



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 297 B OF 2014

Consolidated with Cause No.283, 298, 299, 300, 301, 302 and 303 of 2014

(Before Hon. Lady Justice Maureen Onyango)

1. HUMPHREY OMENGEH

2. JOSHUA OUMA

3. PATRICK OTIENO NGIRE

4. JONATHAN OYIEYO

5. WILSON OMULO

6. CALEB ODHIAMBO OKECH

7. BARRACK OTIENO

8. CHARLES ODHIAMBO ANYANGOCLAIMANTS

-Versus-

CHEMELIL OUTGROWERS CO. LIMITED RESPONDENT

JUDGEMENT

This Judgement is in respect of 8 different suits which were heard together as follows:-

1. Kisumu Cause No.283 of 2014 HUMPHREY OMENGEH v CHEMELIL SUGAR CO. LIMITED (Formerly Nairobi Cause No.15 of 2012)
2. Kisumu Cause No.297'B' of 2014 JOSHUA OUMA OMOLLO v CHEMELIL SUGAR CO. LIMITED .
3. Kisumu Cause No, 298 of 2014 PATRICK OTIENO NGIRE v CHEMELIL SUGAR CO, LIMITED.
4. Kisumu Cause No.299 of 2014 JONATHAN ONYANGO OYIENGO v CHEMELIL SUGAR COMPANY.

5. Kisumu Cause No.300 of 2014 WILSON OMOLLO MANYASA v CHEMELIL SUGAR CO. LIMITED.
6. Cause No.301 of 2014 CALEB ODHIAMBO OKECH v CHEMELIL SUGAR CO. LIMITED.
7. Cause No.302 of 2014 BARRACK OTIENO ODUOR v CHEMELIL SUGAR CO. LIMITED .
8. Cause No.303 of 2014 CHARLES ODHIAMBO ANYANGO v CHEMELIL SUGAR CO. LIMITED.

Each of the Claimants testified in the individual files but the defence was heard together in respect of all cases. The Respondents witness was MOPHAT OMONDI, the Human Resource and Administration Manager.

Facts

HUMPHREY OMENGE the 1st Claimant testified that he was employed as a tractor driver on 1st January 1996. He was later engaged as a supervisor from 2003 to 2005. He was again engaged as a field assistant from 2006 to 2008. In 2008 he was called by the Human Resource Manager Mr. Tom Roye to his office. The Human Resource Manager told him that he had attained the age of 55 years. He asked for his retirement benefits but was not paid. He was also not issued with a letter notifying him of the retirement. He then sought help from the Labour Office which put pressure on the Respondent. He was eventually paid Shs.120,434.35. He testified that he was entitled to payment of Shs.931,352.35 which he is praying that this court orders the Respondent to pay less the amount received.

JOSHUA OUMA OMOLLO, the 2nd Claimant testified that he was employed by the Respondent on 1st May, 2007 and stopped working on 13th July, 2009 when his employment was terminated. He was informed by the supervisor that there was no more work. He was not given a letter of termination. He was paid Shs.68,015.80 but he was entitled to Shs.302,371.00. His Claim is for the difference of Shs.234,351.00. He worked as a sanitary attendant and worked continuously. His terminal dues were tabulated by the Labour Officer.

The 3rd Claimant PATRICK OTIENO NGIRE testified that he was employed by the Respondent on 8th March 1995 as a bag stacker in the sugar store. He worked until 6th April, 2009 when his services were terminated. He reported to work on that day when he was informed by the time keeper that his clocking card was missing. He was paid Shs.77,538 but his terminal dues were calculated by the Union as Shs.830,226. He is claiming the balance of Shs.652,688.

The 4th Claimant JONATHAN ONYANGO OYIEYO testified that he started working for the Respondent in January, 2003 as a sanitary attendant and worked until 13th July, 2009 when he was abruptly stopped from working. He reported to work on that day but was not allowed to work by a manager whose name he could not recall at the time of hearing. He was paid Shs.101,188.90 after intervention by Labour Officer. His terminal dues were calculated by the Union at Shs.673,638. He is claiming the difference of Shs.642,800.

The 5th Claimant CALEB ODHIAMBO OKECH was employed by the Respondent in March, 2007 under welfare department. He was later transferred to Sugar Stores. He was stopped from working on 13th July, 2009. His salary was Shs.12,000 per month. He worked continuously. On 13th July, 2009 when he reported to work his card was missing. The time keeper told him his services had been terminated. He was later in 2010 paid Shs.46,221 after intervention by the Labour Officer. He was however entitled to Shs.302,371 so he is claiming the balance of Shs.263,171 and damages for unfair termination.

The 6th Claimant BARRACK OTIENO ODUOR testified that he was employed by the Respondent from June, 2005 as a sanitary attendant and left employment on 13th July, 2009. On that day he reported to work as usual but was told by the time keeper that his card was missing. He was later paid Shs.82,356

but the labour office had directed that he should be paid Shs.391,638. His claim is for the balance between what was due and what was paid being shs.309,283.

The 7th Claimant CHARLES ODHIAMBO ANYANGO testified that he started working for the Respondent in 1995 as a spray attendant. Later he was engaged as a lab sampler. On 13th July, 2009 he reported to work at 2pm but found his clocking card missing. When he asked where it was he was told to go and see the employment manager who did not give him any reason. He was informed by the lab technician that his employment had been terminated. He was not paid for the last day worked.

He later reported to the Labour Officer who wrote to the Respondent. There was a meeting between the Respondent and the Labour Officer. Thereafter he was paid Shs.125,000 but was entitled to Shs.935,888. He testified that he is claiming the balance of Shs.810,487.

For the Respondent MOPHAT OMONDI testified that HUMPREY OMENGE was initially employed as a tractor driver and worked intermittently up to 2007 when he started working continuously. He was terminated in September, 2008. He reported a dispute at the Labour Office and after conciliation the Respondent agreed to pay him notice, leave and other benefits. He was paid shs.120,434.35. Later the Respondent received a demand letter claiming CBA back dated pay, severance pay, accrued leave, house allowance and notice. He testified that the 1st Claimant was never a union member and was being paid shs.577.90 per day while according to General Order for 2009 the minimum rate was shs.293.35 inclusive of house allowance.

Mr. Omonge testified that the 1st Claimant was paid for annual leave as directed by the Labour Officer at the rate of 28.8 days per year or 2.4 days per month according to the Respondent's leave policy. He stated that the 1st Claimant is not entitled to severance pay as his last contract stipulated and the 1st Claimant was aware that the contract was ending on 7th September 2008.

He testified that apart from the 1st Claimant all the other claimants were terminated on 13th June, 2009. The termination was verbal and they were not paid terminal dues until after intervention of Labour Officer. He testified that the payments were partly agreed on at the Labour Office and the tabulation done by the Respondent. He testified that the Respondent had discretion to determine how much to pay and did not consult the claimants. He testified that the Claimants were paid 2 weeks pay in lieu of notice, accumulated leave and accumulated off-days.

Determination

From the evidence on record and the pleadings as well as the written submissions, the issues for determination are the following:-

- 1. Whether the Claims filed by the Claimants are time barred.**
- 2. Whether on not the Claimants were casual employers.**
- 3. Whether the termination of the Claimants was unfair or was declared redundant.**
- 4. Whether the claimants are entitled to the reliefs sought.**

Limitation

The parties are all agreed that the Claimants were employed on various dates but their services were all terminated on 13th July, 2009. Subsequently certain payments were made to the Claimants on 14th May, 2010. The claims were therefore supposed to be filed within 3 years of the payment being 14th May, 2013. The Claims were however filed on 5th November 2014, more than one year later, without leave of the court. It is only the 1st Claimant HUMPHREY OMENGEH whose Claim was filed in Nairobi on 9th January 2012 before being transferred to this court on order made on 24th October, 2012.

The Respondent has submitted that the suits are time barred as they offend the provisions of section 90 of the Employment.

Although the plea of limitation was raised in the defence and in the written submissions filed by the Respondent, the Claimant's counsel has completely ignored the issue.

Section 90 of the Employment Act is couched in mandatory terms. It provides that -

90. Limitations

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

The effect of limitation is to extinguish a right such that the court can no longer exercise its jurisdiction to determine a claim that is time barred. In the case of **Peter Nyamai & 7 others v M.J. Clarke Limited [2013]eKLR Radido J.** stated as follows -

"The first thing I need to state is that the time limit on filing of Claims is a jurisdictional question and not merely procedural.

I say so placing reliance in the Court of Appeal decision in Divecon v Samani (1995-1998) EA 48. I must however mention that the cause of action in the Divecon case was based on tort though, the Court of Appeal mentioned that the trial Court had found that the cause of action was founded on both tort and contract. The Court of Appeal nevertheless went ahead to consider the grant of leave or extension of time in respect of causes of action based on contract."

I find that apart from the Claim filed by HUMPHREY OMENGEH all the other claims are time barred and this court has no jurisdiction to determine them. The suits are therefore struck out.

For HUMPHREY OMENGEH it has been submitted by the Respondent that his last contract expired and therefore the termination of his employment was as a result of expiry of his contract and not an unfair termination.

In the documents filed in court by the claimant upon which he bases his claim, there is a tabulation of his terminal dues as follows -

Name	Humphrey Omengeh Aluoch	
Years of Service	13 Years	
Annual Leave Days	390 x 577	225,030
Leave Allowance	13 x 815	23,595
Off Days	144 x 577	83,088
Notice Pay Days	90 x 577	51,930
Overtime Days		
Severance Per Days	338 x 577	195,026
House Allowance Months	156 x 2260	352,684

Total Kshs.	1,143,353
Amount Paid Kshs.	120,434
Balance Kshs.	1,022,919

A similar document is filed by the Respondent in the list of documents filed on 8th April, 2015 as No.3 thereof referred to as "**3. schedule of terminal benefits for Humphrey Omengeh Aluoch.**"

At Appendix 4 thereof is copy of payment cheque for the said Humphrey Omengeh Aluoch but for Shs.120,434.35.

Both the 1st Claimant and RW1 testified that the tabulations of terminal benefits was done following the conciliation meetings at the labour office. It is the courts view that the said Appendix 3 is the tabulation for the 1st Claimant but the Respondent on its own decided to pay the Claimant an amount that it unilaterally determined as stated by RW1 in his testimony under cross examination. No other explanation was given for not paying the full amount agreed upon at the Labour Office. In the Respondents list of Documents filed on 5th February 2016, item 2 thereof is an Internal Memo dated 12th May, 2010 in which the Head of Human Resource instructed the Head of Finance to limit payments to 3 years based on a salary of either Shs.10,798 per month or Kshs.414.63 per day capped at 3 years. This is how the figure of shs.120,434.35 paid to the 1st Claimant was arrived at. Yet the tabulation at the labour office shows that the 1st Claimant worked for 13 years and was paid a daily wage at the rate of Shs.577 per day.

For the foregoing reasons, I find that the 1st Claimant HUMPHREY OMENGEH is entitled to payment as tabulated at the Labour Office in the sum of Shs.1,022,919 less payments received in the sum of Shs.120,434.35 leaving a balance of Shs.902,484.65. I accordingly enter judgement for 1st Claimant against the Respondent for Shs.902,484.65 with costs and interest at court rates.

Dated and signed and delivered this 29th day of September, 2016

MAUREEN ONYANGO

JUDGE