REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 85 of 2013

KUDHEIHA WORKERS.....CLAIMANT/APPLICANT

VERSUS

MARSH PARK HOTEL.....RESPONDENTS

R U L I N G

The respondents herein Marsh Park Hotel filed a Notice of Preliminary Objection dated 27/1/2013 before this court on 30/1/2013.

The preliminary objection raises the following issues:-

1. That the complaints herein having arisen or accrued on or about March 2008, the statutory period for lodging this case in court has lapsed.

2. That the complaints herein are time barred by dint of Section 90 of the Employment Act No. 11 of 2007.

3. That the claimant herein lacks *locus standi* to originate, maintain and mount the instant complaint insofar as the complainant is not an aggrieved party under and/or pursuant to the provision of Section 87 of the Employment Act 2007.

4. The complaint herein does not raise and/or disclose any reasonable cause of action .

5. The complaint(s) constitutes and/or amounts to an abuse of the due process of the law.

6. The complainant herein is non-suited.

7. The instant complaint is pre-mature, misconceived and otherwise legally untenable.

8. The instant complaint is otherwise fatally defective and bad in law.

The respondents avers that the complaint is anchored on a termination on alleged termination in relation to 3 claimants accruing on 5.3.2008 for Charles Omal Abuki and Samuel Onyonyi Areri and on 29.3.2008 for Gladys the 3rd claimant. That these facts are not in dispute since the termination were in 2008. The respondents submit that this suit ought to have been mounted within 3 years set under S.90 of Employment Act 2007 which terminates in March, 2011.

The respondents also aver that this complaint herein has been mounted by the Union on behalf of the complainants. Their contention is that the aggrieved parties are claimants themselves either personally or

facilitated. They cited S. 87(a) of Employment Act and state that the aggrieved party in the employee and not the Union and so the Union has no *locus* to file this claim.

The respondents also content that though this court is a special court it is enjoined by the Industrial Court Act and other Labour Acts to discern the existence of a cause of action and they aver that S. 49 of Employment Act does not apply herein.

The claimants on the other hand have submitted that the claimants are members of their Union and so the union has a *locus* to represent them. On issue of time, the claimants aver that this case was referred to the Labour Office from 7th August, 2008 who stayed with the matter for long. The Labour Office stayed with the claim until they released a certificate of failure to resolve the dispute on 16/3/2011 and this is when the claimants now filed their dispute.

The claimants also submitted that under Article 159(2)(a) of Constitution and S. 20 of ICA, justice should be done without undue regard to technicalities and I urge court to dismiss the preliminary objection and proceed with the case.

The respondents admit that it is true that the matter was referred to the labour Office and a conciliator was appointed. That being the position the respondents submit that the claimants having chosen to pursue their claim through the Labour Office are bound by their acts and so should not complain about delays at Labour Office.

Having heard the submission of the parties the issues I have to decide concern:-

1. Whether the action is time barred by virtue of S. 90 of Employment Act.

2. Whether the claimant Union have *locus standi* to bring this suit on behalf of the claimants.

3. Whether this cause of action filed by the claimants is tenable in law.

On 1st issue, it is true that the cause of action arose in March, 2008. This was before the Employment Act 2007 commenced its operation on 2.6.2008. S. 62 of the LR Act, a trade dispute may be reported to the Minister in a prescribed form and manner by or on behalf of a trade Union, employer or employers' organization that is a party to the dispute or by the authorized representative of an employer, employer's organization or trade Union on whose behalf the trade dispute is reported. Such a dispute under S5(3) of 562. If it concerns dismissal or termination of an employee shall be reported to the Minister within 90 days of the dismissal or any longer period that the Minister on good cause permits. Pursuant to this provision the dispute concerning this case was reported to the Minister vide the claimants Appendix VI herein and was accepted. A conciliator was appointed as exhibited by Appendix V as provided under S. 65 of the LRA. Under S. 67 of the LRA, once a conciliator is appointed, he is expected to resolve the dispute within 30 days or any extended period agreed by the parties to the dispute.

Under S. 69 of LRA a trade dispute is deemed unresolved by the conciliator if:-

" (a) a conciliator issues a certificate that the dispute has not been resolved by conciliation or

(b) thirty days period from the appointment of the conciliator or any longer period agreed to by the parties, exposer.

Under S. 73 (1) - "If a trade dispute is not resolved after conciliator, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court"

I believe that the process of referring the case to the Industrial court under the LRA is as followed by the claimants herein after the conciliator gave them a certificate of failing to resolve the dispute as per their Appendix IV herein.

It is true that S. 90 of Employment Act 2007 cups the time within which to file a suit like this at 3 years. This does not however oust the provision of the Labour Relations Act 2007 which provides for ways of instituting suit after going through the dispute resolution mechanism through the Labour Ministry. So long as the time lines envisaged under the Labour Relations Act as complied with, the cup of 3 years does not in my view intend to lock out litigants who opt to seek justice through the conciliation route which is even encouraged under our Constitution and S. 15 of the ICA, 2011 concerning the question of *locus* under S.12(2) of the Industrial Court Act 2011.

"An application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Union, the cabinet Secretary or any office established under any written law for such purpose."

To contend that the trade Union herein does not have *locus standi* to file this case is therefore wrong as the trade Unions are given *locus* by virtue of the above section.

Lastly, on the issue of a cause of action, what the parties herein seek are remedies following a wrongful termination. S. 162(2) of the Constitution states that "Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:-

a) employment and labour relation; and ----"

the Industrial Court as it is is a special court to handle all employment and labour relations cases as is the suit before court. To allege that there is no cause of action for the court to determine is to preempt the hearing of this case and its outcome. If there is no cause of action, this court will make a finding on the same. However to raise the matter as a preliminary objection is premature.

I do agree with the claimants that they have *locus* to bring this matter to court and they are not time barred. I find the preliminary objection has no merit and I dismiss it with costs to the claimants.

HELLEN WASILWA
JUDGE
9/05/2013

Appearances:-
N/A for Claimant.

Betty Asuna Counsel h/b Ogutu for Respondent.

CC. Sammy Wamache