



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NUMBER 151 OF 2013

[Formerly Industrial Court of Kenya at Nairobi, Cause Number 254 of 2011]

BETWEEN

KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

MUHORONI SUGAR COMPANY LIMITED [IN RECEIVERSHIP].....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. John Ogutu, Industrial Relations Officer, for the Claimant

Mrs. Onyango Advocate instructed by Otieno Ragot & Company Advocates for the Respondent

JUDGMENT

1. This Claim is presented by the Claimant Union, on behalf of its 5 Members [Grievants], who are former Employees of the Respondent, a Sugar Company which has since been placed under receivership.
2. The 5 Grievants are David Malakwen Koros, Elias Onyango Ochogo, Joab Okoth Olum, Alex Ogaya and John Odhiambo Owuoth. The first 4 Grievants worked as Drivers. The 5th Grievant was a Field Clerk.
3. The Grievants were suspended by the Respondent in February 2006, on the allegation that they colluded with a non-Employee, one Elijah Muriithi, to siphon diesel from the Respondent factory. Their contracts were terminated on 22nd May 2006.
4. They filed the Claim on 23rd February 2011, 5 years after termination. They alleged that termination was unfair. The Respondent acted against the Grievants on the utterly illogical ground that Grievants' phone numbers were found in the phone-book of the suspect outsider, Elijah Muriithi. It was not shown how the Grievants were linked to fuel siphoning. Elijah was arrested, charged in a Criminal Court, tried and acquitted.
5. The Claimant seeks an order of reinstatement. There is no other prayer made.
6. The Respondent filed its Statement of Response on 29th April 2011. It is conceded that the Grievants were employed by the Respondent. The Respondent investigated fuel siphoning and prepared a report. The Grievants were asked to show cause why their services should not be terminated. They were subsequently dismissed on account of their involvement in fraud. The Respondent states that termination was procedurally fair and based on valid reason. It is the Respondent's position also, that the Claim is time-barred under Section 90 of the Employment Act and offends Rule 6 of The Industrial Court [Procedure] Rules 2010.
7. The dispute was reported to the Ministry of Labour on 12th October 2009. Conciliation did not yield settlement.
8. Grievant Number 5, John Odhiambo Owuoth, gave evidence on behalf of the Grievants on 9th November 2018. Security Officer Andrew Otieno Owuor gave evidence for the Respondent on the same date, bringing the hearing to a close.

The Court Finds:-

9. The sole remedy sought by the Claimant is not reasonable or practicable.

10. The Respondent is a company in receivership. Companies are placed in receivership when they cannot meet their financial obligations. It is not likely that the Respondent would be in a position to restore the Grievants to their jobs, without loss of benefits, as sought by the Claimant. It is not reasonable to expect the Respondent to sustain Grievants in employment, while the Respondent is in a financial quandary.

11. 12 years have passed from the time the Grievants left employment. The Parties have moved on, and it is unlikely that they would be able to rebuild an employment relationship, based on trust and confidence. ***In Kenya Union of Sugar Plantation & Allied Workers v. Muhoroni Sugar Company Limited, [in receivership] [2018] e-KLR***, the Court declined the order of reinstatement, on the ground that the Claimant had not shown exceptional circumstances to warrant reinstatement of Employees.

12. The Claim is improperly before the Court. Termination took place in 2006. The dispute fell under clause 4 [d] of the 5th Schedule, under Section 84 of the Labour Relations Act 2007, which provides that any summary dismissal which took place before the commencement of the Labour Relations Act [26th October 2007], shall be determined in accordance with the provisions of the Trade Disputes Act, Cap 234 [now repealed].

13. The Claim should have been referred to the Industrial Court under Sections 5[g] and 8 of the Trade Disputes Act, read together with Schedule 5 of the Labour Relations Act.

14. On Section 90 of the Employment Act, pleaded by the Respondent, the Court agrees with the interpretation of this Court, made in ***Kenya Union of Sugar Plantation and Allied Workers v Muhoroni Sugar Company Limited [in receivership] [2018] e-KLR***. The Employment Act 2007 was not in force when termination occurred. The Claim would not be time-barred under a law which was not in force on the date of termination. The Claimant has not mentioned the Employment Act 2007. Reinstatement has not been pleaded under the Employment Act 2007. It has not been submitted that the Grievants were dismissed contrary to any provision of the Employment Act 2007. There is no ground to bring in, any provision of the Employment Act 2007, to this Claim.

15. Section 15 of the Trade Disputes Act allowed the Industrial Court to grant an order of reinstatement. There was no time-bar under the Trade Disputes Act. Case-law has established however, that Claims based on contracts of employment, were at the time, subject to the time-limit created under the Limitation of Actions Act, Cap 22 the Laws of Kenya. Objection by the Respondent on time-limit would only succeed, if it was shown that the Claim was filed in violation of the time-bar created under the Limitation of Actions Act, rather than the Employment Act 2007. Case-law from the old Industrial Court also established that an order of reinstatement would not be available where considerable time had lapsed, from the date of termination. The decisions of the Court on this were predicated on the concepts of reasonableness and practicability. Section 12 [3] [vii] of the current Employment and Labour Relations Court Act, which sets a limit of 3 years on the grant of the remedy of reinstatement, from the date of termination, is a codification of case-law from the old Industrial Court of Kenya.

16. The Court is convinced that the Claim has no merit and is not properly before it.

17. The decision of the Court cited at paragraphs 10 and 13 above, relates to the same Parties. The issues in dispute are not dissimilar. The same, single remedy, of reinstatement is sought. The Grievants left employment 12 years ago. The Claims were filed in the same year 2011, and kept in abeyance until this year. Judgment in the earlier case was delivered on 3rd May 2018. The Claimant should have withdrawn the present Claim, or pursued settlement with the Respondent in any other way other than adjudication, having heard what the Court said, in the previous Claim. It was not necessary to stretch judicial resources, and take the Respondent through another process of judicial hearing. It is the view of the Court, that the Claimant Union pays costs to the Respondent.

IT IS ORDERED:-

a) The Claim is rejected.

b) Costs to the Respondent.

Dated and signed at Mombasa this 22nd day of November, 2018

James Rika

Judge

Dated, signed and delivered at Kisumu this 6th day of December, 2018

Mathews Nderi Nduma

Judge