



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**  
**CAUSE NO. 730 OF 2013**  
**TAILORS AND TEXTILES WORKERS UNION.....CLAIMANT**  
**VERSUS**  
**ALPHA KNITS.....RESPONDENT**  
**RULING**

1. On 2<sup>nd</sup> March 2015, the Respondent Alpha Knits Ltd filed Notice of Preliminary Objection pursuant to the claim filed by the claimant, Tailors and Textiles Workers union on 20<sup>th</sup> May 2013. At paragraph 3, the Respondent states;

*The Respondent shall raise a preliminary objection in reference to the Fifth Schedule of the Labour Relations Act No.7 of 2007 under the Transitional Provisions Clause 4(a) which states that:*

*Where any of the following matters commenced before the commencement of this Act, the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed).*

*a. Any trade dispute that arose before the commencement of this Act.*

2. The Respondent also submitted that the grievant, **Ms Zippora Gesare Gichana was dismissed from the employment of the Respondent on 24<sup>th</sup> October 2007**. That this matter needed to have been brought to court pursuant to the provisions of the Labour Relations Act noting the date of the cause of action. That the Claimant failed to follow the laid down channels under the Trade Disputes Act, Cap 234 (repealed) at section 14(9)(b) which provides that;

*(9) the court shall not take cognizance of any trade dispute or deal with any matter connected therewith –*

*(a) where the trade dispute arises in any part of the public sector 9 as defined in section 27 (and there is in the opinion of the court adequate machinery for the determination of terms and conditions of employment in that part of the public sector (whether that machinery was established by regulations made under this Act or by any other written law);*

*(b) unless the trade dispute has been reported to the Minister and twenty-one days have lapsed since the date on which the dispute was so reported;*

3. That this matter should have been reported to the Minister for conciliation first before coming to court and thus the claim offends the provisions of section 4(4) of the Trade Disputes Act, Cap 234 Laws of Kenya (now repealed) as the cause of action arose during the subsistence of Cap 226 and as the claim relies on Labour Relations Act, Labour Institutions Act and the Employment Act which commenced on 2<sup>nd</sup> June 2008 after the cause of action arose, the suit should be struck off. The Claimant has failed to comply with the mandatory provisions of section 4(4) of the Trade Disputes Act (now repealed). The law then required any trade dispute involving the dismissal of an employee or termination of any contract of employment to be reported to the Minister within 28 days of the dismissal or termination of employment. This dispute was never reported to the Minister.

4. That the Claimant has also not complied with section 2(4) of the Fifth Schedule of the Labour Relations Act with regard to the provisions of section 17;

*17. (1) The award or decision of the Industrial Court shall be final.*

*(2) The award, decision or proceedings of the Industrial Court shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise, either at the instance of the Government or otherwise.*

5. The Respondent also submit that the objection herein is submitted based on principles set out in **Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd [1969] E.A.** noting the point of law raised herein which if considered would dispose of the suit and as held in **Tailors and Textiles Workers union versus Moi University and Rivertex E.A. Ltd, Cause No.1981 of 2011** that a preliminary objection cannot be sought with regard to the exercise of judicial discretion and must relate to questions of law based on the facts that the issues of facts raised are correct. The question raised herein relate to limitation and non-compliance with mandatory provisions of section 4(4) of the Trade Disputes Act, Cap 234 laws of Kenya (repealed) and section 4(4) of the Trade Disputes Act, Cap 234 laws of Kenya (repealed).

6. The Respondent has relied on the following case – **Ayub Asamba versus Telkom Ltd, Cause No164 (N) of 2009** and **Joseph Mbasi Muthama & Others versus BAT, Cause No.s 857, 858 and 859 of 2010.**

7. The Claimant on their part submit that the objections raised are frivolous and meant to delay justice as suits should not be dismissed on mere technicalities. The Claimant followed the procedure laid down under section 4(4) of the Trade Disputes Act (now repealed). The matter was reported to the Minister for conciliation and an investigator was appointed and a report given by the time the suit was filed on 17<sup>th</sup> May 2013. The respondents are aware of the report to the Minister from correspondence from the labour officer and investigator as both parties were invited for conciliation meetings and requested for memoranda. The investigator has not given a report and noting the delay, the claimants filed suit before the court.

8. The Claimant also submit that the cases cited by the Respondent are not relevant as procedures required were followed. The objections should be dismissed to enable the Claimant be heard.

## **Determination**

9. On 21<sup>st</sup> November 2007 the Claimant reported a dispute with the minister against the Respondent with regard to the Grievant herein, Gesare Zippora Gichana. The Minister wrote to the parties on 13<sup>th</sup> December 2007 inviting them to attend a meeting and to carry employment records on 19<sup>th</sup> December 2007. On 25<sup>th</sup> January 2008 the Minister further wrote inviting both parties to a meeting. A further invitation of the Minister to a meeting was done vide letter dated 11<sup>th</sup> March 2008. On 10<sup>th</sup> June 2008 parties were invited to submit their memoranda for investigations to commence.

10. The claim herein was filed on 20<sup>th</sup> May 2013. The issue in dispute is the *wrongful dismissal of Ms.*

*Zippora Gesare Gichana (S/N 50/50)*. The prayers sought relate to wages for 23 days worked; house allowance, cash in lieu of notice; service-gratuity; and 12 months compensation.

11. The Claimant admit that the cause of action relate to the dismissal of the Grievant on 23<sup>rd</sup> October 2007. The Labour Relations Act, the Labour Institutions Act and the Employment Act commenced on 2<sup>nd</sup> June 2008. The cause of action therefore occurred before the coming into force of these laws. The case herein having been filed through the claimant, a trade union, became covered by the Trade Disputes Act (now repealed) and the operative period for filing such suit with the court was covered by the Limitation period of 6 years as provided in the Limitation of Actions Act.

13. Under both the Trade Disputes Act (now repealed) disputes filed by trade unions must commence by reporting the dispute to the Minister for Labour under Section 4 of the Trade Disputes Act or as now set out under Section 62 of the Labour Relations Act. Section 4 of the Trade Disputes Act provides as follows;

***(1) Subject to subsection (4) any trade dispute, whether existing or apprehended, may be reported to the Minister by or on behalf of any party to the dispute.***

***(2) Every report of a trade dispute shall be made in writing and shall sufficiently specify.***

***(a) The employers and employees, or the classes and categories thereof, who are parties to the dispute:***

***(b) The party or parties by whom or on whose behalf the report is made:***

***(c) The nature of the authorization given by the party or parties desiring the dispute to be reported on their behalf; and***

***(d) Each and every matter over which the dispute arisen or is apprehended.***

***(3) – ...***

***(4) Any trade dispute involving the dismissal of an employee or the termination of any contract of employment shall be reported to the Minister within twenty-eight days of the dismissal or termination of employment:***

***Provided that the Minister may, if he considers that the circumstances of a particular case so warrant, accept the report of a trade dispute concerning a case of dismissal or termination not so reported to him within twenty-eight days.***

14. My reading of the applicable law at the time the Grievant was dismissed on **23<sup>rd</sup> October 2007** was The Trade Disputes Act which provided for disputes to be reported to the Minister within 28 days in a case of dismissal or termination of any contract of employment. The process should not take more than the 6 years provided for under the Limitations of Actions Act and with the report done by the Claimant to the Minister and the invitation for a meeting on 13<sup>th</sup> December 2007, the Claimant complied with the applicable law. As submitted also, the Minister has not resolved the matter and a claim was filed with the court on **20<sup>th</sup> May 2013**, a few months just before the lapse of 6 years. Such I find to be within the timelines required for filing disputes such as this one with the court, being the court seized with jurisdiction over employment and labour disputes at the time the same became ripe for filing.

15. The failure by the minister to file any report following the party's memoranda as directed vide Minister's letter dated 10<sup>th</sup> June 2008 should not be visited upon the Claimant or the grievant. The Claimant had complied with the law by reporting a dispute in good time and should not be locked out of court having filed the claim before the lapse of a crucial date that is 6 years.

16. With regard to the issues set out in dispute, the facts set out being a matter of evidence, the merits of the same shall not be gone into at this point. However, it is trite that the rights set out under repealed laws and the law applicable at the time the cause of action arose, the Trade Disputes Act or any law that the Claimant wishes to rely upon must be commensurate with the nature or remedies sought. Without delving into the main suit, such shall suffice.

**The objections set out by the Respondent are hereby dismissed. The Respondent shall file defence and the matter set down for hearing of the main claim.**

**Delivered in open court at Nairobi this 8<sup>th</sup> day of September 2016.**

**M. MBARU**

**JUDGE**

**In the presence of:**

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