



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

AT NYERI

CAUSE NO. 43 OF 2015

KUDHEIHA WORKERS..... CLAIMANT

VERSUS

KANGEMA HIGH SCHOOL..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th June, 2015)

RULING

The claimant filed the memorandum of claim on 12.03.2015 alleging refusal by the respondent's board of governors to pay terminal benefits for the claimant's members Stephen Mwangi and Samuel Kariuki.

The respondent filed the response to the memorandum of claim on 16.04.2013 through Kimwere Josphat and Company Advocate. At paragraph 1 of the response the respondent raised a preliminary objection that the claim as drawn and filed was incompetent as it raised no reasonable cause of action against the respondent and should be struck out on the following grounds:

- a. The claim is expressly barred by Limitation Act read together with the Employment Act the cause of action arising in the year 2009 and the suit having been filed without the leave of the court.
- b. That the suit is incurably drawn by enjoining two claimants which result in two different causes of action which due to their nature and different causes of actions and controversy cannot be possibly jointly heard.
- c. The claimant has no active agreement with the respondent and has no feet to bring the suit on behalf of the claimants.
- d. The suit is bad in law and raises no cause of action against the respondent.
- e. Section 35 (6) (d) of the Employment Act 2007 expressly bars the claimants from bringing the claim.

The parties were heard on the preliminary objection on 28.05.2015. Counsel for the respondent urged grounds (a) and (e) of the grounds (a) to (e) above and the rest of the grounds are therefore deemed to have been abandoned.

The 1st issue is whether the claimant's suit was time barred. The respondent submitted that the claimant

pleaded that the claim started on 31.12.2009 when both claimants were retired. The 3 years under section 90 of the Employment Act, 2007 for filing the suit based on the contract of employment lapsed on 31.12.2012 and the suit was filed on 12.03.2015 long after the lapsing of the 3 years. The respondent submitted that the suit was filed without leave of the court and was therefore time barred. For the claimant it was submitted that the parties were at all material times in a valid recognition and collective agreement that allowed parties to get into conciliation proceedings which culminated in the certificate of disagreement on 21.02.2014. It was submitted that before then, time did not run.

Section 62(3) of the Labour Relations Act, 2007 provides that a trade dispute shall be reported to the Minister within 90 days of the dismissal or termination of employment or any longer period that the Minister on good cause permits. In the present case the dispute was reported on 16.11.2012 per exhibit 014. The respondent's case is that employment was terminated on 31.12.2009 when both grievants were retired from employment. It is clear that the 90 days prescribed for reporting the dispute had already lapsed. Nevertheless, the Minister accepted the dispute by the letter dated 16.01.2013 being exhibit 015 on the memorandum of claim and the court's opinion is that by that acceptance, the Minister is deemed to have enlarged the period of 90 days and the dispute was validly launched. The certificate of unresolved dispute was issued on 21.02.2014 per exhibit 020 on the memorandum of claim. The suit was filed on 18.05.2015 and the court holds that time did not run until 21.02.2014 when the certificate of unresolved dispute was issued.

It was submitted for the respondent that the respondent did not participate in the conciliation proceedings. However, section 63(2) of the Labour Relations Act is clear that refusal by a party to file a replying statement shall not affect the validity of a referral to the Minister. Section 73 of the Act provides that a dispute that is not resolved may be referred to the court. The court holds that time does not run until the statutory conciliation process for resolving the dispute has been exhausted and an otherwise view would render that statutory process ineffective as it would be defeated.

To answer the 1st issue for determination the court finds that the suit was not time barred.

The 2nd issue for determination is whether the claimant was barred from claiming gratuity in view of the provisions of section 35 (6) (d) of the Employment Act 2007 which expressly bars the claimants from bringing the claim because they belonged to the National Social Security Fund. The court finds that the claimants made prayers beyond the prayer for gratuity. Secondly, the court finds that the cited section 35(6) (d) applies only where the parties have not entered into an agreement providing for more than one basis or species of entitlement to gratuity or service pay or other terminal benefits. In this case the claimant submitted that the collective agreement provided for gratuity as claimed and the court finds that such is an issue best dealt with at the full hearing of the suit.

In conclusion, the respondent's preliminary objection shall fail and the respondent shall pay the claimant's costs in that regard. Parties are now invited to take directions with a view of fixing the suit for hearing.

Signed, dated and delivered in court at Nyeri this Friday, 5th June, 2015.

BYRAM ONGAYA

JUDGE