



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2209 of 2015

DANIEL THUO KABI 1ST CLAIMANT
JAMES KARANJA KINUTHIA 2ND CLAIMANT
JAMES NJIRAINI GACHOKI 3RD CLAIMANT
JOHNSON GACHOKI NDAMBIRI 4TH CLAIMANT
RICHARD MUSAU NDAMBUKI 5TH CLAIMANT
REUBEN KWANZU AMBWAYA 6TH CLAIMANT
DUNCAN MUNI MURIITHI 7TH CLAIMANT
JOSHUA MADIADA MANYARA 8TH CLAIMANT
ALFRED MUREITHI GITHINJI 9TH CLAIMANT

VERSUS

GENERAL MOTORS EAST AFRICA LIMITED RESPONDENT

RULING

INTRODUCTION

1. The application before me is the Respondent's Notice of Motion dated

22.12.2017 seeking for the striking out of the Claimant's Memorandum of Claim dated 11.12.2015 with costs. The motion is supported by the affidavit sworn by Mr. Antony Musyoki on 22.12.2017.

In summary the applicant contends that:-

- (a) The suit is a nullity and incompetent because it does not disclose any reasonable cause of action worth litigating by this Court.
- (b) The dispute herein being retirement age of her employees has been determined by a Court of concurrent jurisdiction as 55 years based on the 2013 Collective Bargaining Agreement.
- (c) The continued prosecution is likely to embarrass the Court or end up in a different decision.
- (d) The suit is an abuse of the Court process.

She contends therefore that the Collective Bargaining Agreement signed in 2013 is the one which governs the terms and conditions of service between her and the Claimants and she acted on it when she retired the Claimants on reaching 55 years.

2. The application is opposed by the Claimants through the Replying Affidavit sworn by **Mr. Daniel Thuo** on 23.2.2018. In brief the claimants contend that:-

- (a) The application is bad in law and intended to defeat the suit through technicalities.
- (b) The Collective Bargaining Agreement alluded to by the Applicant is not applicable to their employment contracts and it does not govern the terms and conditions of service between them and the respondent since they were not privy to it.
- (c) Their contracts of service were entered into 30 years prior to the said Collective Bargaining Agreement and it was governed by the Retirement Benefits Scheme Rules which provided for retirement age of 60 years.
- (d) The Collective Bargaining Agreement made in 2013 cannot operate retrospectively but only applies to the employees who joined the respondent after that date.
- (e) They were therefore retired prematurely and illegally because they had not attained their mandatory retirement age of 60 years stipulated in the Staff Retirement Benefits Scheme Handbook which governs retirement age for every employee of the respondent.
- (e) They were not parties in the Employment and Labour Relations Court Cause No. 1174 of 2015 where the Court declined to grant injunction but they exhibited Ruling of concurrent jurisdiction in Employment and Labour Relations Court Cause No. 2292 of 2014 where injunction was granted to restrain the respondent from prematurely retiring their fellow employee.
- (f) The issue of retirement age was never fully determined in Employment and Labour Relations Court Cause No. 1174 of 2015 and it is still pending trial and as such the Court will not be embarrassed.

Analysis and Determination

3. The issues for determination are:-

- (a) Whether the suit does not disclose any reasonable cause of action.
- (b) Whether the issue in dispute herein (retirement age) has been determined by a Court of concurrent jurisdiction.
- (c) Whether the suit is likely to embarrass the Court if it arrives at a different decision.
- (d) Whether the suit is an abuse of the Court process.

Reasonable Cause of Action

4. The applicant submitted that the subject matter in the suit herein is the retirement age for the Claimants and contended that the answer is provided in Clause 22 (9) of the Collective Bargaining Agreement which states that the mandatory retirement age is 55years. That the Collective Bargaining Agreement was negotiated and signed by the union which represented the Claimants on 1.1.2013.

5. The Claimants submitted that the suit raises triable issues including:-

- (a) Whether the Collective Bargaining Agreement can retrospectively vary the terms of a contract signed 30 years before.
- (b) Whether in view of Section 9 of the Labour Relations Act, a Collective Bargaining Agreement of 2013 can introduce a Clause contradicting the contract of employment.
- (c) Whether a Collective Bargaining Agreement between the Union and the Respondent can be enforced against the Claimants who were not a party to the said contract or Collective Bargaining Agreement.
- (g) Whether a Collective Bargaining Agreement signed to provide for retirement age of 55 years can apply to the Claimants who at the time of being retired were more than 55 years old.

6. The Claimants maintained that they were not privy to the Collective Bargaining Agreement between the Union and the Respondent and as such it cannot be binding on them. They further maintained that their mandatory retirement age is 60 years as provided by the Retirement Benefits Scheme Hand Book and not 55 years as provided by the Collective Bargaining Agreement dated 10.2.2013 which they contended was invalid and a nullity vis -a- vis section 9 of the Labour Relations Act.

7. I have carefully considered the evidence contained in the rival affidavits. I have also considered the rival submissions filed plus the cited precedents and the law. There is no dispute from the evidence that there is a Collective Bargaining Agreement negotiated and concluded 2013 between a Trade Union and the respondent. There is further no dispute, that the Claimants are members of the union. There is also no

dispute that the said Collective Bargaining Agreement provided for a retirement date of 55 years as opposed to an earlier Pension Scheme Hand book which provided for 60 years as the mandatory age of retrenchment.

8. This suit herein is grounded on the reasoning that the Collective Bargaining Agreement concluded in 2013 does not apply to the Claimants, that they were not privy to it and that it cannot apply retrospectively to vary the terms of their contracts signed 30 years or so earlier.

In the Claimants' view, the 2013 Collective Bargaining Agreement was only applicable to the employees who joined the respondent in 2013 and after. However, the respondents case is that the Collective Bargaining Agreement is applicable to the Claimants and indeed governed the terms and conditions of service for them including the retirement age. For that reason she contends that there is nothing for the Court to try in the suit because the mandatory age of retirement under the Collective Bargaining Agreement was 55 years and the Claimants were retired after attaining that age.

9. I agree with the defence that the Claimants were bound by the terms and conditions of service negotiated and agreed between the Claimants' trade union and their employer under the 2013 Collective Bargaining Agreement. Once employees register themselves as members of a trade union, they are deemed to have surrendered their rights to directly negotiate for their terms and conditions of service with their employer. They cannot therefore later reject the terms negotiated by the union on ground that they were not privy to the Collective Bargaining Agreement after it is concluded and registered. The Collective Bargaining Agreement becomes their Contract of Service until another one is negotiated and concluded.

10. In view of the foregoing, the Claimant's contention that they were not parties to the Collective Bargaining Agreement concluded by their union in 2013, is fallacious and one that does not disclose any reasonable Cause of Action. Abuodha J. made similar finding in **Amalgamated Union of Kenya Metal Workers –vs- General Motors East Africa Ltd. [2016] eKLR** which was brought by Claimant's trade union on similar dispute as this suit. The Court held:-

“It is not in dispute that Clause 22 of the current Collective Bargaining Agreement sets retirement age at 55 years. It is the operating Collective Bargaining Agreement until a new one is signed. The parties are bound by the terms of the current Collective Bargaining Agreement until a new one is signed either voluntarily or through an Order of this Court upon hearing the parties.”

11. In view of the fact that the mandatory retirement age of the Claimants was expressly stated as 55 years in the Collective Bargaining Agreement which was their written contract since 2013, I see nothing reasonable for this Court to try in this suit. If the Claimants have any claim related to the amount of pension payable to them, it is my view that the law provides for an alternative procedure for that under the Retirement Benefits Act. Having found herein above that there is no reasonable dispute that warrants trial herein, I see no reason to address myself on the remaining issues framed above for determination and proceed to allow the application by the respondent.

Conclusion and Disposition

12. I have found that the dispute herein is founded on the Claimants' invalid contention that the Collective Bargaining Agreement concluded by their trade union in 2013 does not apply to them. I have also found that the said Collective Bargaining Agreement was at all material times applicable to them and the terms of service contained therein including the retirement age of 55 years were binding on them until a new Collective Bargaining Agreement was signed and registered in this Court.

Consequently, I allow the respondent's Notice of Motion dated 22.12.2017. Each party shall bear his or her own costs of the suit.

Dated, Signed and Delivered in Open Court at Nairobi this 12th day of October 2018

ONESMUS N. MAKAU

JUDGE