



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.57 OF 2014

[Formerly Nairobi Cause No.1072 of 2010]

TOBIAS OKECH.....1ST CLAIMANT
ROMLUS J OKOTH.....2ND CLAIMANT
BENSON KARIUKI.....3RD CLAIMANT
FRANCIS KIARIES.....4TH CLAIMANT
EZEKIEL KHALIBWE.....5TH CLAIMANT
PAUL MAMBUNDA.....6TH CLAIMANT
SAMSON INDIMULI.....7TH CLAIMANT
ISMAEL ASONGE.....8TH CLAIMANT
NICHOLAS OLOO.....9TH CLAIMANT
MARY NYAMBUGI.....10TH CLAIMANT
DANIEL MAINA.....11TH CLAIMANT

VERSUS

BIASHARA SAWMILLS LIMITED.....RESPONDENT

JUDGEMENT

The claimants filed the Memorandum of Claim on 17th September, 2010 under Nairobi Cause No.1072 of 2010 filed by the union, Kenya Building Construction Timber Furniture and Allied Industries Employee Union against the respondent. The claimants herein were listed as the grievants as the union was the claimant. On 26th October, 2015 the claimants herein applied to act in person. On 8th December, 2015 the claimants appointed advocates to attend and represent them herein.

The claimants amended the Memorandum of claim and filed it on 16th December, 2015. A response was filed on 19th February, 2016.

By application dated 7th December, 2016 the claimants' advocate applied to cease acting for them which was allowed.

At the hearing of the matter the claimants were acting in person.

Claim

The claimants commenced proceedings herein under their union, Kenya Building Construction Timber Furniture and Allied Industries Employee Union on the grounds that there was no recognition or collective agreement (CBA) with the respondent. The respondents are not members of the Timber Industries Employers Association which has are recognition agreement and CBA with the union, Kenya Building

Construction Timber Furniture and Allied Industries Employee Union.

The claims made are based on the Building Construction Industry order.

The claimants were employed by the respondent on different dates;

1st claimant was employed on 3rd August, 1999 as an Electrician at a salary of Ksh.5,000.00 per month without a house allowance and his employment terminated on 14th March, 2004 while he was earning Ksh.5,730.00 per month;

The 2nd claimant was employed on 1st September, 1997 as a carpenter and paid ksh.1,200.00 per month without a house allowance and worked until 30th July, 2004 earning the same wage per month;

3rd claimant was employed on 26th February, 1994 as a lorry driver at a salary of Ksh.1,200.00 per month without a house allowance and his employment terminated on 17 July, 2004 while earning Ksh.3,484.00 per month;

The 4th claimant was employed on 10th September, 1987 as a welder artisan at a wage of ksh.3,200.00 per month without a house allowance and his employment was terminated on 30th April, 2004 while earning ksh.6,500.00 per month;

The 5th claimant was employed on 2nd December, 1993 as a Saw Doctor at a wage of ksh.2,700.00 per month without a house allowance last earning ksh.6,900.00 per month;

The 6th claimant was employed on 6th April, 1991 as a carpenter at a wage of ksh.800.00 per month. He was promoted to a foreman at a wage of Ksh.3,480.00 per month from the year 1999 which pay was without a house allowance and his employment was terminated on 3rd April, 2004 while earning ksh.3,480 00 per month;

The 7th claimant was employed on 13th February, 2001 as a Saw Doctor Assistant at a wage of ksh.2,030.00 per month without a house allowance and his employment was terminated on 22nd April, 2004 while earning the same wage;

The 8th claimant was employed in April, 1989 as a wage of ksh.450.00 per and without any house allowances and his employment was terminated on 2nd August, 2004 while earning Ksh.3,120.00 per month;

The 9th claimant was employed on 8th April, 1995 as a mason at a wage of Ksh.1,350.00 per month, he was promoted over time and employment terminated while earning ksh.3,330.00;

The 10th claimant was employed in December, 1991 as a Shop Assistant at the respondent's shop in Molo Town Branch at a wage of ksh.800.00 per month without a house allowance, in the year 1993 she was promoted to a Cashier at a wage of ksh.2,670.00 per month and employment terminated while she was earning the same wage; and

The 11th claimant was employed in June, 1987 as a Welder and upgraded to an Artisan Foreman at a wage of ksh.9,980.00 without a house allowance until 17th May, 2004 when employment terminated.

The claim is that the claimants were all dismissed without due process and contrary to the Building and Construction Industry order, 2004. No reason was given or payment of terminal dues made. No claimant was allowed to take annual leave or paid in lieu thereof. Work hours were 8am to 5pm from Monday to Friday and 8am to 6pm on Saturday and those in the garage from 8am to 1pm.

The claimants all worked diligently until termination of employment for all of them took effect between April and August, 2004.

The claimants had in the year 1997 joined the union which resulted in a struggle for recognition and which resulted in the union filing **Nairobi Cause No.23 of 1997** and **Cause No.42 of 2003** over recognition and dismissal of employees respectively.

In this regard, the claimants were dismissed from employment by the respondent to perpetuate unfair labour practices and to deny them their terminal dues.

The 1st, 3rd, 5th and 7th claimants were directed by the respondent to withdraw from the union or risk termination of employment which was done in April, 2004.

The 2nd, 6th and 8th claimants were informed that their work had gone down and would be recalled back where there was improvement.

The 10th claimant and 3 others were picked by the police for alleged loss of cash at the respondent office.

The claim is also that the claimants had been employed under the provisions of the repealed Employment Act Cap 226 and in the law notice period is provided at one month or payment in lieu thereof. The respondent had made efforts to have the claimant opt out of their union and when they declined they were dismissed from employment. The matter was addressed by the union in Nairobi Cause No.23 of 1997.

The claimants' right to join a trade union were contravened by the respondent.

The claimants are seeking for orders and findings that they were wrongfully dismissed from employment and should be paid their terminal dues; there was underpayment and this should be addressed and redressed;

1st claimant, Tobias Oketch is seeking the following dues;

- a) Notice pay Ksh.8,293.00;
- b) Leave pay Ksh.29,876.00;
- c) Gratuity/severance pay ksh.19,140.00;
- d) Underpayments Ksh.235,921.40;
- e) Compensation;

2nd claimant, Rumulus Okoth;

- a) Notice pay Ksh.5,400.00;
- b) Leave pay Ksh.30,634.75;
- c) Gratuity/severance pay ksh.15,200.00;
- d) Underpayments Ksh.410,820.40;
- e) Compensation;

3rd claimant, Benson Kariuki;

- a) Notice pay Ksh.6,764.00;
- b) Leave pay Ksh.58,643.75;
- c) Gratuity/severance pay ksh.39,030.00;
- d) Underpayments Ksh.536,826.00;
- e) Compensation;

4th claimant, Francis Kiarie;

- a) Notice pay Ksh.6,204.00;
- b) Leave pay Ksh.85,642.85;
- c) Gratuity/severance pay ksh.57,264.00;
- d) Underpayments Ksh.126,285.00
- e) Compensation;

5th claimant, Ezekiel Khalibwa;

- a) Notice pay Ksh.7,562.00;
- b) Leave pay Ksh.64,543.70;
- c) Gratuity/severance pay ksh.43,620.00;
- d) Underpayments Ksh.220,994.90;

e) Compensation;

6th claimant, Paul Mabinda;

a) Notice pay Ksh.4,865.00;

b) Leave pay Ksh.52,252.75;

c) Gratuity/severance pay ksh.33,678.00;

d) Underpayments Ksh.327,786.00;

e) Compensation;

7th claimant, Samson Indimuli;

a) Notice pay Ksh.4,119.00;

b) Leave pay Ksh.10,297.50;

c) Gratuity/severance pay ksh.7,128.00;

d) Underpayments Ksh.100,153.00;

e) Compensation;

8th claimant, Ismael Asonge;

a) Notice pay Ksh.5,400.00;

b) Leave pay Ksh.68,953.00;

c) Gratuity/severance pay Ksh.46,732.00;

d) Underpayments Ksh.568,560.00;

e) Compensation;

9th claimant, Nicholas Juma Oloo;

a) Notice pay Ksh.5,400.00;

b) Leave pay Ksh.41,590.00;

c) Gratuity/severance pay ksh.28,039.00;

d) Underpayments Ksh.319,680.00;

e) Compensation;

10th claimant, Mary Wambugu;

a) Notice pay Ksh.9,205.00;

b) Leave pay Ksh.112,347.70;

c) Gratuity/severance pay ksh.74,340.00;

d) Underpayments Ksh.1,393,172.00;

e) Compensation;

11th claimant, Daniel Maina;

- a) Notice pay Ksh.9,980.00;
- b) Leave pay Ksh.139,112.80;
- c) Gratuity/severance pay ksh.92,112.00;
- d) Underpayments Ksh.9,980.00;
- e) Compensation;

The claimants' evidence was given by three (3) main witnesses the first being Rumulis Okoth that upon employment by the respondent he was underpaid and his employment was terminated on 30th July, 2004 upon information by the respondent that work material had reduced and would be recalled back once there was improvement. He was not paid his terminal dues and such recall has not taken place. There was no written contract of employment, notice or hearing before employment terminated.

Francis Kiarie testified that upon employment by the respondent he worked well but was underpaid and on 30th April, 2004 he was dismissed for joining the trade union. From the year 1982 to 1987 he was employed on permanent and pensionable terms but there was no house allowance paid.

Mr Kiarie also testified that the union failed to attend to their case in court and have suffered since the year 2004 when their employment was terminated. There are eight (8) claimants with one (1) who has since died and two (2) being away since and unable to attend court.

Benson Kanyutu Kariuki testified that upon employment by the respondent he was underpaid and contrary to the Wage Orders applicable in the Building and construction sector. On 7th July, 2004 he was dismissed from his employment without due process and without payment of his terminal dues.

Defence

Upon the filing of the claim, the respondents filed defence on 17th August, 2011 and on the grounds that the claims are based on contracts of employment and are time barred under the Limitation of Actions Act Cap 226 Laws of Kenya.

The defence was also that Mary Nyabugi the 10th claimant has never been an employee of the respondent while Daniel Maina the 11th claimant deserted employment. Tobias Oketch had been given several warnings for desertion of duty and that on a without prejudice basis, the defence is that all the claimants were paid their terminal dues.

The defence was also that there is an award under Nairobi Cause No.23 of 1997 which the respondent rely upon.

Upon the amendment of the claim, the respondent filed a response thereto on 19th February, 2016 and on the grounds that the claimants are not registered members of the Kenya Building, Construction, Timber, Furniture and Allied Industries Employees Union. The claims are based on contracts of employment and are time barred under the Limitation of Actions Act.

The defence is also that the 1st claimant was employed as an Electrician (Trainee) and not as alleged from October, 1999 to 19th April, 2004 when he caused serious injury to a fellow employee John Kimani causing the respondent loss and damage. He absented himself from work and was issued with a warning. He then absconded duty after assaulting his work colleague.

2nd claimant was a casual employee from August, 2002 and on 4th July, 2004 he did not report to work.

The 3rd claimant was a driver from 26th August, 1996 until 7th July, 2004 when he left employment on his own accord. He had several cases of being absent from work.

The 4th claimant was a welder from October, 1990 until April, 2004 when he failed to report to work.

The 5th claimant as a doctor saw from December, 1993 to the year 2004 when he deserted. He had been neglecting his duties and the respondent let him go due to neglect of duty.

The 6th claimant was a supervisor (workshop) from December, 1993 until 3rd April, 2004 when he became arrogant to the manager seeking to be retired since Biashara Master Limited lacked materials. He then left work without notice.

The 7th claimant was employed a casual labourer on 1st March, 1995 until 30th July, 2004.

The 9th claimant was employed as a mason on 1st August, 1999 until 30th July, 2004 when he deserted duty.

The 10th claimant was not an employee of the respondent. employment is denied.

The 11th claimant was employed as a welder on 1st October, 1990 until April, 2004 when he got leave from 26th April, to 17th may, 2004 and never returned back to work.

The defence is also that all the claimants were paid based on the applicable wage orders and there was no underpayment. The claimants deserted work without notice and the respondent counterclaims for notice pay not issued before such desertion.

The respondent called a single witness, Samuel Kibobi Gichini the Head Security from November, 2002 to date and who testified that the claimants are not members of Kenya Building, Construction, Timber, Furniture and Allied Industries Employees Union and the claims made are time barred.

All the claimants were employed by the respondent save for the 10th claimant. They were causal employees paid on a weekly basis and based on available work or for work done. The claims made that there as a dismissal from employment are not true as the claimants left work on their own volition. There was never a demand on the terminal dues until this suit was filed. The claimants remained away from work for many years only to file this claimant and had they had any terminal dues owing, such should have been addressed with the respondent which was not done.

The court allowed each claimant to cross-examine the witness.

The witness testified that there was no termination of employment for the claimants joining a trade union. There were negotiations with the union but that is a matter addressed by the court since. As the claimants were employed as causal, they left on their own volition. Only Benson the 3rd claimant was employed on permanent basis as a driver.

The witness also testified upon cross-examination by the 10th claimant that there was no employment with her and the respondent. the records submitted indicate her employment was with a third party, Biashara Hardware Molo and not the respondent.

The 11th claimant has since died.

At the close of the hearing, the parties agreed to file written submissions. Only the claimant complied.

Determination

From the pleadings, and as noted above, the suit commenced under **Nairobi Cause No.1072 of 2010** filed by the union, **Kenya Building, Construction, Timber, Furniture and Allied Industries Employees Union** on 17th September, 2010. The claim as filed by the union was on a dispute of wrongful dismissal of 11 employees and the claims made related to notice pay, leave pay and service pay. The union admitted there was no recognition or a collective agreement between the parties.

The union as the claimant also noted the parties had Cause No.23 of 1997 and Cause No.42 of 2003 over the issues of recognition and the dismissal of employees respectively.

Under Cause No.42 of 2003 - Kenya Building, Construction, Timber, Furniture and Allied Industries Employees' Union versus Biashara Master Saw Millers Ltd [2004] eKLR the matter related to the summary dismissal of two grievants, Michael Gakiria Mwangi and Ngugi Muchiri who are not claimants herein. The court made a finding therefrom unrelated herein as the claimant were still in employment with the respondent at the time.

In Cause No.23 of 1997 between the same parties, this related to the recognition of the claimant by the respondent. some of the claimants were still in the employment of the respondent at the time.

Upon the filing of the claim herein The issue of time limitation addressed by the respondent in the defence dated 17th August, 2011 was never addressed. The court finds this an important matter to address as upon it, the claims made shall find basis or fails the same.

By pleading time bar to the claims, this being an issue of law and touching on the court jurisdiction as held in the case of **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA** and **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others S.C Application No. 2 of 2012 [2012]eKLR** this issue should have been gone into instantly. This is still alive even at this stage.

Where employment terminated in the year 2004 for all the claimants, the applicable law with regard to any wrongful termination of employment was the repealed Employment Act Cap 226 Laws of Kenya.

The law relating to limitation is contained in the Limitation of Actions Act which provides at section 4 as follows;

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.

The claim was filed at Nairobi under Cause No.1072 of 2010 on 17th September, 2010 as noted above. The pleadings are that;

1st claimant's employment terminated on 14th, March, 2004;

2nd claimant on 30th July, 2004;

3rd claimant on 17th July, 2004;

4th claimant on 30th April, 2004;

5th claimant worked for 10 years and 3 months which translates to termination of employment to March, 2004;

6th claimant on 3rd April, 2004;

7th claimant on 22nd April, 2004;

8th claimant on 2nd August, 2004;

9th claimant worked for 9 years and 3 months translating to termination of employment in July, 2004;

10th claimant worked for 14 years and 8 months which translates to termination of employment to August, 2004; and

11th claimant on 17th May, 2004.

With the best efforts and putting the last work date at 31st August, 2004 in view of the law on limitation in time, by filing the claim on 17th September, 2010 the same is out of time. There is no explanation as to why the claims which arose on or before August, 2004 were not filed with the court before the time lapse.

The parties agree there were efforts to negotiate the matters herein especially before the union was replaced by the claimants now acting in person. However, time is not extended by negotiations. The Court of Appeal in the case of **Rift Valley Railways (Kenya) Ltd versus Hawkins Wagonza Musonye and another [2016] eKLR** held as follows;

While there is no doubt that section 15 of the Employment and Industrial Relations Act [Employment and Labour Relations Court Act, 2011] 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

In this case, where employment terminated on or before August, 2004 and the suit was filed on 17th September, 2010 and even though this is a few weeks after the time lapse, reasons demanded that leave under the applicable statute be applied for and on that basis the claims be filed therefrom. The lapse of not filing the claims within the allowed 6 years period from the year 2004 is without justification.

The claims are time barred by application of the repealed Employment Act Cap 226 read together with the Limitation of Actions Act. this denies the court jurisdiction to hear and determine the matter herein.

Without jurisdiction to address the claims time barred, the court must down its tools at this point.

For the avoidance of doubt, the 10th claimant stood out in her pleadings and evidence. She was employed by Biashara Hardware Molo and not the respondent. this was brought out in defence but the claimant failed to address or cause to be enjoined such third party. Her claim(s) against the respondent are misplaced as made against the wrong party.

Accordingly, the court without jurisdiction, the claims are struck out. As both parties failed to address the subject issue of law and jurisdiction in good time, each shall bear own costs.

Delivered in open court at Nakuru this 29th day of April, 2019.

M. MBARU JUDGE

In the presence of:

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