



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Union of Employees of Voluntary and Charitable Organisations
(KUEVACO) v Pumwani Riyadha Mosque Committee (Cause
337 of 2016) [2019] KEELRC 2139 (KLR) (22 February 2019) (Ruling)**

*Kenya Union of Employees of Voluntary and Charitable Organisations
(KUEVACO) v Pumwani Riyadha Mosque Committee [2019] eKLR*

Neutral citation: [2019] KEELRC 2139 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 337 OF 2016
MA ONYANGO, J
FEBRUARY 22, 2019**

BETWEEN

**KENYA UNION OF EMPLOYEES OF VOLUNTARY AND CHARITABLE
ORGANISATIONS (KUEVACO) CLAIMANT**

AND

PUMWANI RIYADHA MOSQUE COMMITTEE RESPONDENT

RULING

1. The Respondent filed a Preliminary Objection to the Claimant's Notice of Motion filed on 6th September 2017 and the Claimant's Statement of Claim filed on 1st March 2016 on the following grounds:
 1. That the claim and application dated 5th September 2017 are statute barred pursuant to Section 90 of the *Employment Act*.
 2. That the claim and application dated 5th September 2017 are nonstarters and should be dismissed in limine.
 3. That the suit and application are frivolous and an abuse of the court process.
2. The Claimant filed a Replying Affidavit on 22nd May 2018 sworn by Odin Boaz Otieno, its authorised representative, in response to the Respondent's Reply to the Statement of Claim, the Notice of Preliminary Objection and the Grounds of Opposition to the Notice of Motion. The Claimant avers that:



1. The Respondent belatedly filed on 23rd April 2018, without a further leave of Court being granted, her Reply to the Claim together with Grounds of Opposition, Notice of Preliminary Objection and the Respondent's list of Authorities.
2. The grievants were terminated on 30th April 2008 and the Claimant reported the matter to the minister on 7th May 2008, seven days after the redundancy.
3. The Minister accepted the report and subjected the Minister's decision of appointing the Conciliator in a letter dated 24th February 2009.
4. Should the Respondent have been aggrieved by the appointment of a conciliator it was at liberty to refer the matter to this Court under Section 65 (4) of the *Labour Relations Act*.
5. Despite the death of a grievant, this Court has the exclusive jurisdiction to hear and determine the grievants' rights in this trade dispute pursuant to Section 12(1)(b) of the *Employment and Labour Relations Court Act*.
6. Since all the five grievants' rights in the Statement of Claim do survive even after death of a grievant the Preliminary Objection should be disallowed.

Respondent's Submissions

3. The Respondent submitted that the Claimant opted to file the claim 8 years after the alleged cause of action arose which is contrary to the provisions of Section 90 of the *Employment Act*. It relied on the decision in *Rift Valley Railways (Kenya) Limited v Hawkins Wagunza Musonye & Another* [2016] eKLR where the learned Judge cited the decision in *Divecon v Samani* (1995-1998) 1 EA 48 at page 54 that:

“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.”

4. The Respondent further submitted that the alleged cause of action arose in 2008 upon the Claimant's termination and that the claimants had no capacity to bring the cause of action in 2016. It relied on the case of *Attorney General & Another v Andrew Maina Githinji and Another* [2016] eKLR.
5. It submitted that no court has the power to entertain what cannot be done as such an action was brought out of the prescribed time and that the fact that the matter was set up for conciliation under Section 62(3) of the *Labour Relations Court Act* is immaterial to the running of time. The Claimant relied on the decision in *Rift Valley Railways Case* where the Court held:

“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.”



6. It submitted that though section 12(3)(viii) of the *Employment and Labour Relations Court Act* provides the Court with discretion to exercise in certain instances, that discretion does not extend to matters to which the court has no jurisdiction to entertain. It relied on the decision in *Denis Ksang Ripko v Kenya Commercial Bank Limited* [2016] eKLR. It further submitted that the Preliminary Objection is meritorious and that the Claimant's Statement of Claim cannot stand.

Claimant's Submissions

7. The Claimant submitted that Respondent failed to file a replying statement to the Minister as per the compulsory requirement under Section 63 (1) of the *Labour Relations Act*. The Claimant submitted that the Respondent's position on abatement of the claim due to the Claimant's death is without the understanding of the meaning of Claimant as defined under Rule 2 of the Employment and Labour Relations Court (Procedure) Rules 2016. It submitted that the grievants are not established as Claimant as they are not the proper party in this suit and that by the death of a grievant there can be no abatement.
8. The Claimant submitted that case law relied upon by the Respondent to support the Limitations of Actions is an irrelevant case for any trade dispute suit before this Court.
9. The Claimant further submitted that it is a compulsory constitutional and legal requirement for the Respondent to produce on record the written employment proof to strictly prove that the Claimant's evidence in the statement of claim is invalid.
10. It submitted that the Respondent's Preliminary Objection in the suit is not proper as it is a frivolous defence hence should be dismissed. It relied on the decision in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) E.A 696.

Determination

11. The Respondent's Preliminary Objection is premised on the ground that the Claimant's Statement of Claim is statute barred pursuant to Section 90 of the *Employment Act*. The Claimant filed the Statement of Claim on 7th March 2016 on behalf of 5 grievants namely Badada Habi, Halima Suleiman, Abdulgani Omar, Juma Hassan and Zainabu Mohamed who were all allegedly terminated unfairly on account of redundancy on 30th April 2008. The Respondent submitted that the claim was filed 8 years after the cause of action arose and the fact that the matter was referred to Conciliation is immaterial to the running of time. The Claimant on its part submitted that the Respondent failed to file its response to the Minister in accordance with Section 63(1) of the *Labour Relations Act*.
12. The Claimant referred the dispute to the Minister, under Section 62 (4) of the Labour Relations Court, vide its letter dated 7th May 2008. The Respondent did respond to the dispute and neither party therein filed its respective written proposal to Conciliator as directed in the letter dated 24th February 2009. Consequently, the Labour Officer in its letter dated 26th May 2011 informed the Claimant that having failed to submit its Memoranda to the Conciliator within the stipulated time it was at liberty to invoke the provisions of Section 69 of the *Labour Relations Act*.
13. Evidently, the cause of action accrued on 30th April 2008 and the dispute was declared unresolved in the Labour Officer's letter dated 26th May 2011.
14. It is not until the 7th March 2016 that the Claimant filed its claim on behalf of the 5 grievants. In determining the limitation of time in employment claims the Court is guided by Section 4(1) of the Limitation of Act which provides:



4. Actions of contract and tort and certain other actions
 1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - a. actions founded on contract;
 - b. actions to enforce a recognizance;
 - c. actions to enforce an award;
 - d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
15. This is because the date of accrual of the cause of action is before 2nd June 2008, the implementation date of the [Employment Act, 2007](#).
16. From the foregoing the claim ought to have been filed by 30th April 2014 but the Claimant resorted to referring the dispute to the Minister under Section 62 of the [Labour Relations Act](#). The commencement of the conciliation process prior to the filing of the Statement of Claim is what the claimant termed as the prevailing circumstance that led to the failure to abide with the stipulated time to file a claim of 6 years under Section 4(1) of the [Limitation of Actions Act](#).
17. Nevertheless, the Labour Officer declared that the Conciliation was not concluded on 26th May 2011 but the Claimant only filed a claim close to two years later on 7th March 2016. Should the conciliation phase be considered in determining when time runs? This was an unnecessary delay in filing the Claim and the court cannot entertain a claim brought way out of time.
18. The Court of Appeal in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR held:

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.
19. Time does not stop running on the commencement of reconciliation 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 Wagunza 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.”



See: Times Newspapers Ltd v O'Regan [1977] I.R.L.R. 101 where the Court sitting on appeal held that an employment tribunal had erred in law in finding that it was not reasonably practicable for an employee to make her complaint for unfair dismissal within the requisite period on grounds of her belief that the period to file her claim ran from the end of negotiations between her union and the employer.

In the circumstances of this case, we are satisfied that 464 respondents having conceded that their employment was terminated in the years 2008, 2009 and 2010 and filed their claim on 22nd January, 2014, that they filed their claims outside the limitation period of 3 years. The Employment and Labour Relations Court therefore erred in holding that it had jurisdiction to hear and determine claims that were filed outside the statutory limitation period.”

20. The Claimant in the Replying Affidavit to the Notice of Preliminary Objection stated that the averment made by the Respondent in respect of the death of some of the grievants should be disallowed as the claim does survive even after the death of a grievant. It relied on the decision of Ongaya J. in Kenya Union of Employees of Voluntary and Charitable Organisations v National Council of Churches of Kenya [2014] eKLR.
21. The position taken by the union is not supported by the law. A union represents an employee. Where the employee dies the instructions do not survive the employee and a legal representative must take over the rights of the deceased employee before instructing the union to continue with the representation. Otherwise the union would be acting without instructions.
22. In Tailors & Textile Workers Union v Kapric Apparels Garments (EPZ) Ltd [2014] eKLR Radido J. held:

I have looked at sections 2 and 82 of the Law of Succession Act and the authority cited by Mr. Khagram. It is clear that it is a personal representative who has the power to enforce causes of action which survive a deceased for the benefit of his estate.
23. Further section 24 of the Employment Act is clear that any wages and other remuneration due to a deceased employee shall be paid to a legal representative and if there is no legal representative such wages or property should be delivered to the local labour officer or District Commissioner to be held in trust.
24. The present cause was filed after the death of the Grievant. No personal representative had been appointed. I gave time to the Union to confirm whether any application had been made or was pending, but no information had been given by the time the matter was being mentioned on 21 March 2014 after the Deputy Registrar notified the parties through her letter of even date.
25. On the basis that no personal representative had been appointed at the time of filing the Claim and without making a determination on the locus of the Union, it is my view that the claim herein is incompetent and cannot survive and it is hereby struck out with no order as to costs.”
26. From the foregoing, the preliminary objection succeeds and the suit herein is struck out on grounds that it is time barred. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE

