CONTRACT
*when does breach of contract occur
*when does time begin to run for breach of contract
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL NO. 16 OF 2004

THOMAS KIBE AND 114 OTHERS…….…………....…………….PLAINTIFFS
=VERSUS=
KENYA PORTS AUTHORITY……….……………………………DEFENDANT

JUDGEMENT

The 115 plaintiffs in this action are seeking for a declaration that they are entitled to be remunerated for the extra hours worked at the defendant's container terminal in Mombasa. The plaintiffs claim that the defendant despite providing its staff in the staff regulations clause C (a) (d) that it would operate on a 5 day working week of 40 hours, had made it mandatory for the plaintiffs to work shift system. That shift system had led to the plaintiffs working for 7 days in a week which includes Saturday and Sunday.

The plaintiffs have pleaded that the defendant has failed to pay them the overtime rate of salary for the extra hours worked. The plaintiffs tabulated in their plaint the extra hours worked by each one of them. That tabulation shows that all the plaintiffs except plaintiff No. 43 (**Peter Macharia**) claim the extra unpaid hours for a period in excess of 12 months.

The plaintiffs claim is denied by the defendant by their defence dated **13th January, 2005**. Parties by their consent filed in court on **18th May, 2009** and adopted by the court on **8th July, 2009** agreed as follows:

"The following issues be decided as preliminary issues
· Whether under the defendant's staff Regulations, Managers are entitled to be paid for any overtime involved?
· If the answer to No. 1 is yes, whether any claim so arising are time barred pursuant to section 66 (6) of the Kenya Ports Authority Act Cap 391."

Section 66(b) of that act provides as follows:

"66. where any action or other legal proceeding is commenced against the Authority 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)…………………………..

(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 continuing injury or damage, within six months next after the cessation thereof."

Parties were ordered to do written submissions in regards to those two issues. On **27th October, 2011**, the parties learned counsels highlighted those submissions.

PLAINTIFF'S SUBMISSIONS

It was argued on behalf of the plaintiff that the Kenya Port Authority Revised Staff Regulations 2002 herein after called the Regulations by clause C9(c) provides for a 40 hour working week for the defendant's employees. That a working week consists of 5 days from Monday to Friday. That the Regulations also provides for shift working which where the hours exceed the standard working week provides for payment of overtime. The defendant introduced the shift working system for the plaintiffs which required that they be paid overtime rates. The defendant made it mandatory for the plaintiffs to work that shift system which involved the plaintiffs working on Saturday, Sunday and public holidays.

In so doing that the defendant made it clear that absenteeism on the part of the plaintiffs would result in disciplinary action which would include suspension or dismissal. That during the period between 1999 to 2004 the plaintiffs were entitled to two days rest per week on Saturday and Sunday. However, when the defendant introduced rota system the plaintiffs were forced to work 7 days a week without rest days.

Plaintiffs learned counsel in his written submissions stated that the plaintiffs' entitlement to two rest days was settled by an Industrial court case No. 52 of 2002. He stated in his submissions that it was held in that case that the defendant's Port workers would work 7 days a week from Monday to Sunday but that such employees would then be entitled to two rest days.

That industrial court case according to the learned counsel also determined that the defendant port employees would work 8 hours a day. The plaintiffs learned counsel did not provide a copy of that case for my consideration.

Further, in his written submissions learned counsel for the plaintiff stated that the plaintiffs had worked for the period pleaded in their plaint that is between the years 1999 and 2004, 32 extra hours per week. That according to the learned counsel was in breach of section 71, 72 and 73 of the now revoked Constitution.

On the issue whether the plaintiff's suit is statute barred as provided under section 66 of the Act the plaintiffs submitted that the following conditions had to be met for an action to be said to be statute barred:-

"(a) the Act must be in pursuance or in execution or intended execution of the act or any public duty or authority or in respect of any alleged neglect or default in execution of this Act or of any such duty or authority. (b) when criteria (a) above is met, the action must be commenced within 12 months next after the Act, neglect or default complained of or (c) in case of continuing injury or damage within 6 months after the cessation thereof."

The plaintiffs in their submissions stated that section 12 of the Act does not refer to management of employees as one of the powers of the defendant and that it therefore follows that section 66 does not relate to employees of the defendant and accordingly this action is not caught by the limitation under section 66. The plaintiff submitted that their employment by the defendant is not statutory or public duty as envisaged under section 66 as read together with section 12 of the Act.

Further that the last limb of section 66 does support the plaintiffs' submission. Further, that section 66 (b) does not apply to a case where there is continuing injury or damages which is the case in the plaintiffs' action. It was submitted that the plaintiffs action was a continuing damage which damage or injury occurred every time the defendant failed to pay them for the extra hours worked.

That damage or injury has not ceased but has continued. For that reason the plaintiffs prayed that the court do find that their action is not statute barred. The plaintiffs' relied on the book entitled "***Limitation Act 7th Edition (1997)***" by **V. R. Manohar** where the learned author stated:

"In the case of continuing breach of contract or in the case of continuing tort a fresh period of limitation begins to run at every moment of the time during which the breach or tort as the case may be, continues".

The plaintiff also relied on the book "***Arsons Law of Contract***" 28th Edition by **J. Beatson** where the author stated:

"A distinction is however drawn between a once and for all breach and a continuing breach. In the case of the former, once time has started to run it would continue to do so and a claimant cannot extend the limitation period by for example making repeated demands for the repayment of money owed. In the case of a continuing breach….the promised duty is considered as persisting and as being forever renewed until that which has been promised has been done a further breach arises in every successive moment of time during which the state or condition is not promised."

Relying on those portions of those books the plaintiffs submitted that the defendant continued damage/injury by failing to pay them extra hours worked, at overtime rate, for every month worked was a continuing injury or breach as provided under section 66(b) of the Act.

On the issue whether the plaintiffs are entitled to be paid the extra hours at over time rate, the plaintiff argued that in the defendant's introduction of the rota system, they were forced to work extra hours as stated in clause 10 (a) of the Regulation which clause provides as follows:

"except as otherwise specifically provided over time payment when authorized is payable for time worked beyond the standard daily hours for the place and post in which the employee is working unless he is given time off in lieu."

The plaintiffs argument is that the extra hours they were forced to put in by the defendant cannot be termed as overtime but can only be termed as extra hours and that therefore the payments of those extra hours were not limited by clause C10 (g). The plaintiff argued that those hours cannot be regarded as overtime but are extra hours worked because the defendant mandated them to work without option.

Clause C10 (g) provides that employees in supervisory grade (HM4) which is the plaintiffs grade are not eligible for payment of overtime. The plaintiff conceded that the defendant had paid them for the extra hours worked with effect from 19th April to 31st August 1999, but at the normal rate and not overtime rate.

In oral submissions before court learned counsel ***Mr. Wameyo*** for the plaintiffs further argued that the plaintiffs' suit is a declaratory suit and therefore was not caught by the limitation in section 66 of the Act. That the plaintiffs were seeking a declaration that they are entitled to be paid overtime for the extra hours worked and continue to be worked.

DEFENDANT'S SUBMISSIONS

In the defendant's written submissions the defendant stated that the plaintiffs' had admitted that they are part of the defendant's management staff.

That being so, the plaintiffs' are not eligible for the payment of overtime as per clause C10(g) that due to exigencies of work the defendant created a shift that would ensure smooth running of the port.

According to the defendant that action was within the provisions of clause C9 (e). That clause provides that although a standard shift is; "***five turns per week….when required…..other shift system may be introduced at particular places to suit local conditions, having regard to intensity of the work to be performed***".

The defendant submitted that the Regulation was the contract between the parties herein and that been so the plaintiffs' could not introduce extrinsic evidence. In that regard the defendant relied on the case; **Muthuuri Vs National Industrial Credit Bank Limited (2003) KLR** in that case it was held:

1. The history preceding the execution of a contract and any discussions or assurances in that regard are superseded by the subsequent written contract which becomes the exclusive memorial of the parties agreement.
2. No extrinsic evidence is admissible to contradict, vary, add to or subtract from the terms of the document.

In that regard, that the extrinsic evidence cannot contradict a written contract. This submissions by the defendant was in response to the plaintiffs' argument that theirs were extra hours worked and not overtime as prohibited by the regulation. The defendant also submitted that clause C10 (a) shows that no such distinction exists. That clause has been reproduced above in this judgment.

Further the defendant referred to clause E15 which provides for "***on call***" payments to the plaintiffs when they were outside the normal working hours. The defendant argued that the employment of the plaintiffs is a function of the defendant's Board and in that regard considering sections 9 and 58 of the Act the plaintiffs' employment falls within the ambits of section 66 of the act.

In responding to the issue before the court whether the defendant have breached the contract the defendant responded by saying that there had been no breech. This is because, the defendant had complied with clause C10 (g). That is because the plaintiffs' are managerial staff as provided in that clause.

JUDGMENT

I will begin by saying that I have read and considered both the written and the oral submissions of all the parties. Therefore, where I have not necessarily repeated the parties' arguments it should be understood in that background. The plaintiffs are all managerial staff of grade HM4 they are therefore members of staff who are excluded by the staff regulation from entitlement of overtime payment; that is as per clause C10(g) of the Regulations.

I therefore reject the plaintiffs' attempt to include themselves under the clause which provides for overtime payment. The plaintiffs argued that the defendant introduced a rota system which the defendant mandatorily required them to adhere to.

The rota system is provided for in clause C9(a). That clause in part provides "***in fixing rostered hours of duty, account must also be taken of such factors as the requirements of the public etc. It therefore follows that hours of duty may vary both for members of the same occupation at different location and for members of different occupation at the same duty station***".

Clause C9 (b) refers to eligibility to overtime payment of staff to which the plaintiffs by virtue of clause C10 (g) are not eligible. In this regard the plaintiffs' argument that what they worked was extra hours and not over time as correctly argued by the defence is an attempt to introduce extrinsic evidence to alter a written document that is the Regulations.

The courts cannot re-write parties contract. This was clearly stated in the case: **NATIONAL BANK OF KENYA LTD VS PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER (2001) KLR** in that case the court of appeal held:

"a court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."

The plaintiffs have conceded that they were paid for the extra hours worked. That payment which is refereed to in the regulations as "***on call***" payment is provided for in the agreement. This court cannot

therefore re-write the regulations to provide for payment of those extra hours as overtime rate.
I also make a finding that the plaintiffs in working according to the rota system prepared by the defendant cannot be said to have been held in slavery or servitude as per section 73 of the now revoked Constitution. A contract of employment is entered into freely and ordinarily there is provision in the contract of employment for termination. Where the contract of employment is not in writing, the Employment Act provides for its termination.

Employees as defined in Blacks Law Dictionary, is "***a person who works in service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.***" That definition shows that the employer directs how his work should be executed by the employee and that does not amount to slavery or servitude.

The treatment of the plaintiffs in a different manner to those that are unionized staff in the regulations cannot be said to be discriminatory. This is because each employee has an individual contract with the defendant which is entered into freely.

Further I find that the Employment Act Cap 11 does not apply to this case because its application was from June 2008. The plaintiffs' claim relates strictly to the period between the years 1999 and 2004. Further, section 8 of the Act does not apply to employment contract. That section regulates the operations of the defendant in its provisions of services to the public. It therefore does not apply.

I can find no basis in the documents placed before me for the argument that the plaintiffs are entitled to be paid for the extra hours worked at the over time rate.

Is the plaintiffs' suit time barred? Section 66 (b) reproduced above limits the period of filing an action under the act to be within 12 months next after the act, neglect or default complained of.

The plaintiff's claim is for payment of extra hours worked at over time rate from the year 1999 to 2004. The plaintiffs argued that section 66 as read with section 12 of the Act would allow their claim to be entertained. Section 12 as stated before, is the section which enables the defendant to provide services at its port. Such services are the maintenance of Beacons and other navigational aids. It is therefore not relevant in the case of employment contract. The plaintiff argued that every day worked by them was a promise that they would be paid for the extra hours worked. The plaintiff therefore, argued that a cause of action arose on each day they worked. They therefore, argued that the limitation period in section 66 of the Act did not apply.

It was not clear whether the plaintiffs were arguing that their claim for 12 months prior to the date of filing the plaint was capable of been entertained because it was within 12 months mention in section 66; or whether the plaintiffs was arguing that every new day worked renewed their claim for payment for extra hours from 1999 to the year 2004.

If the first scenario is the plaintiffs' case then it would follow that only the plaintiffs claim that relates to the year 2004 would not be caught by the limitation of section 66. However, since I have already found that the plaintiffs' are not entitled to payment at overtime rate, for extra hours worked, I will not consider that argument any further.

If the plaintiffs' case is that each successful day where extra hours were worked had the effect of renewing their claim and thereby removing the limitation of section 66 of the Act; I make a finding that the plaintiffs' claim was incapable of being renewed by each new day worked. I reject that argument and also reject the argument that the plaintiffs' damage was a continuous one.

As earlier found, the plaintiffs are of managerial staff and are therefore not entitled to payment of overtime. Their payment of extra hours which they confirmed they received is provided for under clause E15 of the regulations. In respect of a contract such as the one between the plaintiffs and the defendant the right to sue only occurs when the contract is breached.

According to the plaintiffs claim, the defendant ought to have paid them the overtime rate in 1999. It therefore follows that the supposed breach started in 1999. In my view that was when the right to sue accrued. In my opinion, the right to sue was established when the alleged breach of the contract of employment occurred in 1999. Every other subsequent alleged failure to pay the plaintiffs the over time rate flowed from the first breach of 1999.

It follows that had I found that the plaintiffs were entitled to receive over time rate payment their claim began to run for the purpose of limitation as stated in section 66 of the Act from 1999 when the alleged breach took place. I also reject the plaintiffs' argument that their action does not fall within the provisions of section 66 of the Act. This is because section 66 provides the actions it limits to be;

"….any action or other legal procedures is commenced against the Authority (defendant) 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 alleged failure of the defendant to pay the plaintiffs over time is an act envisaged under section 58 as read with section 10 (f) of the Act. The Board of the defendant under section 10(f) of the Act is empowered to approve, alteration in the organization of the defendant. The Board by virtue of that section provided the regulations which regulates the plaintiffs' employment with the defendant. It follows that the employment of the plaintiffs and the regulation are part of the Act and any action brought in relation to that employment or regulation is caught by the period of limitation of section 66 of the Act.

Plaintiffs' learned counsel argued that the plaintiffs' case is one of declaration and therefore was not limited by section 66 of the act. I respond by saying that the plaintiffs claim as clearly seen in their plaint seeks declaration of their right within the contract of employment. The plaint does not seek declaration of rights outside the contract of employment. The right to sue under that contract is limited by the provisions of section 66 of the Act.

The determination of the issues raised by consent of the parties, which were the subject of this judgment, in my view finally determines this case. It is for that reason that I have delivered a judgment and not a ruling. Having determined both issues, presented by the parties in the negative, the only issue remaining for determination is the issue of costs. There is no reason why costs should not follow the event.

The plaintiffs have failed, in my view, in their entire claim. For that reason, I hereby dismiss the plaintiffs' case with costs been awarded to the defendant.

JUDGMENT BY:

MARY KASANGO
JUDGE

DATED and **DELIVERED** at **MOMBASA** on this ***24th*** day of ***November, 2011.***

R. MWONGO
JUDGE