



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 45 OF 2019**

**TOBIAS OMENDA ANDHALA.....CLAIMANT**

**v**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS**

**& HOSPITAL WORKERS .....RESPONDENT**

**RULING**

1. Tobias Omenda Andhala (Claimant) instituted these legal proceedings against the Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers (the Union) on 20 May 2019 alleging breach of duty on the part of the Respondent to represent him in an unfair termination of employment claim.
2. The unfair termination of employment was pleaded to have arisen on 30 December 2007.
3. In the Memorandum of Claim, the Claimant accused the Union of having failed to pursue his case to its logical end and he sought general damages for *professional negligence*.
4. According to the Claimant, the Union was aware that the prescribed limitation for employment disputes was 3 years and therefore it should have moved the Court before the end of the prescribed period.
5. Upon service of Notice of Summons and Memorandum of Claim, the Union took out a Notice of Preliminary Objection dated 9 December 2019 contending

TAKE NOTICE that at the mention of the applicant's claim dated 5<sup>th</sup> March 2019, counsel for the Respondent (KUDHEIHA) will contend as a preliminary point of law, that the applicant's claim is hopelessly misconceived and totally devoid of merit for the reason that the applicant wants to mount this suit on grounds and assumption that the limitation period of employment /contract claim is 3 years as provided for in section 90 of the Employment Act, 2007 which is not merited by law in this application as it is not yet due.

WHICH APPLICATION is grounded upon Article 159(2)(c) of the Constitution of Kenya, 2010 which provides as follows "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted" and PART VIII (dispute resolution) as provided for in section 62, 65, 69 and 73 of the Labour Relations Act, 2007 of which the Respondent adhered to.

6. The Claimant filed his submissions on 7 May 2020 while the Union filed its submissions on 3 November 2020.
7. The Court has considered all the material placed before it and identified 2 broad Issues arising for determination.

**Whether conciliation stops limitation time from running**

8. The Union, though raising the Preliminary Objection, was of the view that section 90 of the Employment Act, 2007 which prescribes a 3-year limitation does not start to run until the processes (conciliation) contemplated by sections 62, 65, 69 and 73 of the Labour Relations Act have run course to a logical conclusion.
9. To strengthen its contentions, the Union cited Nairobi Cause No. 846 of 2009, *KUDHEIHA v Njabini Secondary School* in which the Court held that a cause of action would only accrue at the point an Investigator appointed by the Minister communicates his report and Kisumu Cause No. 85 of 2013, *KUDHEIHA v Marsh Park Hotel* wherein the Court held that a dispute could only be referred to the Court after a Conciliator had issued a requisite certificate of an unresolved dispute.

10. In this latter decision, the Court was of the view that section 90 of the Employment Act does not oust or override the provisions of the Labour Relations Act on conciliation.

11. Different Judges of this Court took inconsistent positions on the applicability of section 90 of the Employment Act, 2007 to trade disputes reported to the Cabinet Secretary for Labour, for purposes of conciliation (see *Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Company Ltd* (2015) eKLR; *Banking Insurance & Finance Union (K) v Bank of India* (2014) eKLR; *Kenya Scientific Research International Technical and Allied Workers Union v Rainald Schuvera* (2012) eKLR and *Kenya Plantation & Agricultural Workers Union v Mununga Leaf Base* (2013) eKLR

12. The inconsistent positions have since been the subject of a determination by the Court of Appeal.

12. In *Attorney General & another v Andrew Maina Githinji & Ar* (2016) eKLR, the Court of Appeal stated

[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.

[23] Time does not stop running on the commencement of conciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law. This is fortified by the decision of this court in the case of **Rift Valley Railways (Kenya) Ltd v Hawkins Wagonza Musonye and another** (2016) eKLR which held as follows:

*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.....*

**13. For now, the binding case law upon this Court is that time does not stop running because parties are going through alternative dispute resolution processes under the Labour Relations Act.**

**Whether the relationship between Claimant and the Union was contractual and subject to section 90 of the Employment Act, 2007**

14. Section 90 of the Employment Act, 2007 envisages a cause of action arising out of a contract of service.

15. It is not the case of the parties herein that they had a contract of service between themselves. The contract of service was between the Claimant and Board of Management of Oyugis Secondary School.

16. On that single basis, the Court is of the view that the reference to section 90 of the Employment Act, 2007 was misdirected.

17. According to the Court, the cause of action advanced by the Claimant is more in the broad genre of tort and agency. The Claimant is alleging poor or no representation by the Union of which he was a member.

18. This form of liability lies in negligence and is usually pleaded as a breach of duty of fair representation by a trade union. The duty requires a trade union to act fairly, impartially, without ill-will or discrimination when pursuing a member's grievance.

19. In comparative jurisdictions, the right of a member to sue a trade union for negligent representation was affirmed by the Constitutional Court of South Africa in *Food and Allied Workers Union Ngcobo N.O & Ar* (2014) 1 SA 32 (CC).

20. Having reached the view that the cause of action being advanced by the Claimant is in the realm of a tort, the only remaining question is, what is the prescribed limitation period for *tortious* actions is?

21. Section 4(2) of the Limitation of Actions Act sets a limitation of 3-years but subject to the extensions set out in sections 26, 27 and 28 of the Act.

22. The Claimant reported a grievance to the Union around 23 January 2008.

23. If that is taken as the cut-off date, then the Claimant should have moved the Court by 23 January 2011.

24. He moved the Court in 2019 without seeking leave of the Court.

**Conclusion and Orders**

25. Flowing from the above, the Court will uphold the Preliminary Objection and strike out the Memorandum of Claim.

26. There will be no order on costs.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 4<sup>th</sup> day of December 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Otieno instructed by Omondi Abande & Co. Advocates

For Respondent Joseph Okwach, Industrial Relations Officer

Court Assistant Chrispo Aura