



Railways Workers Union (K) v Kenya Railways Corporation (Cause E456 of 2023) [2023] KEELRC 3444 (KLR) (20 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3444 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E456 OF 2023
NZIOKI WA MAKAU, J
NOVEMBER 20, 2023**

BETWEEN

RAILWAYS WORKERS UNION (K) CLAIMANT

AND

KENYA RAILWAYS CORPORATION RESPONDENT

RULING

1. The Respondent applied through its Notice of Motion application dated July 12, 2023 that the Claimant suit be struck off for offending the mandatory provisions of section 87 of the [Kenya Railways Corporation Act](#). It was asserted that the court lacks the requisite jurisdiction to hear the suit by dint of section 87 of the [Kenya Railways Corporation Act](#).
2. The Claimant was opposed and filed a Replying Affidavit sworn on July 28, 2023. In it, the Claimant asserts that it believes the application by the Respondent is another tactic to delay and sabotage the commencement and conclusion of negotiations that may lead to the registration of the CBA for the period 2017-2021 and 2021-2025. The Claimant avers that the Respondent has been privy to the existing trade dispute from 2017 a period of more than 5 years to date but has been frustrating the process through procedural technicalities as the one envisaged in the orders sought in their application. The Claimant asserts the continued refusal to negotiate a CBA is in breach of Labour Laws, International Labour Conventions and ultimately infringes the Claimant Union members constitutional rights that guarantees them fair labour practices. The Claimant asserts it has explored various avenues from reaching out to the Respondent, subjecting the matter to conciliation and now the trade dispute is before this court for directions. The Claimant avers that by virtue of section 73(1) and (3) of the [Labour Relations Act](#), this court has the requisite jurisdiction to adjudicate on this matter as it is evident from the aforementioned facts that the conciliation process on the trade dispute has not been successful. The Claimant asserts that the Respondent/Applicant has been privy of the existing Trade dispute from 2017 and therefore the Limitation they intend to introduce under Section 87 of the [Kenya Railways and Corporation Act](#) does not suffice.



3. The application was disposed of by way of submissions. At the time of writing the Ruling, only the Claimant through M/s Abel B. C. Asuma Advocates had filed their submissions.
4. The Claimant submitted that Articles 48, 50(1) and 2(4) as well as Article 159(2)(d) of the Constitution allow for the Claimant to seek redress – right to access justice, right to hearing and the disdain for procedural technicalities being given undue regard. The Claimant submits that section 87 of the Kenya Railways Act is in direct conflict with the Constitution and in particular with Article 48, 50(1), 159(2) (d) and Article 2(4). It submits that any law that is inconsistent with the Constitution is null and void to the extent of the inconsistency.
5. The Claimant submitted that in Patrick Mukono Kisilu t/a Mutomo Kanda General Agencies v County Government of Kitui [2021] eKLR the Court stated as follows;

“Aside from the above findings it is now settled that any provision of law that hinders the right to access justice under Article 48 is bad law and to that extent, Section 134 of Government Proceedings Act is unconstitutional.”

6. It submitted that in Kenya Bus Service Ltd & another v Minister For Transport & 2 others [2012] eKLR, Majanja J. stated as follows;

“Where the state is at the front, left and centre of the citizen's life, the law should not impose hurdles on accountability of the Government through the courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government.

And further in the same decision:

“The general worldwide consensus is that a shorter limitation period for the state cannot be justified. The reach of the Government is far and wide and in an era of accountability or transparency ushered in by the Constitution, the State must abide by the same standards required of mere mortals. Mandatory notice requirements and short limitation periods would tend to undermine social justice and in a country like ours where illiteracy is rife, communication systems and links are few and far between and access to legal services wanting, their effect would be to provide a cover for impunity and create de-facto state immunity.”

7. The Claimant submits that the above Constitutional provisions and decisions of the Court are very clear that the mandatory requirements for notices with the effect of denying a litigant the right to be heard are unconstitutional and have no place in the present dispensation. The Claimant thus urged this Court to find that Section 87 of the Kenya Railways Corporation Act to be unconstitutional. It submits that Article 159(2)(d) of the Constitution of Kenya binds the Courts of law to ensure that justice is administered without undue regard to procedural technicalities and this provision allows the Courts to cure procedural flaws and make judicial determinations on the substantive issues thereon. The Claimant submits that the present issue is a mere technicality that can be cured to allow the court to address the more fundamental issue of labour relations which continues to affect thousands of poor employees all over the country. The Claimant urges the court to be persuaded to consider the more factual and substantive issues and find that it has jurisdiction to determine the same. The Claimant submits that any failure to issue a statutory notice of intention to sue is a procedural technicality that this Honourable Court can cure and allow a hearing on the substantive issues.



8. The provision of the law that is cited by the Respondent in challenge to the jurisdiction of the court to entertain the Claimant's claim is section 87 of the [Kenya Railways Corporation Act](#). Section 87 of the [Act](#) provides as follows:-

87. Limitation

Where any action or other legal proceeding is commenced against the

Corporation for any act done in pursuance or execution, or intended execution, of this [Act](#) or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

- (a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and
- (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

9. Whereas the Claimant ought to have notified the Respondent of the intention to commence proceedings, the consensus is as espoused in the decision of [Kenya Bus Service Ltd & another v Minister For Transport & 2 others](#) where my brother Majanja J. stated thus:

“Where the state is at the front, left and centre of the citizen's life, the law should not impose hurdles on accountability of the Government through the courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government.

...“The general worldwide consensus is that a shorter limitation period for the state cannot be justified. The reach of the Government is far and wide and in an era of accountability or transparency ushered in by the [Constitution](#), the State must abide by the same standards required of mere mortals. Mandatory notice requirements and short limitation periods would tend to undermine social justice and in a country like ours where illiteracy is rife, communication systems and links are few and far between and access to legal services wanting, their effect would be to provide a cover for impunity and create de-facto state immunity.”

10. The provision under the section 87 of the [Railways Corporation Act](#) seems to accord the Respondent de-facto immunity from civil action. The raft of Constitutional provisions that guarantee access to justice and equality of arms before the law mean that section 87 of the [Kenya Railways Act](#) is in direct conflict with the [Constitution](#) and in particular with Article 48, 50(1), 159(2)(d) and Article 2(4). It is trite that any law that is inconsistent with the [Constitution](#) is null and void to the extent of the inconsistency and I therefore find section 87 of the [Railway Corporations Act](#) unconstitutional and declare it null and void. It has no place in the statute books. The sum total of the foregoing is that the notice of motion by the Respondent is found to be unmerited and is dismissed with costs to the Claimant. Directions will issue immediately after this Ruling on the disposal of the claim.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

