



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.14 OF 2014

FORTUNATA WANJIKU MUCHEMI.....1ST CLAIMANT
PRISCILLAH WANGUI MAINGI.....2ND CLAIMANT
MARTHA NJOKI MAINA.....3RD CLAIMANT
DAVID MURIITHI NDEGWA.....4TH CLAIMANT
MAGDALINE NYAWIRA HUMBU.....5TH CLAIMANT
GRACE NYATHOGORA NDEGWA.....6TH CLAIMANT
ROSE WAIRIMU MWANGI.....7TH CLAIMANT
ANGELICA WANJA NGUKU.....8TH CLAIMANT
BEATRICE WAIRIMU MWANGI.....9TH CLAIMANT

VERSUS

ARCHDIOCESE OF NYERI CONSOLATA HOSPITAL, MATHARI.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 7th April, 2016)

RULING

The claimants filed the memorandum of claims on 21.01.2014 through A.J.Kariuki & Company Advocates. The claimants prayed for judgment against the respondent for:

- a. The claimants herein be paid their retirement benefits as per the parties' collective bargaining agreement and as calculated in the claimants' written statements.
- b. The claimants' union (KUDHEIHA) be required to take part as are required by law to ensure the claimants do not suffer injustice.
- c. The costs of the suit plus interest.
- d. Any other relief the honourable court deem just so to grant.

The respondent filed a notice of preliminary objection on 14.05.2014 through Kahiga Mungai & Company Advocates. The notice stated the following grounds:

- a. The suit is frivolous, vexatious, and an abuse of the due process of the court.
- b. The suit is fatally defective and ought to be struck out as the same is *res judicata*.
- c. That no documentary evidence has been made to support the allegations made.

The respondent changed its advocates to Kahari & Kiai Advocates by the notice filed on 18.12.2014 and refilled a notice of preliminary objection on the same date together with the statement of defence. At paragraph 6 of the defence the respondent stated that the claimants together with 21 other workers filed Industrial Court of Kenya Cause No. 176(N) of 2008 which matters were settled and judgment entered in favour of the respondent and costs awarded thereof. At paragraph 7 the respondent stated that the prayers sought herein have not shown any cause of action against the respondent and that they are not enforceable as they involve orders against third parties who are not in control of the respondent. Thus the respondent prayed that the claimants' claim be dismissed with costs.

The respondent filed on 21.10.2015 the notice of change of advocates to Wahome and Gikonyo Advocates and all pleadings filed for the respondent were expunged from the record by the orders of 23.10.2015.

The respondent filed on 02.12.2015 the response to the claim. At paragraph 1, the respondent pleaded that the suit was *res judicata* in view of the award in Industrial Court of Kenya Cause No. 176(N) of 2008 at Nairobi. Further the claimants having been retired or severed in 2008 and their dues paid in January, 2009 the claims were statutory barred under section 90 of the Employment Act, 2007. The respondent gave notice of a preliminary objection on account of the two grounds. This ruling is to determine the preliminary objection.

The **1st issue** is whether the suit is *res judicata*. The materials on record are clear. The earlier suit Industrial Court of Kenya Cause No. 176(N) of 2008 at Nairobi was between the Kenya Union of Domestic, Hotels, Educational Institutions, Hospital and Allied Workers against Consolata Hospital, Matathari, Nyeri. There appears to be no doubt and dispute that the respondent in the present suit is claiming in the same behalf as the respondent in the earlier suit or that it is the same and one entity. The earlier suit was by the union on behalf of its 46 members who are said, in the award, to have been listed. That list is not before the court and is hard to tell if the claimants in the present suit could have been in that suit. All that is before the court is a denial by the claimants in the reply to the response that they were not amongst the 46 members listed in the earlier suit. The court finds that the issue as urged before the court is a dispute of fact to be resolved at a full hearing and thus the preliminary objection as founded upon *res judicata* will fail as it does not meet the settled principle in preliminary objections that the parties should not be in a dispute about the relevant facts.

The **2nd issue** for determination is whether the suit is time barred. The memorandum of claims is filed on 21.01.2014 and is dated 2.10.2014. The claimants at paragraph 3 of the memorandum of claims state that their disputes relate to a letter dated 10.03.2009. The claimants' witness statements show they were retired by January 2009. Their claim is for terminal dues in view of that retirement. The court finds that their cause of action was time barred as it was filed after lapsing of 3 years as envisaged in section 90 of the Employment Act, 2007. On that account and in line with the submissions made for the respondent, the suit is liable for dismissal.

In conclusion, the claimants' suit is hereby dismissed with orders that the claimants will pay the respondent's costs of the suit for the period after 23.10.2015.

Signed, dated and delivered in court at Nyeri this **Thursday, 7th April, 2016.**

BYRAM ONGAYA

JUDGE