



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 39 OF 2016

FRANCIS ONINI OPONDO
CELESTINE WAMALWA WEKESA
NDWASHE MIGWI (together and

On behalf of 46 others)

CLAIMANT

v

MAJANI MINGI SPINING FACTORY

1ST RESPONDENT

HARRY HORN

2ND RESPONDENT

RULING

1. The Claimants commenced legal proceedings against the 2 Respondents on 12 February 2016 and the issue in dispute was stated as

Failure to pay terminal dues to Ndwashi Migwi, Celestine Wamalwa Wekesa, Francis Onino Opondo and 47 others whose names are annexed hereto.

2. The Respondents, upon service of Notice of Summons and the Memorandum of Claim filed a Notice of Preliminary Objection and Reply to Memorandum of Claim on 21 June 2016.

3. The Notice of Preliminary Objection was in terms

1. THAT this claim is statute barred pursuant to section 90 of the Employment Act, 2007.

2. THAT failure to comply with the aforesaid provision of the law makes the entire claim fatally defective.

3. THAT 1ST respondent is a non entity in law and the instant claim cannot stand against it.

4. THAT the instant claim is a non starter, devoid of any merit and a gross abuse of the court process and it ought to be dismissed with costs.

4. On 15 July 2016, the firm of Munene Chege & Co. advocates came on record for the Claimants.

5. On the same day, the Claimants filed Grounds of Opposition and List of Authorities.

6. The Respondents filed their list of authorities in support of the preliminary objection on 23 August 2016 and 31 August 2016.
7. The preliminary objection was taken on 15 September 2016.
8. Some background of material relevant to limitation is necessary.
9. On 9 March 2007, the Tailors and Textiles Workers Union reported a trade dispute in terms of the Trade Disputes Act, cap. 234 (now repealed) to the Minister for Labour and the issue in dispute was *lock out of employees as per attached schedule*.
10. The Minister accepted the dispute and appointed an Investigator pursuant to section 5(1) of the Act.
11. The appointment of the Investigator was revoked through a letter dated 5 March 2008 and another Investigator was appointed.
12. On 10 February 2015, the appointment of the second Investigator was also revoked and Mr. Karanja of Nakuru Labour Office was appointed instead.
13. The Investigator invited the parties to conciliation meetings and also requested them to make written submissions through a letter dated 11 August 2015. It appears the parties did not comply and he sent out reminders on 27 August 2015 and 1 October 2015.
14. On 30 October 2015, the Tailors and Textile Workers Union wrote to the Investigator informing him that the dispute had been resolved and should be marked as settled.
15. Apparently running parallel with the conciliation, the Labour office instituted criminal prosecution of the Respondents.
16. On 12 February 2016, the Claimants bypassed the Union and instituted the present proceedings themselves, before an advocate came on record as indicated earlier.
17. The dispute now before Court accrued before the enactment and commencement of the Employment Act, 2007.
18. The applicable statute and the statute under which the Textile and Tailors Workers Union reported the dispute was the Trade Disputes Act, cap. 234.
19. The Trade Disputes Act was repealed by the Labour Relations Act, 2007.
20. Paragraph 4(a) of the Fifth Schedule to the Labour Relations Act provides 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;*
 - (b)
21. In the Court's view therefore, the Employment Act, 2007 and more specifically section 90 thereof does not apply to the instant dispute.
22. Any dispute as to limitation in the circumstances can be determined only by reference to the Trade Disputes Act (now repealed).
23. Under the framework established by the Trade Disputes Act (repealed), the then Industrial Court

could not take cognisance of a dispute unless it was first reported to the Minister responsible for Labour.

24. And it was the statutory duty of the Minister to refer a dispute to the Court.

25. The Trade Disputes Act (now repealed) did not provide for any limitation as has now been put in place through section 90 of the Employment Act, 2007.

26. The objection as taken on limitation by dint of section 90 of the Employment Act, 2007 must therefore fail.

27. The Respondents also took objection to the Cause on the grounds that the 1st Respondent was a non-entity in law and that the dispute had been resolved and reliance was put on the Union's letter dated 30 October 2015, which was filed in Court by the Claimants.

28. The objection on the 2 grounds cannot be determined under the guise of a preliminary objection and if the Respondents are interested in pursuing the objection, they should follow the known procedural route.

29. The upshot of the above being that the Court finds no merit in the Notice of Preliminary Objection and dismisses it with no order as to costs. It is so ordered.

Delivered, dated and signed in Nakuru on this 2nd day of November 2016.

Radido Stephen

Judge

Appearances

For Claimants Mr. Chege instructed by Munene Chege & Co. Advocates

For Respondents Mrs. Kairu instructed by Sheth & Wathigo Advocates

Court Assistant Nixon