

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 495 OF 2014

JOHN WALTER OTIENO.....1ST CLAIMANT/RESPONDENT

JOSEPH LWANIA..... 2ND CLAIMANT/RESPONDENT

JOSEPH WABUSHI.....3RD CLAIMANT/RESPONDENT

VERSUS

KENYA UNION OF POST PRIMARY.

EDUCATION TEACHERS.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant filed the notice of motion seeking to have the memorandum of claim as well as the amended memorandum of claim filed herein to be struck out for the reason that the claim was statute barred. The notice of motion expressed to be under Order 51 Rule 1 of the Civil Procedure Rules 2010 and Section 90 of the Employment Act 2007, is supported by the grounds on the face of it and the affidavit of Maurice Akello Misori sworn on 20th April 2016.

2. The Claimants appearing in person at the time of the motion being disposed of filed in opposition to the notice of motion a document structured in the form of a letter dated 13th October 2017. The Respondent had filed submissions on 25th September 2017. In brief, the Respondent/Applicant asserts that the cause of action arose on 31st December 1999 when the Claimants' terms of office ended and they raised their demand for payment with the Respondent. The Respondent argues that the Claimants had until 31st December 2002 to file suit as that was the end of the 3 year limitation period imposed by statute. The Respondent relied on the case of **Fred Mudave Gogo v G4S Security Services (K) Ltd [2014] eKLR** where the court held that a claim that does not conform to the mandatory time limitations must fail. The Respondent cited the case of **Peter Nyamai & 7 Others v J Clarke Limited [2013] eKLR** and argued that the Claimants claim was time barred even if they had resorted to an alternative dispute resolution mechanism as provided for under the Constitution of Kenya or labour laws. The Respondent thus urged that the claim be struck out with costs.

3. The Claimants set out a litany of complaints against the Respondent which they had helped birth in the 1990's during the regime of President Moi. They articulated the steps the matter had taken in court and concluded that their chances of recovering from the Respondent was nil taking into account the Respondent's unfair treatment of the Claimants. The Claimants submitted that at the time of the inception of the union, it did not have the capacity to pay their dues but with the revamped membership of over 34,000 members and revenue of Kshs. 35 million per month, the Respondent can now afford to pay their dues.

4. Limitation of a cause of action depends on the time constraints imposed by statute. The claim herein is predicated on occurrences in December 1999. To be precise, 31st December 1999 is when the cause of action accrued. At the time, the Employment Act 2007 was not in force and therefore the law applicable law is the Employment Act cap 226 (now repealed). The Employment Act in force at the material did not

provide for a time limit and the law thus applicable is Section 4(1) of the Limitation of Actions Act. It provided for 6 years. From 31st December 1999, the Claimants had until 31st December 2005 to file a suit. This suit was filed on 30th April 2014 some 15 or so years later which is 9 years outside the limitation period. In the case of **David Ngugi Waweru v Attorney General & Another [2017] eKLR** the Court of Appeal (Waki, Nambuye, Kiage JJA) held that limitation of actions under Section 4(1) of the Limitation of Actions Act do not contemplate extension and that there is no room to extend time regardless of the sympathy a court may have to a party before it. Sadly, in this case, the founders of KUPPET are languishing in poverty and there is nothing the court can do to extend time to enable them to pursue their remedies. Perhaps their hopes lie on the negotiating skills they possess to get the current crop of officials to pay them their dues since they too will retire some day and will want to be dealt a fair hand as well. The suit is hopelessly time barred and it is struck out. There is no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 4th day of December 2017

Nzioki wa Makau

JUDGE