



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.176 OF 2015

MICHAEL KARIITHI MUTHEE..... CLAIMANT

VERSUS

MATHIRA WATER AND SANITATION COMPANY.....RESPONDENT

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

RULING

The claimant filed the memorandum of claim on 02.10.2015 through M’Njau and Margetto Advocates and on 02.12.2015 changed his advocates to Muhoho Gichimu & Company Advocates.

The respondent filed the response to the claim on 08.12.2015 through Wahome Gikonyo & Company Advocates. At paragraph 5 of the response it is stated that the claimant through his union reported the labour dispute to the Minister for Labour and is stated the conciliator was required to resolve the dispute within 30 days from the time of the referral, the dismissal having taken place on 28.02.2013 so that the suit was time barred under section 67 of the Labour Relations Act, 2007 and section 90 of the Employment Act, 2007. The respondent then gave a notice of preliminary objection.

The issue for determination is whether the suit is time barred as urged for the respondent in the preliminary objection.

The facts per record and the relevant law are as follows:

- a. The claimant was dismissed by the letter dated 28.02.2013.
- b. Section 62 (3) of the Labour Relations Act, 2007 provides that a trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within 90 days of the dismissal; or any longer period the Minister, on good cause, permits. The union reported the dispute by its letter of 5.02.2014. The report was obviously outside the prescribed time.
- c. Nevertheless, the Chief Industrial Relations Officer accepted the report of the dispute and appointed a conciliator as per section 65(1) of the Labour Relations Act, 2007 per the letter dated 28.05.2014. The said section 65 (1) of the Act requires the Minister to appoint a conciliator within 21 days of a trade dispute being reported. The date the minister received the letter of 5.02.2014 reporting the dispute is not clear but what is clear is that a conciliator was appointed (taking it that the Chief Industrial Relations Officer was acting for the Minister on delegation or conveying the Minister’s decisions but which is not apparent on the face of the letter.)
- d. Under section 67(1) of the Act, the conciliator was to attempt to resolve the dispute in 30 days of his appointment or such other time the parties would have agreed upon. The 30 days ended on or about 28.06.2014 but the conciliator issued a certificate of dispute dated 11.08.2015. Section 69 of the Act provides that the dispute is deemed to be unresolved after conciliation if the conciliator

- issues a certificate that the dispute has not been resolved by conciliation; or 30 days period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.
- e. Section 73(1) of the Act provides that if the dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial court. Rule 6 of the Industrial Court (Procedure) Rules, 2010 provides that a referral to the court is by a statement of claim and no special time lines are set. It is the opinion of the court that the timelines would be the period of limitation as set out in section 90 of the Employment Act, 2007. Thus, where all steps have been followed under part VIII of the Labour Relations Act, the court holds that time for instituting the suit shall run from when the dispute is deemed to be unresolved after conciliation if the conciliator issues a certificate that the dispute has not been resolved by conciliation; or 30 days period from the appointment of the conciliator, or any longer period agreed to by the parties, expires (in line with the provisions of section 69 of the Act). It is the further holding of the court that where there are any defects in the timelines in the procedure under part VIII of the Labour Relations Act, 2007, time for instituting the suit shall run from the date of the dismissal in issue. In both instances as to the date the cause of action accrues, the claimant must file the suit within the time of limitation under section 90 of the Employment Act, 2007.
- f. In the instant case, despite any possible defects in the timelines under part VIII of the Labour Relations Act, 2007, the cause of action in any event accrued on the date of dismissal on 28.02.2013 and the suit was filed on 02.02.2015 long before or about 28.02.2016 when the 3 years prescribed in section 90 of the Employment Act, 2007 were to lapse. Accordingly, the court returns that in the circumstances of the present case, the claimant's suit was not time barred. As the claimant has not alleged and made claims with respect to a continuing injury, he did not need to file the case within 12 months from the date of the cause of action prescribed for a continuing injury under section 90 of the Employment Act, 2007.

The court finds that the decisions cited for the respondent are clearly distinguishable from the facts of the present case. Thus in **KUDHEIHA –Versus- Kaheti Primary School [2014]eKLR** the Minister had appointed the conciliator over five years from the due time and the suit was clearly time barred. In **Kenya Union of Commercial Food and Allied Workers –Versus- Mutuguta Farmers Co-operative Society Limited [2015]eKLR** the suit had many defects including that there had been no recognition or collective agreements between the parties, no statutory trade dispute resolution by conciliation was shown to have taken place, and six years of the period of limitation under section 4 of the Limitation of Actions Act, Cap.22 had clearly lapsed. In **Kenya Union of Commercial Food and Allied Workers –Versus- Kirubia Farmers Co-operative Society Limited [2015]eKLR** the collective agreement did not apply and 6 years under section 4 of the Limitation of Actions Act, Cap.22 had clearly lapsed.

In conclusion, and for the stated findings and holding, the preliminary objection shall fail with orders that the respondent will pay the claimant's costs for opposing the objection. Parties are now invited to take directions on further steps in the suit.

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

BYRAM ONGAYA

JUDGE