



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1816 of 2011

**RICHARD NYASOKO KIYONDI.....
.....1ST CLAIMANT**

**THOMAS MBOYA 2ND
CLAIMANT**

**PAUL NJOROGE KIBUCHI3RD
CLAIMANT**

VS

**BRITISH AMERICAN TOBACCO (KENYA) LIMITED.....
.....RESPONDENT**

Mr. H. Okeche for the Respondent/Applicant
Mr. Odicho for the Claimant/Respondents

RULING

The claim was filed on 28th October 2011 by three (3) claimants named therein and by 67 others listed in Appendix ‘3’ to the Memorandum of Claim.

The cause of action arose on or about the 26th February 2006 when the Respondent without notice locked out the claimants when they reported to work in the morning. The claimants had served the Respondent for several varying years though were referred to as ‘casual employees’.

The claim is for accumulated terminal benefits for 70 claimants in the list annexed to the Memorandum of Claim and marked Appendix ‘3’. According to paragraph 3 of the Memorandum of Claim the accumulated total claim is as follows;

- | | | | |
|-----|--------------------------------------|---|--------------------|
| (a) | Two months’ salary in Lieu of Notice | – | Kshs.1,110,610.00 |
| (b) | House Allowance for one month | - | Kshs. 364,000.00 |
| (c) | Transport of their household | - | Kshs. 4,160,000.00 |
| (d) | Shift Allowance | - | Kshs.9,687,800.00 |
| (e) | Service pay | - | Kshs.6,575,040.00 |

(f)	Increment arrears	-	<u>Kshs.1,927,200.00</u>
	Total	=	<u>Kshs.23,824,650.00</u>

It is alleged in the Statement of Claim that, the Claimants were treated as casual workers in spite of their long service and eventually they were locked out without notice.

In its Memorandum of Defence, the Respondent raised Preliminary Objections as follows;

- (i) That the suit offends the provisions of Section 90 of the Employment Act, 2007 in that the same was filed outside the period of three (3) years next after the cause of action arose.
- (ii) The suit is incompetent since the three claimants have not identified the 67 others.
- (iii) The suit on behalf of 67 others is incompetent since it is not supported by authority from them;
and
- (iv) The suit is in violation of Section 68 of the Labour Relations Act, 2007.

With respect to the issue of limitation, it is common cause that the alleged termination took place on 26th February 2006. During this time the law applicable to termination of employees was the Employment Act Cap.226 of the Laws of Kenya (now repealed). The same Act did not provide a limitation period for filing of labour disputes emanating from contractual relationships. The law applicable therefore was Section 4(1) of the Limitations of Actions Act, Cap.22 of the Laws of Kenya which provides a limitation period of six (6) years with respect to disputes founded on contract.

It is common cause that the suit was filed on 28th October 2011, about five (5) years from the date the cause of action arose. The court has considered the decision in the *Industrial Court of Kenya Cause No.124 of 2010, Gerald Muli Kiilu Vs Barclays Bank of Kenya*, and differs with the retrogressive application of Section 90 of Employment Act No.14 of 2007 to a matter in which the cause of action arose on 6th January 2005 and the claim filed on 5th February 2010, well within the six (6) years limitation period provided under Section 4(1) of the Limitation of Actions Act, Cap.22 of the Laws of Kenya that was applicable then. Accordingly the suit is not statutory barred and the objection is dismissed.

With respect to the 2nd objection regarding non disclosure of the 67 others and their failure to provide authority to the three named claimants to bring this suit on their behalf, the court has perused the pleadings and paragraph 3 refers to appendix 3, a list of 104, workers claiming terminal benefits.

In the reply to the Respondent's Preliminary Objection, the Claimants state that the total number of the affected employees in respect of which the matter went for conciliation was 107 but only 70 employees are joined to this suit. Another group of three (3) filed separate suits but their matters being cause Nos.857, 858 and 859 of 2010 were consolidated by the court with this matter.

Attached also to the Statement of Claim is a written Authority which reads;

"We, Thomas Mboya, Paul Njoroge Kibuchi and 67 others do authorize Richard Nyasoki Kiyondi, one of the claimants mentioned above to swear and sign the verifying affidavit on our behalf."

The authority is dated 25th October 2011 and is signed by the three (3) named claimants. The 67 other claimants named in Appendix 3 shall identify themselves as and when this matter goes for the hearing. The Respondent had the option of seeking further and better particulars from the claimants with respect to the provided list of employees if it so wished but did not.

Section 20(1) of the Industrial Court Act, provides;

“In any proceedings to which this Act applies, the court shall act without undue regard to technicalities and shall not be strictly bound by rules or evidence except in criminal matters;

provided that the court may inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings”.

To this end, the fact that the list of claimants in appendix 3 exceed the named 67 claimants and is not specific in the Statement of Claim and in the letter of authority to act on the identity of the 67 claimants out of the 104 contained in Appendix 3 is not by itself a fatal deficiency to the suit as filed. The court finds accordingly.

The final Preliminary Objection is that the suit is in violation of Section 68 of Labour Relations Act which reads;

“(1) If a trade dispute is settled in conciliation the terms of the agreement shall be –

(a) recorded in writing and

(b) signed by the parties and the conciliator”.

In that this dispute was duly settled between the Respondent Company and the Kenya Union of Commercial, Food and Allied Workers to which the claimants are members and an agreement was signed on behalf of the 107 former employees, 70 of whom are the claimants in this suit.

The agreement is attached to the Statement of Defence and marked Appendix 4 and reads as follows;

“the above parties met and agreed as follows:-

•That the investigation be changed to conciliation;

•That all the affected 107 former employees be paid 2 weeks’ wages each as ex-gratia payment.

•That all the 107 former employees be paid accrued leave for 6 months prior to date of leaving employment at the rate of 1.75 days per month.

•That the Company shall give the first consideration to the affected employees in recruitment of new persons in November, 2006”.

The agreement is signed by the Company representatives and those of the Union and witnessed by the Chairman of the Conciliation proceedings, Mr. J.N. Kinyua from the District Labour Office, Thika on 25th August, 2006.

Whether or not this agreement was signed on behalf of the 70 claimants in full and final settlement of the claims arising from this dispute is a matter of fact that cannot be resolved at this preliminary stage. Accordingly the Preliminary Objection is also dismissed.

The suit will proceed on its merits and the same be allocated a hearing date.

It is so ordered

Dated and Delivered in Nairobi this 3rd day of May, 2013.

Hon. Justice Mathews N. Nduma

PRINCIPAL JUDGE