



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO 187 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENYA UNION OF SUGAR PLANTATION AND**

**ALLIED WORKERS.....CLAIMANT**

**-VERSUS-**

**MUHORONI SUGAR COMPANY LIMITED**

**(IN RECEIVERSHIP).....RESPONDENT**

**JUDGMENT**

The claim herein has been filed by Kenya Union of Sugar Plantation and Allied Workers, the claimant, on behalf of Paul Ojuka 1<sup>st</sup> Grievant, Samuel Ominde 2<sup>nd</sup> grievant, Richard Agure, 3<sup>rd</sup> grievant, Clapatone Otieno, 4<sup>th</sup> grievant and Michael Otieno, 5<sup>th</sup> grievant.

All the grievants were employees of the respondent, Muhoroni Sugar Company Limited (In Receivership). All the grievants were employed by the respondent in on different dates and in different capacities. The grievants were all officials of Nyando Co-operative Savings & Credit Society Limited, registered under the Co-operative Societies Act.

Nyando Savings and Credit Co-operative Society Limited, the SACCO had been experiencing liquidity problems. At the request of the SACCO Society, Muhoroni Sugar Company had extended soft loans to the society. In 2004 the SACCO was loaned Kshs.1,750,000 to enable it offer school fees facility to its members who repaid at an interest rate of 10% on reducing balance. In 2006 the company again granted the society a loan of 4.5 million to be repaid within 9 months at the rate of Kshs.500,000 per month. The loan was intended to be advanced to the members for 3<sup>rd</sup> term's school fees for their children.

Due to complaints from its members, the Co-operative Officer, Nyando District appointed auditors to carry out an inspection into the affairs of the SACCO, most of whose members were employees of the respondent.

According to the report, the management committee of the SACCO advanced to themselves and a few members hefty loans leaving the majority of the members with loans equivalent to only 2 times their shares. The report states that the loans were given without following the loan policy with the result that most of the members and committee members who received the loans were unable to service the loans as they had no ability to pay. The grievants were among the committee members who benefitted from loans that they were unable to service.

Upon receiving a copy of the report the respondent issued letters of suspension to the grievants to pave way for further investigations. The grievants' employment were subsequently terminated by letters dated 11<sup>th</sup> October 2006. They appealed against the termination seeking reinstatement by letters dated 30<sup>th</sup> October 2006. By letters dated 25<sup>th</sup> April 2007 they were informed that their appeals were rejected by the respondent's Appeals Committee sitting on 15<sup>th</sup> March 2007.

The grievants were aggrieved by the termination of their employment and their union reported a dispute to the Minister for Labour who appointed HELLEN MANENO of Provincial Labour Office, Kisumu as Conciliator. At a conciliation meeting on 18<sup>th</sup> March 2010 the parties failed to agree and signed a certificate of disagreement paving way for filing of this suit.

**Claimant's case**

It is the claimant's position that the termination of employment of the grievants was unlawful and unfair as the reasons and grounds for the termination were not related to their employment or in accordance with their terms of service or the Collective Bargaining Agreement signed by the claimant and the respondent. It is the claimant's submission that job descriptions of the grievants did not encompass being officials of

the SACCO Society and their actions and conduct as officials of the SACCO Society were not governed by their terms and conditions of employment. It is submitted that the grievants were elected officials of the SACCO Society and the termination of their employment by the respondent was *ultra vires*, that the same amounted to interference by the respondent into the affairs of the society, was illegal and illogical. It is submitted that the SACCO society had its own constitution which governed its membership and officials, and the respondent had no role to play in the running and functioning of the society. It is further submitted that the report from the District Co-operative Officer, Nyando did not recommend the dismissal of the society's officials either from office or from employment but spelt the necessity for recovery of the loans. It is submitted that the issue of disbursement of funds was solely under the authority of the society and the Parent Ministry that the respondent did not initiate or fund the report yet it used it as the basis to terminate the employment of the grievants. It is submitted that the respondent abused its powers, that its action is unfair and untenable labour practice, its decision wanton and perverse.

The claimant prayed that that the grievants be reinstated with effect from date of suspension without any loss of benefits.

### **Respondent's Case**

In the amended statement of response filed on behalf of the respondent, it is submitted that upon conducting a thorough and comprehensive investigation, it was ultimately established that on or about 11<sup>th</sup> October 2006 after the respondent released to the SACCO a cheque of Kshs.4.5 million, the grievants were involved in financial malpractices in regard to disbursements/application of the funds as a direct consequence of which children of the employees of the respondent did not report to school and which situation instigated lack of morale and commitment to duty on the part of respondent's disgruntled employees gravely affecting the running and operations of the respondent company.

That the respondent had a duty and responsibility as it did to consider acts and omissions committed by its employees which were substantially detrimental to it and its properties. It is submitted that the termination was just, done in good faith and based on the extensive investigation and on issues raised and considered in the Notice to Show Cause.

The respondent further avers that the pleadings as filed are time barred and defective for want of adherence to the mandatory provisions of Rule 6 of the Industrial Court (Procedure) Rules 2010 and that the claimant lacks the capacity to file and maintain a suit on behalf of the grievants, who were not its members at the time when the cause of action arose for the reason that there was no Collective Bargaining Agreement in force between the claimant and the respondent.

The respondent avers that this suit is filed contrary to the mandatory provisions of the Company's Act in respect of suits against companies under receivership.

The respondent prayed that the claim be dismissed and/or struck out with costs on grounds that it is statute barred relying on the Industrial Court Procedure Rules, 2010, the Limitations of Actions Act, the Employment Act and the Labour Relations Act.

### **Hearing**

At the hearing of the case the claimant called one witness PAUL ONYANGO OJUKA, 1<sup>st</sup> grievant who was also the Chairman of the SACCO Society at the time material to this suit. The respondent called one witness PATRICK OMUTO, the Legal Officer. Both witnesses reiterated the facts as pleaded in their respective pleadings and as already summarised above.

After the hearing, the claimant adopted the submissions in the memorandum of claim while the respondent filed written submissions.

### **Respondent's Submissions**

In the submissions the respondent submits that the claim should be struck out as it is statute barred. The respondent relies on Section 90 of the Employment Act which provides that:-

*“Notwithstanding the provisions of Section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”*

It is submitted that the employment of the grievants was terminated on 11<sup>th</sup> October 2006, but was filed 23<sup>rd</sup> February 2011 without the claimant seeking leave to file out of time. It is further submitted that although there are Judicial authorities to the effect that time starts running when a case is referred to conciliation, the letter referring to dispute to conciliation is dated 14<sup>th</sup> October 2009, 3 years after termination, and after the limitation period had lapsed.

The respondent further relies on Section 62 (3) of the Labour Relations Act, which provides that:-

Section 63(3) of the Labour Relations Act:-

**(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.**

The respondent also relies on Section 67 (1) and Section 69 (1) of the Labour Relations Act which provide that:-

Section 67 (1)

*The conciliator or conciliation committee appointed under Section 66 shall attempt to resolve the trade dispute referred to in Section 65 (1) within –*

*a. thirty days of the appointment; or*

*b. any extended period agreed to by parties to the trade dispute.*

Section 69 of the Labour Relations Act –

*A trade dispute is deemed to be unresolved after conciliation if the –*

*a. conciliator issues a certificate that the dispute has not been resolved by conciliation; or*

*b. thirty day period from the appointment of the conciliator, or any longer period agreed by the parties, expires.*

The respondent further relied on the case of **KENYA ELECTRICAL TRADE AND ALLIED WORKERS UNION -VS- KENYA POWER AND LIGHTING COMPANY LTD NAKURU ELRC MISC. CAUSE NO. 3 of 2015** in which the court stated that “any attempts at alternative dispute resolution and or conciliation shared be within and or inside the 3 year period provided for under Section 90 of the Employment Act.”

It is further the respondent’s submission that the claimant did not prove that the termination of the employment of the grievants was wrongful as the grievants admitted mismanaging the funds loaned to Nyando Co-operative Society by the respondent.

The respondent further relied on the decision of this court in the case of **Banking Insurance and Finance Union (Kenya) -Vs- Co-operative Bank of Kenya Ltd [2015] eKLR** and submitted that the claimant prayed for reinstatement which is not available. It is prayed that the claim be dismissed with costs.

#### **Determination**

I have considered the pleadings, evidence on record and the authorities cited. The issues for determination are the following:-

1. Whether the claim is statute barred.
2. Whether the termination of the grievants employment was unfair.
3. Whether the grievants are entitled to reinstatement as prayed in the claim or to any other remedy.

#### **Limitation**

Section 90 of the Employment Act, which the respondent has relied on to plead limitation provides that all claims arising from or based on the Act or a contract of service in general must be instituted within 3 years from the date of accrual thereof. The Act came into operation on 2<sup>nd</sup> June 2008, while the employment contracts of the grievants were terminated on 11<sup>th</sup> October 2006, before the Act was enacted. This therefore means that that the Act does not apply to the termination of the employment of the grievants. This also applies to the Labour Relations Act, which was also enacted in 2007 and commenced on 26<sup>th</sup> October 2007.

The contracts of the grievants are therefore subject to Section 4 (1) of the Limitations of Actions Act, which provides for a limitation period of 6 years. The cause of action having accrued on 11<sup>th</sup> October 2006, the limitation period lapsed on 10<sup>th</sup> October 2012, long after the suit had been filed. The claim is thus valid as it was filed in time.

#### **Fair Termination**

The claimant avers that the termination of employment of the grievants was unfair, unlawful and illogical as the grounds for termination had nothing to do with their employment. The claimant relied on the case of **Kenya Union of Sugar Plantation & Allied workers -Vs- South Nyanza Sugar Company Limited Cause No. 346 (N) of 2009**. In that case the court reinstated the grievants on grounds that the first grievant therein JACK MBOYA MILANYA was Terminated On Grounds That As Treasurer He Mismanaged SONY WORKERS SELF HELP GROUP while the chairman and secretary were reinstated after initially being terminated together with Milanya. The 2<sup>nd</sup> grievant therein was reinstated as he was acquitted by a criminal court of the charges for which his employment was terminated.

In the present case, the only reason why the claimant avers that the termination of the grievants was wrong is that the reasons for termination had nothing to do with their employment contracts and that the SACCO had its own constitution which provided for the manner in which officials and members were to be dealt with. I do not agree. The funds that were misappropriated were a loan from the respondent and the respondent had advanced the money to the SACCO for a particular purpose. The money was meant to assist the members to pay school fees for their children and was to be repaid through the repayments from members of the SACCO who were employees of the respondent.

The grievants instead advanced the money to themselves knowing very well that they had no ability to pay as disclosed in the Inspection Report of the District Co-operative Officer. The effect of their action was that the children of the members of the SACCO were not able to report back to school for third term due to lack of school fees thus affecting the morale of workers and their commitment to duty. Secondly, the money could not be recovered and paid back to the respondent due to the fact that it was loaned without following the loaning policy of the SACCO to the grievants and others with no ability to pay.

Section 17 of the repealed Employment Act which was applicable at the time of termination of Employment of the grievants provided for summary dismissal on grounds of gross misconduct.

It has not been denied that the grievants misused the money advanced by the respondent to the SACCO by loaning the same to themselves without complying with the loaning policy. It has further not been denied that what the grievants did constituted gross misconduct. All that is stated is that the misconduct was not against the respondent but employees of the respondent.

I find that there was sufficient grounds to take disciplinary action against the grievants for misappropriating and/or misusing monies advance to the SACCO by the respondent and the termination was therefore not unjustified or unlawful.

### **Remedies**

Having found that the termination was not unjustified or unlawful, I do not have to consider the remedy of reinstatement as the grievants are not entitled to the same.

I will however do so for record purposes. The claimant prayed for only one remedy; reinstatement. At the time of filing suit on 2<sup>nd</sup> February 2011 the Employment and Labour Relations Court Act, which limits reinstatement to 3 years from date of termination, was not in force. However, Section 49, which provides for the same was in force. Even had I found the termination unfair I would not have ordered reinstatement as the claimant has not demonstrated exceptional circumstances warranting reinstatement as provided in Section 49 (4).

### **Conclusion**

For the foregoing reasons, I find that the claimant has not proved its case with the result that the case is dismissed.

Each party will bear its costs.

**DATED AND SIGNED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF APRIL 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 3<sup>RD</sup> DAY OF MAY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**