

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.88 OF 2016

(Formerly Industrial Cause No.1397 of 2013 at Nairobi)

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS.....CLAIMANT**

VERSUS

NEW KYENI FARMERS CO-OPERATIVE SOCIETY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 7th October, 2016)

RULING

The claimant union filed the memorandum of claim on 20.11.2013 alleging the unfair termination and payment of terminal dues of its member one Ayub Isaiah Njeru, the grievant. The claimant's case is that the respondent employed the claimant to the position of clerical officer effective sometimes in 1962 until termination on 26.02.1983 when the respondent terminated the contract of service on account of alleged insubordination and absenteeism. The parties were bound by a collective agreement and a trade dispute was reported culminating into the Minister's report on the settlement and investigation report of 26.06.1985. The Minister recommended that the grievant's termination be reduced to termination with full pay of terminal dues and 6 months' pay being compensation for wrongful loss of employment. The report was dated 26.06.1985 and parties were requested to accept the recommendation.

The respondent filed the response to the memorandum of claim on 25.05.2016 through Njeru Ithiga & Company Advocates. The claimant prayed that the memorandum of claim be dismissed with costs. The respondent averred that the claimant's claim was frivolous and an abuse of court process having been filed on 20.11.2013 being more than 30years from 26.02.1983 when the claimant was allegedly and unlawfully dismissed from the employment of the respondent. On 14.09.2013 the respondent filed the notice of preliminary objection that the suit was time barred under section 4(1) of the Limitation of Actions Act, Cap. 22 and section 90 of the Employment Act, 2007 which prescribe six years and 3 years respectively for a suit founded upon a contract of service.

It is not in dispute that the claimant was dismissed on 26.02.1983. The Minister's investigation report was on 26.06.1985. If the trade dispute remained not resolved, section 8 of the Trade Disputes Act, Cap. 234 (Repealed) entitled the union to make a representation to the Minister for the Minister to refer the Trade Dispute to the Industrial Court. A notification of a dispute was purportedly made to the court under section 14(7) of the Trade Disputes Act, Cap 234 (Repealed) on 20.03.2012. First, the Act had already ceased to exist so that in the opinion of this court, the section was moribund and not applicable. Secondly, the section 14(7) as relied upon required the notice to be signed by both parties to constitute a valid notification but was only signed for the union and not the respondent. In any event, the union purported to take steps when the time of limitation in the statutes as cited for the respondent in the preliminary objection had already lapsed from 26.06.1985 when the Minister made the report on the trade dispute or from 26.02.1983 when the grievant was dismissed. The union has not given any justification for the belated actions.

However, it is submitted for the claimant that under the 5th Schedule to the Labour Relations Act, 2007, section 2(4) thereof provides that trade disputes commenced before the commencement of the Labour Relations Act, 2007 would be handled in accordance with the Trade Disputes Act, Cap.234 (Repealed).

The Labour Commissioner notified the court by a certificate dated 13.06.2013 under section 14 (9) (e) that the Cabinet Secretary for Labour had accepted the report of a trade dispute between the parties. The claimant relied on the finding and holding in **Kenya Union of Commercial, Food and Allied Workers – Versus- National Cereals and Produce Board, Cause Number 683 of 2010** (Madzayo J) that section 90 of the Employment Act, 2007 did not apply to disputes prior to enactment of the Act, and section 84 of the Labour Relations Act of 2007 did not recognise trade disputes prior to enactment of the labour Relations Act, 2007 so that it was the appointed investigator of the Minister for Labour and not the claimant who was to blame for the dispute not reaching the court.

The respondent has not made submissions in so far as the Trade Disputes Act, Cap. 234 (Repealed) applies to the present case. This court is bound to enforce the statutory law for the time being enacted and applicable and the court returns that the Trade Disputes Act, Cap. 234 (Repealed) applies to the present dispute as per the 5th Schedule to the Labour Relations Act, 2007, section 2(4) thereof.

Accordingly, the suit was not time barred and the preliminary objection will fail.

In conclusion the preliminary objection dated 13.09.2016 and filed for the respondent on 14.09.2016 is hereby dismissed with costs and parties are now invited to fix an appropriate date for hearing of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 7th October, 2016.

BYRAM ONGAYA

JUDGE