



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1324 OF 2018**

**JOSEPH MUTUKU KYALO & 111 OTHERS.....CLAIMANTS**

**- VERSUS -**

**DEVKI STEEL MILLS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 7<sup>th</sup> December, 2018)

**RULING**

The claimants filed on 23.0-8.2018 a notice of motion through Ataka Kimori & Okoth Advocates. The motion was under Rule 17(1), (2), (3), & (4) of the Employment and Labour Relations Court (Procedure) Rules, 2016; section 90 of the Employment Act Cap 226, sections 62, 65 and 69 of the Labour Relations Act Cap 233. The claimants prayed for orders:

- a) That the application is certified as extremely urgent and service thereof be dispensed with at the first instance for purposes of this prayer and prayer (b) below.
- b) That the Court grants priority inter-parties hearing date for the application herein.
- c) That the Court grants the applicants leave to file the claim herein.
- d) That the draft statement of claim attached herewith be deemed as dully filed.
- e) That the Court file herein be kept in the strong room.
- f) That the costs of the application be borne by the respondent.

The application was based on the supporting affidavit by the 1<sup>st</sup> claimant annexed thereto together with attached exhibits and upon the following grounds:

- a) The claimants were at all material times members of the Kenya Engineering Workers Union that represents unionisable employees in the respondent's establishment.
- b) The union and the respondent concluded the first collective agreement pursuant to a ruling by the Court delivered on 09.09.2005 in Cause 71 of 2004 between the union and the respondent. Subsequent two years' collective agreements were signed on 13.05.2009 and on 04.02.2013 respectively.
- c) Since 2009 the respondent failed to implement the collective agreement leading to disputes and grievances between the union and the respondent.
- d) The claimants claim against the respondent under the collective agreement and the Employment Act, 2007 on the headings of unpaid annual leave in arrears; unpaid public holidays in arrears; unpaid house allowance in arrears; unpaid overtime in arrears; unpaid rest days in arrears; unpaid service pay in arrears; unpaid milk allowance in arrears; unpaid night shift allowance in arrears; unpaid leave travel allowance in arrears; payment in lieu of notice; general damages on account of wrongful dismissal; exemplary damages on account of unfair labour practices; and certificate of service.
- e) Various conciliators were appointed to resolve the grievances under the Labour Relations Act, 2007 but no amicable resolution was reached. The last conciliator was appointed on 25.05.2018 and no settlement agreement or certificate of disagreement has been issued by the conciliator in that regard.

f) The respondent locked out the claimants on 29.06.2015 to compel the claimants to sign fresh contracts of service with an outsourced company, Jokali Handlers Services Limited and the respondent did so without paying the claimants their accrued benefits. The claimants were aggrieved with the lock out and they filed cause ELRCC No. 1197 of 2015 at Nairobi against the respondent. The case challenged the lockout but never claimed terminal dues. On 10.07.2015 the Court ordered the respondent to unconditionally all the claimants to resume duty pending determination of the interlocutory application in that suit. The order was extended till hearing and determination of the suit. The claimants resumed duty as was ordered and the judgment in the suit was delivered on 20.12.2016. Effective 20.12.2016 the respondent locked the claimants out despite the claimants' several attempts to continue in employment. The claimants therefore consider themselves dismissed from employment without notice and in breach of the Employment Act, 2007 and the collective agreement. The conciliator also failed to issue a certificate of disagreement and the time has lapsed in that regard.

g) The claimants' claim against the respondent is for over Kshs.100 Million and it would be unfair for the respondent not to pay the claimants' due terminal benefits.

h) The application is meritorious and brought without undue delay.

i) The claimants have not contributed to the conciliator's failure to issue the certificate of disagreement.

The respondent filed on 18.09.2018 the replying affidavit of James Mbogo Kariuki, the respondent's Group Human Resource Manager and filed through K. Mberia & Partners Advocates. The grounds of opposition are as follows:

a) The respondent honoured the collective agreements and paid the claimants per the collective agreements.

b) The claimants have blamed their union and the conciliator on delay of the resolution of their grievances but the two are not parties to the suit and the Court should not therefore adjudicate over the matter. It is proper that the trade union is enjoined in the suit as the representative of the claimants.

c) Section 67 of the Labour Relations Act, 2007 requires the conciliator to resolve a dispute within 30 days or such extended time the parties may agree to. If the prescribed time lapses, as per section 68 of the Act, or if the conciliator issues the certificate of disagreement, the dispute is deemed not resolved. The trade union was aware but never referred the dispute to the Court per section 73 of the Labour Relations Act. Over 10 years had lapsed and the claimant should not be allowed to file the belated suit.

d) The issue of the lock out was decided by Nduma J in cause No. 1197 of 2015 and those issues are *res judicata*.

j) By a notice dated 29.05.2015 the respondent informed all its employees about the outsourcing of none core functions. The outsourcing was effective 01.07.2015. Each affected employee was paid the days worked, all allowances due and service pay.

k) The claimants were given the one month notice per section 35(1) (c) of the Employment Act, 2007 and they are not entitled to pay in lieu of notice under section 36 of the Act.

l) After the termination and outsourcing, the claimants were at liberty to be employed by the contracted outsourcing service providers. Some of the employees did join that employment and signed contracts as exhibited.

m) Section 90 of the Employment Act, 2007 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 the Act or contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof. Extension of time of limitation is possible under Part III of the Limitation of Actions Act only on account of disability, acknowledgement and part payment, fraud, mistake, and ignorance of material facts and in the instant case the Court lacks jurisdiction to extend time of limitation as prescribed in section 90 of the Act.

n) It is a fallacy and imagination for the claimants to allege that the respondent owes the claimants Kshs. 100 Million.

o) Section 74(2) of Employment Act provides that an employer avails documents for the preceding 36 months. Section 53 of the Labour Relations Act, 2003 also requires the employer to keep records on minimum statutory wages or salary for the previous 3 years. The claimants' claim is for 2008 to date and it will be against the cited statutory provisions for the respondent to be expected to effectively defend the suit.

p) If the claimants are dissatisfied about the manner their union handled their grievances then the union is the proper respondent and not the respondent.

The claimants filed on 19.11.2018 the supplementary affidavit of the 1<sup>st</sup> claimant. Submissions were filed for the parties. The Court has considered the material on record and makes findings as follows:

1) The claimants' case is that they were dismissed from employment on 20.12.2016. The Court returns that for injuries that are not continuing, the 3 years of limitation of action under section 90 of the Employment Act, 2007 would lapse on or about 20.12.2019 and for such claims, the suit would not be time barred. However. For claims based on a continuing injury, the time of limitation under section 90 of the Act lapsed on or about 20.12.2017 and the claims for such continuing injury would not lie.

2) The applicants have not established a statutory provision for extension of the time of limitation prescribed in section 90 of the Employment Act, 2007 where such time of limitation has already lapsed. Consequently the application was misconceived in so far as the applicants applied for leave to file the suit out of time and the respondent's submission that the Court lacked jurisdiction to extend the time of limitation is upheld.

3) The Court follows **Attorney General –Versus- Andrew Maina Githinji & Another [2016]eKLR**, where Waki JA thus, “...By expressly inserting Section 90, the intention of Parliament, in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section preemptorily limits actions by the use of the word “shall”.”

4) The Court has taken into account the parties' respective margins of success and all circumstances of the case and each party will bear own costs of the application.

In conclusion the application filed for the claimants on 23.0-8.2018 by way of the notice of motion dated 18.08.2018 is hereby dismissed with orders:

1) For a dismissal on 20.12.2016 and for a cause of action where injuries are not continuing, the 3 years of limitation of action under section 90 of the Employment Act, 2007 would lapse on or about 20.12.2019 and for such claims, the suit as may be desired to be filed would not be time barred.

2) For a dismissal on 20.12.2016 and for a cause of action where injuries are of a continuing nature, the time of limitation under section 90 of the Act lapsed on or about 20.12.2017 and the claims for such continuing injury would not lie as the Court lacks jurisdiction to extend the lapsed time of limitation in that regard.

3) Each party to bear own costs of the application.

**Signed, dated and delivered in court at Nairobi this Friday 7<sup>th</sup> December, 2018.**

**BYRAM ONGAYA**

**JUDGE**