



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 486 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA COUNTY GOVERNMENT WORKERS UNION	CLAIMANT
VERSUS	
KIAMBU COUNTY GOVERNMENT	1ST RESPONDENT
COUNTY PUBLIC SERVICE BOARD	2ND RESPONDENT

JUDGMENT

The claimant is a trade union registered under the Labour Relations Act to represent workers of county governments. The claimant was originally the Kenya Local Government Workers Union but changed its name following the establishment of county governments after the general elections in 2013.

The claimant has a recognition agreement with the Association of County Government Employers, formerly the Association of Local Government Employers and has negotiated several Collective Bargaining Agreements with the Association for the exclusive terms and conditions of employment for all unionisable employees of County Governments including the Respondents.

The suit herein is filed by the claimant on behalf of its members (the grievants) who were employees of the defunct Kiambu County Council. All the six grievants were retired from service on 31st December 2000. All the grievants were notified by letter dated 15th June 2000 of the intention to retire them on 31st December 2000 upon attaining the mandatory retirement age of 55 years. The notice is in the format reproduced below –

“KIAMBU COUNTY COUNCIL

County Hall,

P.O. Box 170,

KIAMBU

REF.....

MR/MRS/MISS:

THRO':

.....

.....

REF: RETIREMENT ON ATTAINING COMPULSORY RETIREMENT AGE OF FIFTY FIVE YEARS

Records held in your personal file shows that you will have attained compulsory retirement age of fifty five years by

Consequently, you are hereby given six months' notice of termination as provided for under Section 29(1)(a) of the Terms and Conditions of Service governing salaried employees. You may however make personal representation's if you so wish, on such a step in accordance with regulation 18 of the Public Service Commission (Local Authority Officers) Regulations 1984.

You should therefore proceed on your terminal leave of days w.e.f pending your retirement on

May I take this opportunity to thank you for services rendered and wish you all the best in your future endeavours.

A certificate of service will be issued to you immediately after retirement.

Yours Sincerely

SIGNED

(D. M. MACHARIA)

COUNTY CLERK

The letter specified the dates which each of them was to proceed on leave as follows –

- i. Francis Wanganga Kariuki 4th October 2000
- ii. Peter Nderitu Gakere 17th November 2000
- iii. Agnes Nyawira Kibira 2nd November 2000
- iv. Justina Njeri Ngobe 21st November 2000
- v. Edward Njoroge Kimani 31st December 2000
- vi. Naomi Wanjiku Mbai 27th October 2000

According to the claimant, the said retirement was pursuant to erroneous calculation of the members' expected time of retirement. It is the claimant's averment that the defunct Kiambu County Council retired the grievants at the age of 54 years instead of the mandatory retirement age of 55 years as outlined in the Collective Bargaining Agreement.

The claimant avers that the Permanent Secretary, Ministry of Local Government in a letter dated 11th September 2000, faulted the Respondent's interpretation of Clause No. 29 (1) (b) of the Collective Bargaining agreement between the Respondent and Claimant and its determination of the Claimant's members' retirement age. The Ministry in the said letter advised the Respondent to desist from misinterpreting the Collective Bargaining Agreement and stifling the employees' rights.

The claimant avers that it made several attempts to resolve the stalemate between the Respondent and the Union and to avert a labour dispute, but the several letters addressed to the defunct Kiambu County Council requesting the Respondent to convene a Joint Staff Committee were ignored. That by a letter dated 13th June 2007, and received at the District Labour Officer in Kiambu District on even date, the Claimant reported an informal trade dispute between themselves and the defunct Kiambu County Council and requested the labour office to facilitate arbitration of the matter.

That the labour office embarked on various attempts to resolve the labour dispute. However, the District Labour Officer's letters dated 27th August 2007, 15th July 2008 and 6th October 2008 convening conciliation meetings and inviting the parties for the same were not heeded by the Respondent.

That upon exhausting all probable avenues for informal settlement of the dispute, the Claimant formally reported a trade dispute to the Ministry of Labours vide its letter dated 27th March 2013.

That the Ministry of Labour, in a letter dated 28th June 2013 confirmed acceptance of the Claimant's report of dispute and pursuant to its mandate under Section 65(1) of the Labour Relations Act, the Minister appointed a conciliator, Mr. B. O. Musandu as conciliator between the Claimant and Respondent.

That following several unsuccessful efforts by the aforementioned conciliator to convene conciliation meetings and the defunct Kiambu

County Council's failure to attend the conciliation meetings and/or to tender any or valid reason for its conduct, the conciliator issued a certificate declaring the dispute unresolved pursuant to Section 69(a) of the Labour Relations Act, reason whereof this matter was escalated to this court.

The Claimant avers that the defunct Kiambu County Council, by the unlawful and wrongful and premature retirement of the members of the Claimant's union, breached the law and the parties' Collective Bargaining Agreement.

In the claimant's statement of claim dated 24th March 2015 and filed on 26th March 2015, it seeks the following orders –

- a) A declaration that the respondent's decision premature retirement before the age of 55 years was unjust and unfair.*
- b) Maximum compensation for the unlawful and unfair termination in terms of Section 49(1)(c) of the Employment Act which award is twelve (12) months' gross salary as at the time of his termination.*
- c) The employees be paid actual pecuniary loss suffered since the date of termination, including salary and allowances as would have been earned, housing allowance and all accruing allowances.*
- d) A salary of six months in lieu of notice as per Rule 29(1) (a) of the Collective Bargaining Agreement.*
- e) That the Respondent issue the Claimant's members with a Certificate of Service.*
- f) Interest at court rates on the above prayers.*
- g) The costs of this suit.*
- h) Any other award that this Court deems fit*

The claimant avers that the 1st and 2nd Respondents, the County Government of Kiambu and the County Public Service Board, Kiambu County are pursuant to Section 55, 57, 58 and 59 of the Urban Areas and Cities Act, 2011 and Section 33 of the Sixth Schedule to the Constitution of Kenya, 2010, the legal successors of the defunct County Council of Kiambu.

The respondents filed a memorandum of defence on 4th December 2015 wherein they state that the 1st Grievant, Francis Wanganga Kariuki was employed as a Clerical I by the Respondents and received a notice of retirement on 15th June 2000 when he became eligible for retirement at the age of 55 years old. The Grievant proceeded on terminal leave of 58 days from the 4th October 2000 pending retirement on 31st December 2000 when his retirement took effect.

That the 2nd Grievant, Peter Nderitu Gakere was employed as a Clerical II by the Respondents and received a notice of retirement on 15th June, 2000 when he became eligible for retirement at the age of 55 years old. The Grievant proceeded on terminal leave of 28 days from the 17th November, 2000 pending retirement on 31st December 2000 when his retirement took effect.

That the 3rd Grievant, Agnes Nyawira Kibira was employed as a Cleaner by the Respondents and received a notice of retirement on 15th June, 2000 when she became eligible for retirement at the age of 55 years old. The Grievant proceeded on terminal leave of 38 days from the 2nd November, 2000 pending retirement on 31st December 2000 when his retirement took effect.

The 4th Grievant, Justina Njeri Ngobe was employed as a Cleaner by the Respondents and received a notice of retirement on 26th June 2002 when she became eligible for retirement at the age of 55 years old. The Grievant proceeded on terminal leave of 26 days from the 21st November 2002 pending retirement on 31st December 2002 when his retirement took effect.

The 5th Grievant, Edward Njoroge Kimani was employed as a Messenger by the Respondents and received a notice of retirement when he became eligible for retirement on 31st December 2000 when his retirement took effect.

The 6th Grievant, Naomi Wanjiku Mbai was employed as a Secretary 1 by the Respondents and received a notice of retirement on 15th June 2000 when she became eligible for retirement. The Grievant proceeded on terminal leave of 42 days from the 27th October 2000 pending retirement on 31st December 2000 when his retirement took effect.

The respondent states that the Claimant had a Collective Bargaining Agreement with the Association of Local Government Employers that was entered into on or about 25th March 1994 and was registered by the Industrial Court on 12th July 1994.

That the Collective Bargaining Agreement under Clause No. 29 (1)(b) expressly provided for mandatory retirement upon attaining the age of 55 years. That a notice of six (6) months was served upon the employee during which the employee had adequate time to lodge a personal complaint against the retirement notice and/or to represent their claim before accepting the retirement letter. However, in the instant case, the Grievants did not do so.

That upon receipt of the retirement notices, the Grievants later wrote to the now defunct County Council of Kiambu on 17th July, 2001 raising objections on the issuance of the retirement notices which prompted the Council's response on the 6th and 7th August, 2001 clarifying

the position that the subject matter in dispute being raised after one year was based on employment records of the Grievants which they signed after filling in their personal information including date of birth. Hence, the decision to retire the Grievants was valid.

That on 19th June, 2002 the Grievants wrote a letter to the defunct County Council demanding a Joint Staff Committee meeting with the Council without enquiring on the Council's availability to the said meeting and/or giving them time to prepare for the same.

That the defunct County Council held a meeting with the Grievants on 25th March, 2004 where discussions were confined to whether a committee will be constituted to look into the subject matter in dispute. The Council was to consider such a possibility and respond in due time.

That the Council responded to the Grievants on 19th May 2004 and reiterated the fact that the retirement notice was for a period of six months during which an employee had an opportunity to lodge a personal complaint against the notice before accepting the retirement letter. However, in this case no one did lodge a

complaint during the said notice period.

Further the defunct Council outlined the formulae used in calculating the retirement date of the Grievants which was based on the anniversary of birth and the assumption that a year ends on 31st December.

That on inquiry by the 3rd Grievant, the defunct Council wrote a letter on 6th November, 2006 to the 6th Grievant clarifying and reiterating the position that her termination was based on the fact that she had attained the retirement age of 55 years and that the Council had paid all her statutory deductions to the provident scheme.

That the Grievants reported an informal dispute against defunct County Council to the District Labour Officer on 13th June 2007 and requested for arbitration over the dispute

That on 27th August 2007 the Ministry of Labour unilaterally and/or without input on the Council's availability, invited the Council and the Grievants to attend a joint conciliation meeting on 11th September, 2007.

That due to the short notice, the defunct Council failed to attend the meeting scheduled for 11th September 2007 which prompted the Ministry of Labour to invite them for another hearing on 22nd July 2008.

The meeting scheduled for 22nd July 2008 failed to take place and vide a letter dated 6th October 2008 the Ministry of Labour invited the parties to a joint meeting on 14th October 2008 at 2.30 p.m. at the Kiambu Labour Office. Yet again the same did not take place.

That on 7th June 2012 the Grievants wrote to the defunct Council demanding reinstatement of the Grievants claiming that as per the Collective Bargaining Agreement in place at that time (which was in the year 2012) the Grievants were to retire at the age of 60 years. This was a complete departure from the retirement age of 55 years as per Clause No. 29(1)(b) of the applicable CBA.

That the defunct Council responded to the Claimant's letter on 2nd August, 2012 stating that the Grievants were former employees of the Council and had been retired according to the Collective Bargaining Agreement in force then.

That on 27th March 2013 the Grievants reported a trade dispute between themselves and the 1st Respondent to the Ministry of Labour in accordance with Section 62 of the Labour Relations Act 2007.

The Ministry of Labour accepted the dispute and appointed a Conciliator on 28th August, 2013. The Conciliator requested the parties to the dispute to submit their proposals and scheduled a joint conciliation meeting on 5th September 2013 at 10.00 a.m.

That due to lack of notice in advance, the 1st Respondent was ambushed by the meeting notification by the Ministry of Labour and could not attend the joint conciliation meeting on 5th September 2013.

That the Ministry of Labour scheduled another meeting which was cancelled by the Claimant Union vide letter dated 7th October 2013 claiming that the date was not convenient for the union and requested the meeting to be rescheduled within two weeks.

That the meetings at the Ministry of Labour did not bear fruit and on 18th March 2014 the Ministry of Labour certified the dispute as unresolved pursuant to Section 69 of the Labour Relations Act 2007.

That the 1st Respondent received a demand letter on 13th October 2014 from the Claimant demanding an acknowledgment that the Grievants were terminated unfairly, computation of salaries and allowance for the alleged remaining period of service and maximum compensation as per Section 49 (1)(c) of the Employment Act. All these to be fulfilled within 15 days, failure of which legal proceedings are instituted against the 1st

Respondent.

It is the respondent's averment that the Grievants in this matter were employees of the now defunct municipal council of Kiambu. The employment to municipal councils fell under the mandate of the Public Service Commission, which mandate also extended to retiring the various officers. The 1st and 2nd Respondent came into existence after the 2013 elections. This is way after the Grievants were retired and any claim of compensation should have been raised with the competent bodies then.

The Respondents aver that the Grievants were paid all their terminal dues less statutory deductions which were remitted to their pension scheme as prescribed by law and there is nothing owed to the Grievants by the Respondents.

That the defunct County Council acted within its mandate and authority as required by the then law governing the employment contract and the same cannot be construed as contravening the Employment Act 2007 which only came into effect later in June, 2008 long after the retirement of the Grievants.

The Respondents contend that in the circumstances of this case and in the interest of justice, the statement of claim together with the prayers be dismissed with costs to the Respondents.

Evidence

At the hearing, the claimant called NAOMI WANJIKU MBAE (CW1)

who testified on behalf of all the grievants. The respondent closed their case without calling any witness.

CW1 testified on 20th February 2019 and was recalled on 10th July 2019. In her testimony CW1 stated that she was born in 1946, relying on the national identity cards produced in the claimant's supplementary list of documents dated 6th February 2017. The documents are copies of national identity cards of the 1st, 2nd, 3rd, 5th and 6th grievants as well as death certificate of Justina Njeri Ngobe which reflects the date of death as 8th March 2008 at the age of 60 years.

CW1 testified that they contested the retirement with the Ministry of Local Government and the Permanent Secretary (PS) issued a letter dated 11th September 2000. She further testified that the union also contested the retirement age through a letter dated 23rd March 2004 at page 155 of the claimant's bundle of documents.

Under cross examination CW1 stated that she could not remember how old she was when she was employed. She testified that upon receipt of the retirement notice, the grievants verbally complained to the respondent who never responded to the union's letter. She stated that she was paid her dues upon retirement and was claiming only the last one year.

When she was recalled on 5th November 2019, CW1 testified that all the grievants were paid terminal dues, that all the grievants with the exception of Francis Wanganga were to retire in 2001, but Francis was to retire in 2002. That each of them was claiming the amounts as tabulated in the claimant's supplementary bundle of documents dated 16th July 2019 which tabulations were based on the CBA at page 15 of the statement of claim together with the terms and conditions of service. She testified that her claim was for Kshs.759,600; Francis Wanganga Kshs.1,139,400; Peter Nderitu Gakere Kshs.440,800; Agnes Nyawira Kshs.428,160; Justina Njeri Nobe Kshs.305,520 and Edward Kamau Kshs.310,896.

Under cross examination CW1 testified that she was employed by the defunct Kiambu County Council and not the respondent, Kiambu County Government. She stated that there is no evidence filed to prove what the grievants were earning.

Submissions

Both the claimant and the respondents filed very lengthy and detailed submissions. The submissions are on several issues including the applicable law, the implementation of the CBA and the vesting of liabilities from former local authorities according to the Sixth Schedule to the Kenya Constitution 2010.

Determination

I have noted from the pleadings, evidence on record and submissions that the grievants were retired on 31st December 2000 while the suit herein was filed on 26th March 2015, some 15 years after the impugned retirement of the grievants. On the face of the claim therefore it is statute barred.

I have further noted from the record that the issue of limitation was the subject of a Notice of Preliminary Objection filed by the respondents on 18th November 2015. A determination was made on the same by a ruling delivered on 17th June 2016 by my brother who was handling the case then, but who has since been transferred. Having now considered the record and the evidence it is my conviction that I ought to revisit the issue of limitation, since I am now in the knowledge of information that was not placed before my brother at the time he made the ruling.

It is further my conviction that since the issue of limitation is a question that goes to the jurisdiction of the court, it is a question that I must deal with as a preliminary issue. This is because I can only go ahead with the determination of the suit if I am satisfied that I have jurisdiction.

As was stated in the case of Owners of the **Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited 1989 eKLR**, it was opined that

jurisdiction is everything and without it the court has no power to make one more step, and must down its tools in respect of the matter before it. In the said decision, Nyarangi J.A referred to the following passage from *Words and Phrases Legally Defined* – Volume 3:1 – N Page 113:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

Further, jurisdiction being both a question of law and of fact, my brother only considered the issues at a preliminary stage based on the law and the facts before him. I now have in my possession both the law and the facts having heard the evidence and considered the facts and the applicable law.

This is a matter that transcends different legal regimes that has caused considerable confusion as is evident in this court’s jurisprudence. The law applicable at the time the cause of action arose in 2000 was the repealed Trade Disputes Act. The predecessor of this court then, the Industrial Court was the relevant arbitrator under the repealed Act. Since then the Trade Disputes Act was repealed and replaced by the Labour Relations Act which has different provisions in relation to the factors relevant in this suit. There was also the enactment of the Kenya Constitution 2010 which created County Governments, among them the respondents herein.

Under the Trade Disputes Act, parties reported disputes to the Minister, who either investigated them and prepared reports, or carried out conciliation to reconcile the parties. Where the dispute was not resolved by the Minister, it is the Minister who at the request of both parties, or one of them, referred the dispute to the Industrial Court. A dispute was therefore considered to have been filed upon the same being reported to the Minister. It is because of this that some decisions of this court determined that time stopped running once a dispute reported to the Minister was accepted and conciliation or investigation process commenced, which is not the correct position as the dispute resolution mechanism started with the report of the dispute to the Minister so that the Industrial Court was the second level of the dispute resolution process.

Section 4 of the Trade Disputes Act (repealed) provides as follows –

4. Reporting of trade disputes

(1) Subject to subsection (4) any trade dispute, whether existing or apprehended, may be reported to the Minister by or on behalf of any party to the dispute.

(2) Every report of a trade dispute shall be made in writing and shall sufficiently specify-

(a) the employers and employees, or the classes and categories thereof. who are parties to the dispute;

(b) the party or parties by whom or on whose behalf the report is made;

(c) the nature of the authorization given by the party or parties desiring the dispute to be reported on their behalf; and

(d) each and every matter over which the dispute has arisen or is apprehended.

(3) Every person reporting a trade dispute shall, without delay, furnish by hand or by registered post a copy of the report thereof to each party to the dispute:

Provided that in the case of any parties to a dispute who are members of the same organization of employers or organization of employees the furnishing of a copy of the report to such organization shall be a sufficient compliance with this subsection.

Further Section 8 provides as follows –

8. Reference of trade dispute by Minister to Industrial Court

Where a trade dispute has not been settled under Sections 5, 6 and 7 the Minister may, in a case where an appeal to the Industrial Court does not already lie, on the representation of any trade union, employer or group of employers, refer the disputes to the Industrial Court and the provisions of Part IV shall apply to any such reference.

Section 14(9) provides for the admission of matters by the court as follows –

(9) The Court shall not take cognizance of any trade dispute or deal with any matter connected therewith—

(a) where the trade dispute arises in any part of the public sector (as defined in section 27) and there is in the opinion of the Court adequate machinery for the determination of terms and conditions of employment in that part of the public sector (whether that machinery was established by regulations made under this Act or by any other written law);

(b) unless the trade dispute has been reported to the Minister and twenty-one days have elapsed since the date on which the dispute was so reported;

(c) while such dispute or matter is in the process of being settled, investigated or otherwise determined by means of any other proceedings under the provisions of this Act or of any written law;

(d) while use is being made of any of the machinery or arrangements for the settlement of disputes referred to in section 6 (1);

(e) unless the Court has received a certificate signed by the Labour Commissioner stating that the Minister has accepted the report of the trade dispute and that all available machinery (including statutory machinery) for the voluntary settlement of disputes prior to reference to the Court has been exhausted;

(f) where the trade dispute solely concerns the dismissal or reinstatement of any employee, unless the Court has received, in addition to the certificate required by paragraph (e), the written authority of the Minister for that purpose:

Provided that this subsection shall not apply to any reference or appeal to the Court under Part III, Part V or Part VI.

It is clear from the foregoing, that termination disputes were to be reported within 28 days. Further, it is clear from a reading of the entire Act that the Trade Disputes Act did not oust the application of the Limitation of Actions Act.

The cause of action in the instant dispute, although arising during

the regime of the Trade Disputes Act, was not reported to the Minister under that Act. The dispute was reported to the Minister by letter dated 27th March 2013. The letter to the Minister reads;

“In accordance with Section 62 of the Labour Relations Act, we write to report to you the existence of a trade dispute between the Kenya Local Government Workers Union and the County Council of Kiambu.”

The claimant can therefore not rely on the provisions of the Trade Disputes Act when the dispute was reported under the Labour Relations Act.

Further, both the Trade Disputes Act and the Labour Relations Act provide for timelines for report of disputes. In the Trade Disputes Act it was 30 days from the date of termination or dismissal while in the Labour Relations Act it is 90 days as per Section 62(3) which provides –

(3) A trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within—

(a) ninety days of the dismissal; or

(b) any longer period that the Minister, on good cause, permits.

In determining this issue, I am guided by the many binding Court of Appeal decisions on limitation which this court cannot depart from.

In **G4S Security Services (K) Limited v Joseph Kamau and 468 Others (2018) eKLR** the court held that –

“[17] The learned Judge heard the preliminary objection and dismissed it on the ground that the claims were not time barred notwithstanding that they were filed outside the three year limitation period stipulated in the Employment Act. The

learned Judge found that the respondents’ claims was for unpaid terminal dues which constituted a continuing injury. He defined ‘continuing’ based on the English term as ‘remain in existence, operation or a specified state’. The learned Judge on this basis held that the terminal benefits once accrued, remained due and owing to the employees continuously until paid.

*[18] This position is fortified by the decision of this Court in 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, Waki JA held as follows:*

“...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, and I so hold.”

[19] In the circumstances of this case we find that the contracts of 464 respondents were terminated in 2008, 2009 and 2010 and the claim was filed in 2014. Pursuant to Section 90 of the Employment Act, the claims should have been filed within three years of the termination of employment. The claims in respect of the 464 respondents were therefore time barred.

[20] In the circumstances of this case we find that such ‘unpaid terminal dues’ do not constitute a continuing injury as contemplated under the proviso to Section 90 of the Employment Act. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month. Regarding ‘a continuing injury’, the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelves’ month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant’s dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.

[21] On the respondent’s contention that the parties were undergoing a conciliation process which occasioned a delay in the respondents’ filing suit pending the outcome of the conciliation process, we note that there is no documentary evidence to prove that contention. Indeed, there appears to have been no evidence to prove this fact before the learned Judge.

[22] The statutory framework on the conciliation process is as provided for by the provisions of the Labour Relations Act, 2007. Section 62(3) of the Labour Relations Act, 2007 provides that a trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within 90 days of the dismissal or any longer period that the Minister, on good cause, permits. It is not clear exactly when the respondents reported this matter for conciliation.”

[Emphasis added]

In the case of **Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye & Another [2016] eKLR**, the Court of Appeal stated –

“For us it is clear from our reading of section 90 aforesaid that there are no exceptions to the three year limitation period, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof. This was not a case of a continuing injury or damage but one of a single act of termination. In any case the respondents have not specified when the injury or damage ceased for time to have begun to run. Secondly the learned Judge did not rely on the continuing injury or damage but on the fact that the parties engaged in negotiations. Those negotiations began when time had begun to run following the termination of the respondents’ services.

While there is no doubt that Section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents’ contracts of service.

By craft and innovation, the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time. That is what the court stated in **Divecon v Samani (1995 – 1998) I EA 48 at p. 54.**

“No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract.”

Despite Section 4(1)(a) of the Limitation of Actions Act, which sets the limitation of actions in respect of contracts to six years, Section 90 of the Employment Act, which is a latter statute limits actions on employment contracts or contracts of service in general to three years.”

[Emphasis added]

There are also numerous decisions of this court on the subject. I particularly refer to the decision in **George Oppolo v Guaranty Trust Bank of (K) Ltd [2020] eKLR**, where Radido J. dealing with a matter similar to this one, stated as follows –

“14. On 11 July 2014, the Respondent filed a Preliminary Objection contending that the Cause was statute-barred in terms of Section 90 of the Employment Act, 2007.

15. In a Ruling delivered on 3 July 2015, the Court found that the cause of action/head of claim advanced by the Claimant constituted continuous injury, and therefore because the suit was filed within 3 years and 6 months from date of dismissal, limitation did not arise.

...

20. The Court is however compelled to revisit the question of limitation as it goes to jurisdiction, and where the Court has no jurisdiction or finds it has no jurisdiction, it must down its pen (see **Owners of the Motor Vessel "Lilian S" v Caltex Oil Kenya Ltd (1989) KLR 1**).

21. Another reason which has prompted the Court to revisit the preliminary objection is the decision of the Court of Appeal in **G4S Security Services Ltd v Joseph Kamau & 468 Others (2018) eKLR**.

22. Further, the Court which heard the preliminary objection did not have all the facts before it when addressing its mind to the preliminary objection (the facts had not been interrogated).

Further in the case of **Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company Ltd [2015] eKLR**, the Judge examined the issue of limitation in the context of the Labour Relations Ct and posed the question "Whether time stops running during conciliation". His answer to the question was as follows;

"92. In my view, the 3 years is the outer limit and a party desirous of commencing legal action even where conciliation has gone beyond the 3 years must be alert that any action is commenced in time.

93. And in this respect, it is my view that the dicta by Rika J in Nairobi **Cause No. 71 of 2009, Kenya Local Government Workers Union v Kangundo Town Council** that Section 90 of the Employment Act 2007 however provides for the outer time limits irrespective of the mode used by a party in coming to Court. It basically means that in exercising his discretion, the Minister cannot exceed the outer time limits imposed by the Employment Act 2007. The discretion under the Labour Relations Act cannot extend the limit beyond the 3 years provided for under the Employment Act No. 2007. Otherwise the Minister or the Court would be acting against a mandatory provision of the law depicts the correct legal position. The parties and even the Cabinet Secretary cannot extend the limitation time under the guise of conciliation.

94. In my view, holding that time stops running during conciliation or pending alternative dispute resolution would run counter to the principal objective of the Employment and Labour Relations Court Act and establishment of this Court which is to facilitate just, expeditious and proportionate resolution of employment complaints and trade disputes.

95. The applicant must have been aware of this otherwise it could not have sought leave.

96. Any attempts at alternative dispute resolution and or conciliation should be within and or inside the 3 year provided for under section 90 of the Employment Act, 2007."

In the dispute before me, the grievants were retired on 31st December 2000. The first time the dispute was reported to the Minister, albeit as an informal trade dispute, was by letter dated 13th June 2007 addressed to District Labour Officer, Kiambu. The formal dispute was reported by letter dated 28th June 2013, and although the certificate declaring the dispute unresolved was issued on 18th March 2014, the claimant did not file this dispute until 26th March 2015, more than one year later.

Both the initial report of informal dispute on 13th June 2007 and the report of the formal trade dispute on 28th June 2013 were way out of out of the timelines set in both the Trade Disputes Act of 28 days and the Labour Relations Act of 90 days. There is no evidence that the Minister extended the time for reporting of the disputes. In any event, the letter reporting both the informal dispute and the formal dispute did not state when the cause of action arose. The two letters are reproduced below; -

"KLGWU/KBU/AO/5/2007 Date: 13th June 2007

The District Labour Officer

Kiambu District

P. O. Box 111

KIAMBU.

Dear Sir,

RE: REQUEST FOR INFORMAL ARBITRATION KIAMBU COUNTY COUNCIL AND KENYA LOCAL GOVERNMENT WORKERS UNION

We kindly write to declare an informal Trade Dispute between Kiambu County Council and Kenya Local Government

Workers Union.

The items in dispute include:-

(1) Premature Retirement of

(a) Francis Wang'anga Kariuki

(b) Peter Nderitu Gakere

(c) Agnes Nyawira Kibira

(d) Naomi W. Mbae

(e) Edward Njoroge Kamau

(f) Justina Njeri Ngobe

(2) Refusal by the Council to discuss with the Union on the above cases.

Efforts to have the above cases discussed and resolved has been ignored by the Council and therefore your arbitration over the same will be highly appreciated.

Yours faithfully,

SIGNED

(Joseph Muuo)

AREA SECRETARY - NAIROBI AREA”

“Ref: KLGWU/KBU/CB/1/2013 27th March 2013

The Minister for Labour,

Ministry of Labour & Human Resource Development,

P.O. Box 40326,

NAIROBI

Dear Sir,

RE: TRADE DISPUTE – KENYA LOCAL GOVT. WORKERS UNION AND KIAMBU COUNTY BRANCH

In accordance with Section 62 of Labour Relations Act 2007, we write to report to you the existence of a trade dispute between Kenya Local Government Workers Union and County Council of Kiambu.

The issue in dispute is:

Premature retirement of:

1. Francis Wanganga Kariuki KCC/PER/WAT/63/III

2. Peter Nderitu Gakere KCC/PER/WAT/70/12

3. Agnes Nyawira Kibira KCC/PER/RR/48/67

4. Justina Njeri Ngobe (deceased) KCC/PER/KKY/32/69

5. Edward Njoroge Kimani -

We therefore ask you to exercise the powers conferred to you under the Act above to bring about settlement.

Our efforts to settle the issue/matter at parties level failed.

Yours faithfully,

SIGNED

(Boniface M. Munyao (MBS))

NATIONAL GENERAL SECRETARY”

Whether one considers the dispute in the context of the Trade Disputes Act which was applicable at the commencement of the case of Action herein on 31st December 2000, or under the Labour Relations Act under which the formal dispute was reported, the claim would be statute barred under the Trade Disputes Act, the Labour Relations Act, the Limitation of Actions Act and the Employment Act.

For the foregoing reasons I find that the claim herein was filed out of time and this court has no jurisdiction to hear and determine the same. I accordingly strike out the claim with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JUNE 2020

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE