Kshs.341, 340.00.
- e) Service pay at Kshs.246, 634.61.
- f) Costs of the Suit.
- g) Certificate of service in accordance with section 51(1) of the Employment Act, 2007.
- h) Interest on (a) (b) (c) (d) and (e) until payment in full.

The respondent appointed Hamilton Harrison & Mathews to act in the suit as per the notice of appointment of Advocates filed on 20.04.2018. On the same date the respondent filed the notice of preliminary objection upon the following grounds:

- a) The claim is asserted by a party that has no *locus standi* to make any claims against the respondent in its own name.
- b) The summons dated 11.05.2015 having not been served within a period of 12 months the suit abated having not been served as at 16.04.2018.
- c) The cause of action having accrued in November 2014 and in so far as the purported amended claim asserts further claims, the same are time barred.
- d) The grievant's right to sue for alleged wrongful termination having lapsed, the grievant also lacks capacity to agitate any cause of action against the respondent.
- e) The claim herein is an abuse of the Court process.

The respondent filed on 11.11.2019 the statement of response to the amended memorandum of claim.

The claimant's advocates filed an application to cease acting on 20.07.2018 which was allowed by consent of the claimant on 14.03.2019. By a notice of appointment of advocates filed on 02.08.2019 the claimant appointed Nyabena Alfred & Company Advocates to act in the suit.

Parties have filed submissions on the preliminary objection. The Court has considered all the material on record and makes findings on the preliminary objection as follows:

1) As submitted for the respondent a valid preliminary objection was defined by Law J A in **Mukisa Biscuit Manufacturing Company Limited – Versus- West End Distributors Limited (1969) EA 696** thus, “**So far as am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....**”

2) The respondent urges that as at the time of the cause of action the parties were not in a recognition agreement concluded per section 54 of the Labour Relations Act, 2007 as the recognition agreement was concluded on 11.08.2015. The respondent relied on **Transport Workers Union (K) –Versus- Ideal Logistics Limited [2012]eKLR** where Radido J held thus, “**Without recognition agreement in place a union lacks both contractual and legal capacity to commence any court proceedings on behalf of an employee against an employer**”. The Court has considered that submission and considers that in terms of section 54 recognition is a precondition to collective bargaining and not representation as in the instant case. The Court considers that representation like in the instant case would flow from the grievant's membership in the claimant union. The Court has revisited the pleadings and nowhere is it pleaded for the claimant that the claimant was a member of the claimant trade union and to that extent, the Court returns that the claimant lacks *locus standi* but for want of the grievant's membership and not recognition agreement as at the time of the cause of action.

3) The Court has already found that the claimant lacked standing and indeed the amended statement of claim was filed after lapsing of the 3 years of limitation under section 90 of the Act and introducing fresh claims and prayers. The Court finds that as submitted for the respondent, it is not available for the grievant to amend the amended memorandum as the new claimant and proper party because the suit will anyway be time barred. The preliminary objection is upheld that the suit is incurable as it is time barred under section 90 of the Act.

4) There is no dispute that the summons to enter appearance was not served at all. No affidavit of service was on record. Whereas under Article 159 it would be permissible for the claimant to have applied that the respondent be deemed to have been duly served since the respondent had since discovered the institution of the suit, no such application was made and the preliminary objection is upheld.

In view of the Court's findings, the preliminary objection will be upheld and the suit is liable to dismissal with costs. Since parties are in a recognition agreement, the claimant will pay partial costs of the suit now fixed at **Kshs.25, 000.00** only and towards fostering good industrial relationship between the parties.

In conclusion the memorandum of claim as amended is hereby dismissed with orders the claimant to pay the respondent **Kshs.25, 000.00** being partial costs of the suit and in view of the prevailing COVID 19 pandemic there be stay of execution until 01.07.2020.

Signed, dated and delivered in court at **Nairobi** this **Thursday, 9th April, 2020**.

BYRAM ONGAYA

JUDGE