REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

MISC. CAUSE NO. 3 OF 2015

KENYA ELECTRICAL TRADES & ALLIED

WORKERS UNION **CLAIMANT**

v

KENYA POWER & LIGHTING COMPANY LTD **RESPONDENT**

RULING

1. The Kenya Electrical Trades & Allied Workers Union (the Union) filed an *ex parte* motion on 11 March 2015 under urgency. The motion was seeking

> 1……..
>
> 2. THAT leave be granted to the Claimant/Applicant KENYA ELECTRICAL TRADES & ALLIED WORKERS UNION acting on behalf of JACKSON KARIMI KIMATA, LUCY NG'ETICH and REBECCA NG'ETICH, the Grievant (sic) herein, to file suit against KENYA POWER AND LIGHTING COMPANY after the limitation period.
>
> 3. …….
>
> 4. ……

2. The Kenya Power & Lighting Co Ltd (Respondent) had been listed as the Respondent.

3. Although the law provides that this type of application should be heard and orders made *ex parte*, the Court decided that the motion should be served for *inter partes* hearing. This direction was prompted by the realization that grant of leave can be challenged at the hearing of the Cause and it would not engender expeditious disposal of the Cause were the issue of leave to be raised again during the hearing of the Cause on the merits at this hierarchy of the judicial system. It would also save on judicial time.

4. The Respondent was duly served and it filed Grounds of Opposition and Authorities on 2 April 2015.

5. Mr. Onyony prosecuted the Union's case while Mr. Gitonga Murugara took up the Respondent's case.

6. The background facts appear not to be in dispute and for the sake of clarity, the Court will set them out as advanced by the Union.

7. Through letters dated 13 January 2009, the Respondent terminated the services of Jackson Karimi Kimata, Rebecca Ng'etich and Lucy Ngetich (Grievants).

8. The Union, as a result of the termination of the employment of the Grievants reported a trade dispute to the Minister for Labour through a letter dated 18 October 2010. This was pursuant to the terms of a recognition agreement between the parties and the provisions of the Labour Relations Act.

9. The Minister informed the parties through a letter dated 6 January 2011 of the appointment of a conciliator.

10. On 1 February 2011, the Concilator appointed by the Minister invited the parties to a conciliation meeting through her letter of even date.

11. It is apparent that the trade dispute was not resolved at conciliation hence the present motion.

Union's case on the motion

12. The Union's case is anchored on the grounds that Alternative Dispute Resolution is constitutionally guaranteed and statutorily grounded pursuant to Article 159(2)(d) and section 15(3) of the Employment and Labour Relations Court Act and that the time taken by the conciliation process should not be counted towards computing the limitation of 3 years as provided for in section 90 of the Employment Act, 2007.

13. According to the Union, once parties commence conciliation pursuant to mutually agreed mechanisms and with the statutory underpinnings of sections 62, 67 and 69 of the Labour Relations Act, time stops running. To this effect, the Union contends that time starts running only when the Conciliator issues a certificate in terms of Part VII of the Labour Relations Act, because conciliation is mandatory before filing a trade dispute.

14. The Union further contends that the Court ought to give primacy to substantive justice as opposed to technicalities of the law.

15. Another ground advanced by the Union is that a trade dispute under the Labour Relations Act is not essentially a contract as envisaged by the Employment Act, 2007 and therefore a strict interpretation should not be adopted.

16. While making submissions in furtherance of the motion, Mr. Onyony urged the Court to consider that Article 159 of the Constitution is emphatic on substantive justice over technicalities and that this triumphs over the Limitation of Actions Act (read also Employment Act, 2007), which were enacted before the expansive Bill of Rights came into being as the mother law.

17. The Limitation of Actions Act, in the view of Mr. Onyony did not envisage conciliation nor did it anticipate the procedural steps in dispute resolution.

18. Considering the constitutional architecture, Mr. Onyony faulted the Limitation of Actions Act for permitting applications for leave to extend time in causes of action arising out of tort, nuisance and not those based on contract.

19. He also submitted that because sections 62, 67(1) and 69 of the Labour Relations Act allowed the Minister/parties to extend time for reporting trade disputes and or resolution of disputes during conciliation, therefore the Court should be liberal in its interpretation of limitation provisions in regard to trade disputes.

20. According to Mr. Onyony, the Labour Relations Act is a procedural law.

21. Mr. Onyony further took the submissions in a different tangent by asserting that trade disputes

were not synonymous with contracts of service as defined in the Employment Act, 2007 and that trade disputes involved different entities (grievant, trade union, employer and conciliator) and that grievants should not be penalized for delays by a conciliator.

22. And towards this end, Mr. Onyony reiterated the contention that time ought not to run once the conciliation has commenced. In his view, time starts running once the process is exhausted and that conciliation was meant to save on judicial time.

23. In support of the submissions, Mr. Onyony filed and relied on authorities which the Court will discuss shortly.

Respondent's case

24. According to Mr. Murugara, the Court draws its jurisdiction from the an Act of Parliament as contemplated by Article 162(3) of the Constitution and what the Act donating jurisdiction did not give is not available

25. In the view of Mr. Murugara, this Court, unlike the High Court which has original and unlimited jurisdiction lacks the jurisdiction to grant the orders sought by the Union.

26. The power to extend or enlarge time, according to Mr. Murugara is under prescribed situations pursuant to section 27 and 28 of the Limitation of Actions Act. The situations as mentioned were in cases of negligence leading to personal injuries among others, but not contractual claims.

27. In this regard, it was submitted that limitation is not merely a procedural but a jurisdictional question that Article 159(2)(d) of the Constitution would not blanket. A Respondent, it was submitted accrues rights to plead limitation which cannot lawfully be taken away.

28. On the issue of whether time stops running during conciliation, the Respondent agreed that indeed time stops running but with a caveat, that is for only 30 days that the Concilator is given to resolve the trade dispute or such extended time as agreed by the parties.

29. In the case at hand, Mr. Murugara contended that there was no evidence that the parties extended the time for resolution of the trade dispute.

30. As to trade disputes being a special case not covered by contractual considerations, the Respondent countered that there is nothing special about trade disputes except that they are governed by special laws.

31. In a brief rejoinder, the Union asserted that because the parties to a trade dispute could extend time beyond the 30 days provided for resolution during conciliation, then the Court could also extend time.

The authorities

32. It is in order at this juncture to examine the authorities brought to the attention of the Court by the parties.

33. In *Banking Insurance & Finance Union (K) v Bank of India* (2014) eKLR, Nduma Principal Judge held, drawing from the decision of Ndolo J in *Francis Muthini Mue v Raksh Award t/a Ranwaa Restaurant & Ar*. which in turn cited the decision of Wasilwa J in *Kenya Scientific Research International Technical and Allied Workers Union v Rainald Schuvera* (2012) eKLR that

> Once the conciliation process commenced, time stopped to run for purposes of time with respect to labour matters.

34. In *Kenya Plantation & Agricultural Workers Union v Mununga Leaf Base* (2013) eKLR, Abuodha J dealt with a cause of action which was regulated by the Trade Disputes Act (repealed). The Grievant was dismissed in 1997 and court action was commenced in 2012.

35. A preliminary objection grounded on section 4(1) of the Limitation of Actions Act was raised. The parties had gone through conciliation but the same hit a dead end.

36. The question which Abuodha J posed for determination was whether the cause of action accrued in 1997 when the grievant was dismissed or in 2006 when Respondent refused to honour the recommendations of the conciliator which had been released in 2004, and when he sought the Minister's permission to refer the dispute to the then Industrial Court.

37. Abuodha J found that the cause of action accrued in 2006 and therefore the Grievant was within the 6 year window prescribed under section 4(1) of the Limitation of Actions Act. The learned Judge therefore held that

> once a disputant involves the prescribed dispute resolution mechanism the accrual of the cause of action becomes suspended until the outcome of the conciliation process is rendered.

38. In the *Mununga* decision, Abuodha gave the reasons for his conclusions. These were that the conciliation process was beyond the exclusive control of the Claimant and therefore limitation as a question did not arise. Further, the Judge reasoned that the Court was only the final arbiter in the labour dispute resolution mechanisms after the pre-court attempts had failed.

39. In *Pauline Waithira Muraguri v Muranga Farmers Co-Operative Union Ltd* (2014) eKLR, Abuodha J. again made reference to his decision in the *Mununga* case and rejected a preliminary objection based on limitation because according to him,

> the cause of action accrued.. when the conciliator issued his certificate and was renewed in February, 2012 when the respondent made part payment.

40. But of particular interest is the Judges reasoning at paragraph 9 that

> With regard to labour relations and employment disputes, the escalated process which has at its apex, the Industrial Court would be confusing and problematic to maneuver through were it to be conducted against a background of the technicality of limitation. There is a sense in which it seems more just to hold that causes of action in labour relations and employment disputes, where they have been subjected to conciliation process, accrue at the point where conciliation fails and the conciliator issues his certificate in accordance with section 69 of the Labour Relations Act.

41. The last authority cited by the Union was *Kenya Chemical & Allied Workers Union v East African Portland Cement & Co. Ltd* (2013) eKLR, a decision by Rika J.

42. Rika J was dealing with a case where the parties had mutually agreed to refer certain disputes to arbitration but instead referred the dispute to the Minister, bypassing a valid arbitration clause. The Judge refused to assume jurisdiction before the parties had exhausted their mutually agreed dispute resolution mechanism and observed that

> conciliation and arbitration processes under this law, are private mechanisms, wholly owned by the two parties. They have nothing to do with the State…. The Constitution of Kenya under Article 159(2) demands that in exercising Judicial Authority, this Court is guided by certain principles, among them, the promotion of Alternative Dispute Resolution mechanisms, including (re?) conciliation, mediation, arbitration and traditional dispute resolution mechanisms.

43. The Respondent on the other hand in resisting the motion cited some 8 authorities.

44. The Court will not discuss all of them.

45. In *Bata Shoe Company (K) Ltd v Laban Chema Libabu* (2013) eKLR, Nzioki wa Makau J dealt with an application brought pursuant to section 12(2) and 13(8) of the Industrial Court Act seeking leave to file suit out of time. He held that because the suit was time barred, the Court could not confer jurisdiction on itself and grant leave.

46. Another authority was a decision of Rika J in *Jeremiah Mutua Mutea v the Standard Newspapers Ltd* (2014) eKLR. It was seeking extension of time to file suit and was anchored on sections 27 and 28 of the Limitation of Actions Act.

47. Rika J held that the Court has no power to extend time the limitation of three years in disputes relating to employment contracts, or one year in cases of continuing injury, given under Section 90 of the Employment Act 2007.

48. The Respondent also cited 2 other decisions by Rika J.

49. In *Kenya Game Hunting & Safari Workers Union v Southern Cross Safaris Ltd* (2014) eKLR, Rika J was dealing with a case where there was failure to file an affidavit pursuant to rule 6 of the rules of the Court and held that the Claimant had moved Court prematurely. This authority is not helpful.

50. In *Desidery Tyson Otieno Onyango v Rift Valley Railways (Kenya) Limited* (2014) eKLR, the applicant moved Court through an Originating Motion seeking leave to file suit out of time. Rika J held that

> Time stands still while other dispute resolution mechanisms are engaged. It re-starts when the negotiation or other mechanisms break down.

51. The reasoning behind the holding was that it would be unjust and unreasonable of the Court to view time as running while parties were involved in the primary dispute resolution mechanisms recognised by the Constitution such as negotiations. The Judge was of the view that in such instances there was no need to grant leave.

52. The Respondent's other authority the Court wishes to refer to is the Court of Appeal decision in *Willis Onditi Odhiambo v Gateway Insurance Co. Ltd* (2014) eKLR.

53. In this decision, the Court of Appeal was dealing with a situation where the parties had consented in the High Court to extension of time and it made reference to section 27 of the Limitation of Actions Act and held that

> This section clearly lays down the circumstances in which the Court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort…. The parties could not confer jurisdiction on the judge by their consent.

54. Those are the authorities cited by the parties.

55. From these authorities, the Court can depict the jurisprudence as, one, no Court has the jurisdiction to extend time or grant leave to file a suit out of time after the expiry of the limitation if the cause of action is grounded on contractual relationship and two, in employment and labour disputes, where parties have opted for conciliation (alternative dispute resolution) time for purposes of limitation

stops running until there is a deadlock or the dispute is resolved.

56. The main issue is whether time stops running but before that discussion, the Court will address another issue raised by the Union that trade disputes are not contractual.

Is a trade dispute synonymous with contract of service

57. The Union made an attractive argument that a trade dispute as defined in the Labour Relations Act is not synonymous with a contract of service as defined in the Employment Act, 2007.

58. The purport of the argument, if the Court understood the Union is that the limitation of 3 years set out in section 90 of the Employment Act, 2007 does not and should not apply in cases of trade disputes.

59. A trade dispute is defined in section 2 of the Labour Relations Act as

> means a dispute or difference, or an apprehended dispute ***between employers and employees***, ***between employers and trade unions***, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes ***regarding the dismissal,*** suspension or redundancy of employees, allocation of work or the recognition of a trade union.

60. At core here was the dismissal of the Grievants. The Grievants had contractual relationships with the Respondent. They allegedly suffered actionable wrongs or legal injury when they were dismissed from those contractual relationships.

61. Employers and employees primarily have individual contractual relationships. A dismissal will therefore flow from a contractual relationship.

62. How do trade unions then get involved in the individual contractual relationship? It is because of statutory intervention. The bargaining strength of an individual employee cannot withstand that of the owners of capital hence employees have been allowed to join and participate in the programmes of a trade union. The trade union on its part has been guaranteed the right to organise.

63. After organising and meeting the set legal threshold, an employer is under a statutory duty to recognise the union. This is done in a document generally referred to as a recognition agreement or Memorandum of Agreement.

64. It is the recognition agreement which imbues a trade union with the necessary competency to agitate both at the work place and before the Courts on behalf of its membership. The relationship is based on contract.

65. But because the Grievants were members of the Union, the Union had the legal competence to present challenge and prosecute any complaints on the actionable wrong /legal injury on their behalf. When an employee is dismissed, it is not the Union which suffers a legal injury or actionable wrong.

66. In this sense, the argument projected by the Union that trade disputes are not synonymous with a contract of service as defined in the Employment Act was a red herring. The relationship is and flows directly from a contractual engagement.

67. The cause of action the Union intends to propagate is not its own *qua* trade union. It is as a result of actionable wrongs or legal injuries suffered by the Grievants.

Whether time stops running during conciliation

68. Four distinguished Judges of the inaugural Employment and Labour Relations Court have held

that time for purposes of limitation stops running once conciliation or broadly, alternative dispute resolutions have been engaged.

69. But it seems that this jurisprudence is still in troubled waters. I say so because, the Union being aware of the jurisprudence need not have filed the instant application. It could have straightaway filed the substantive suits but it did not.

70. Soon, it will be established whether I am the lone messenger crying out in the wilderness and who wants to pour oil on troubled waters or whether I endorse the position taken by my brother and sister judges.

71. My own initial views on the question of time stopping to run because of conciliation were outlined in the case of *Peter Nyamai & Ors v M J Clarke* (2013) eKLR.

72. And to understand the position I took I need to outline what I understand the statutory framework for conciliation (alternative dispute resolution) to be.

73. Part VIII of the Labour Relations Act provides for the statutory conciliation process. The architecture of the Part and more particularly a reading of section 62 suggest that alternative dispute resolution envisaged is not mandatory but is left to the choice of the parties, but once the parties opt to follow the route, there are some mandatory and time bound processes.

74. The statutory process will ordinarily set in where the social partners have exhausted the mutually agreed dispute resolution mechanisms without success.

75. One of the partners, by dint of section 62 of the Labour Relations Act, should report a trade dispute to the Cabinet Secretary. If the dispute concerns complaints of dismissal, it should be made within 90 days of the dismissal or such longer period as the Minister may allow.

76. In my view, the import of the section is that the social partners have a window of 3 months after dismissal to exhaust the mutually agreed dispute resolution mechanisms in complaints of dismissal.

77. After one of the partners has reported a dispute, the other partner has 14 days to file a reply. The Cabinet Secretary then has 21 days within which to appoint a conciliator.

78. Pursuant to section 67 of the Labour Relations Act, the conciliator has 30 days from date of appointment to resolve the dispute. If the dispute cannot be resolved within 30 days, the parties may mutually agree to extend the time for the resolution of the dispute.

79. If the parties do not extend the time from the 30 days, then in my view, the trade dispute automatically is deemed unresolved. That is my understanding of section 69(b) of the Labour Relations Act.

80. To put this in context, if an employee is dismissed on 1 January, the Union has up to or around 31 March to report the dispute to the Cabinet Secretary. The other party would then have 14 days to reply. Within 21 days of the reply, and that would be around 5 April, the Cabinet Secretary must appoint a conciliator. If this contextualization were correct, the conciliator would have up to around 5 May to resolve the dispute or the dispute would be deemed unresolved, unless the partners had earlier agreed to extend time.

81. The statutory framework then in effect has set out timelines within which a trade dispute should be resolved or it would be deemed unresolved. But that is the statutory framework. In real life, disputes do not always get resolved within such timelines.

82. But it cannot be disputed that the social partners know the environment within which they operate. Conciliators, who in many cases are Labour Officers, get overwhelmed. They must formally

invite the partners to make submissions on the dispute in issue. This process more often than not cannot be concluded within 30 days.

83. The statute has given the social partners an outlet. They should mutually agree to extend time. The same statute which gives them the leeway to extend time provides that if time is not mutually extended, the dispute would be deemed unresolved.

84. The whole process should take slightly under half a year. Any prudent party would therefore in cognizance of the statutory scheme move Court within about half a year after the reporting of a trade dispute to the Cabinet Secretary, if it is not resolved at conciliation.

85. If the conciliation process is still ongoing, the Court can always stay the Cause pending conclusion of conciliation one way or the other. The Court has such power under the Employment and Labour Relations Court Act.

86. Back to the present application. The Union is alleging unlawful termination of employment which occurred on 13 January 2009. The dispute should have been reported to the Cabinet Secretary within 90 days (around 13 April 2009). It was reported around 18 October 2010. The Cabinet Secretary accepted the report however on 6 January 2011 and appointed a conciliator. The Respondent should have filed any replies by end of January 2011. If all went well, like in an ideal world, the dispute should have been resolved by end of February 2011, because the conciliator called for memoranda from the partners through her letter dated 1 February 2011.

87. By 24 February 2011, the dispute had not been resolved.

88. Now, where a trade dispute is not resolved within the timelines set out in the Labour Relations Act, there are two avenues or possibilities, the conciliator should issue a certificate that the dispute remains unresolved {section 69(a)} to enable the parties to move to Court. No certificate from the conciliator has been exhibited in the instant case.

89. Where a certificate is not issued, a party suing is required to swear an affidavit stating the failure. Such affidavit should have accompanied the draft Memorandum of Claim. No such affidavit has been exhibited.

90. The state of the present application therefore is such that the applicant did not disclose when conciliation broke down.

91. And within this entire scheme, section 90 of the Employment Act, 2007 provides for a limitation period of 3 years.

92. In my view, the 3 years is the outer limit and a party desirous of commencing legal action even where conciliation has gone beyond the 3 years must be alert that any action is commenced in time.

93. And in this respect, it is my view that the dicta by Rika J in Nairobi Cause No. 71 of 2009, *Kenya Local Government Workers Union v Kangundo Town Council* that

> Section 90 of the Employment Act 2007 however provides for the outer time limits irrespective of the mode used by a party in coming to Court. It basically means that in exercising his discretion, the Minister cannot exceed the outer time limits imposed by the Employment Act 2007. The discretion under the Labour Relations Act cannot extend the limit beyond the 3 years provided for under the Employment Act No. 2007. Otherwise the Minister or the Court would be acting against a mandatory provision of the law

depicts the correct legal position. The parties and even the Cabinet Secretary cannot extend the limitation time under the guise of conciliation.

94. In my view, holding that time stops running during conciliation or pending alternative dispute resolution would run counter to the principal objective of the Employment and Labour Relations Court Act and establishment of this Court which is to facilitate just, expeditious and proportionate resolution of employment complaints and trade disputes.

95. The applicant must have been aware of this otherwise it could not have sought leave.

96. Any attempts at alternative dispute resolution and or conciliation should be within and or inside the 3 year provided for under section 90 of the Employment Act, 2007.

97. I therefore must remain the lone voice in the wilderness.

98. Two issues before concluding.

99. The Union also advanced a line of argument that the fact that the statute envisaged extension of time for tortuous action and not in contractual actions runs counter to the constitutional imperative of doing substantive justice. I do not see any constitutional inconsistency or incongruency. Parties to contracts are always privy to the terms of a contract and or when a breach occurred.

100. The Union also asserted that limitation is a procedural and not jurisdictional issue. To my mind, the answer to the proposition is found in the decision of the Court of Appeal in *Divecon v Samani* (1995-1998) EA 48 that

> ***to us, the meaning of the wording of section 4(1) ……is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action……A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that ''the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked''.*** (emphasis mine)

101. A limitation provision or statute vests or gives to a party/defendant a right, and it is not just a procedural right but a substantive right. It is the cause of action which is barred and not the remedy which is barred.

102. Section 90 of the Employment Act, 2007 is clear in its wording that no civil action or proceedings shall lie and it is not just a procedural provision.

103. By the Union/Grievants not bringing the claim within time meant that the Respondent has acquired an accrued right, and I fully endorse and accept as sound legal principle in our jurisdiction the review of authorities and holding by the Privy Council in *Yew Bon Tew v Kenderaan Vas Mara* (1982) 3 All ER 833, and which I had occasion to comment on in Mombasa Cause No. 214 of 2013, *Mary Kasiwa v Scorpio Enterprises Ltd* and Mombasa Cause No. 1418 of 2010, *Charles Kiruthi Mwangi v G4S Security Ltd*.

104. This Court has no power and if the Court has no right or power to entertain what cannot be done, it is a jurisdictional question.

105. The parties agreed that since the issues raised in this application were essentially the same raised in Nakuru Misc. Cause No. 4 of 2015, *Kenya Electrical Trades & Allied Workers Union v Kenya Power & Lighting Co. Ltd*, the decision here should be applicable therein.

106. The Court directs that the ruling herein applies in that other Cause and the orders also apply

mutatis mutandis.

Conclusion and Orders

107. The application seeking leave is untenable in law and stands to be dismissed. The Court orders that it be dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 29th day of May 2015.

Radido Stephen

Judge

Appearances

For Applicant	Mr. Onyony, instructed by Onyony & Co. Advocates
For Respondent	Mr. Murugara instructed by Hamilton Harrison & Mathews Advocates
Court Assistant	Nixon