

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 95 OF 2016

**KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS AND
HOSPITAL WORKERS.....CLAIMANT/APPLICANT**

VERSUS

THE BOARD OF MANAGEMENT, MAKINDU HIGH SCHOOL....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 22nd July, 2016)

RULING

The claimant filed an application on 16.05.2016 seeking to file the memorandum of claim out of time. The notice of motion was brought under section 12(2) and 3 (1) of the Industrial Court Act, 2011 and all enabling provisions of the law. It was supported with the affidavit of Mwari S. Njiru filed together with the application. The applicant desires to file a suit out of time on account of the alleged unfair termination of the employment contracts of its members Samuel I. Nzui, Ndunda M. Izenze; and Samuel M. Kituku (herein after “the grievants”).

The dispute went to statutory conciliation and the conciliator issued a certificate of disagreement on 04.12.2013. The facts of the case are that each of the grievants received from the respondent the letter dated 04.02.2009. The letter conveyed that following the theft of some gadgets from the respondent’s school bus including the starter meter, alternator and power steering pump while each of the grievants was on duty, the respondent had met on 31.01.2009 and interdicted each of the grievants until further notice. It appears that the grievants were subsequently arrested and prosecuted in relation to the alleged theft and were acquitted on 28.04.2011 under section 215 of the Criminal Procedure Code.

The respondent opposed the application by filing the grounds of opposition on 01.07.2016 through F.O.Makori, Litigation Counsel. It is the respondent’s case that the time of limitation of three years under section 90 of the Employment Act, 2007 having lapsed as conceded by the applicant, the court lacks jurisdiction to extent the time for filing the suit and the application must therefore fail.

The material on record is that the grievants were interdicted on 04.02.2009 until further notice. The claimant’s case is that the grievants were not paid half salary during the interdiction as per the provisions of the collective agreement and further, the grievant’s employment has never been terminated.

The court finds that taking the material on record into account, the grievants are still serving on the indefinite interdiction and there is nothing that would stop parties from furthering their employment relationship or terminating it or taking such other steps in view of the interdiction, the grievant’s acquittal and the provisions of the collective agreement. In alternative the grievants were constructively terminated from employment taking all the circumstances of the case into account. Since the interdiction has never been lifted, it is the court’s opinion that the respondent is entitled to make such appropriate administrative or managerial decisions in that regard. As submitted for the respondent, it could very well be that the grievants and the claimant are guilty of laches having failed to appropriately move the court following their acquittal on 28.04.2011. All those are matters that would be subject to determination when properly placed before the court. In so far as the application before the court is concerned, the court returns that the applicant has failed to make out a case for expansion of time as the legal basis to extend the time has not been established. The facts and prayers in relation to the cause of action have remained blurred throughout the consideration of the present application.

The court returns that the application was misconceived. It is not clear what cause of action was time barred, the limits of the extension of time applied for were not clear, and the interdiction having not been lifted, the grievants would appear to be in service until the respondent makes appropriate decisions in that regard or the grievants stand constructively terminated from the date of the indefinite interdiction or the date of the acquittal. The issue of the court extending time and the provisions of law justifying such extension have not been established on the part of the applicant.

The court has considered the blurred status of the employment relationship between the grievants and the respondent following the interdiction together with the subsisting collective and recognition agreements binding the parties and considers that each party shall bear own costs of the application.

In conclusion the application filed on 16.05.2016 is hereby dismissed and each party to bear own costs of the application.

Signed, dated and delivered in court at Nyeri this Friday, 22nd July, 2016.

BYRAM ONGAYA

JUDGE