Ddaiddo v Bank of India (K) Ltd (Civil Appeal E082 of 2021)
[2024] KECA 749 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 749 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E082 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

JUNE 21, 2024

BETWEEN

FRANCOIS MAKORANI DDAIDDO ..... APPELLANT

AND

BANK OF INDIA (K) LTD ..... RESPONDENT

(Being an appeal against the judgment and decree of the Employment and Labour Relations Court at Mombasa (Byram Ongaya, J.) dated 16th July 2021 in ELRC Cause No. 616 of 2015)

JUDGMENT

1. By a plaint dated 16th August 2005 and amended on 24th October 2012, the appellant, Francois Makorani Ddaiddo, sued the respondent, Bank of India (K) Ltd, in the High Court of Kenya at Mombasa in HCCC No. 164 of 2005 seeking injunctive relief to restrain the respondent from dealings in plot MN/192/II (the suit property); an order declaring that the notification of sale of the suit property was null and void, and that he did not owe the respondent any moneys; compensation for years foregone on early retirement; medical cover for a period of 10 years; dues under a provident fund for Kenya National Assurance Co.; damages; costs and interest.

2. The appellant's suit was subsequently transferred to the Employment and Labour Relations Court whereupon it was assigned ELRC Cause No. 616 of 2015. Accordingly, he amended his amended plaint to a "Further Amended Memorandum of Claim" dated 19th February 2015 thereby abandoning some of the reliefs previously sought. In his "Further Amended Memorandum of Claim", the appellant sought the following orders:

    " 1) A declaration the Claimant does not owe the Respondent any moneys.

    2) A declaration that this action of the Respondent in deceiving or lying to Co-operative Bank was malicious and scandalous.

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a). Reinstatement to employment with all benefits for the lost years.

b) In the alternative:

i. Compensation under VERS 3 salaries for every year foregone up to a maximum of 40 salaries - Kshs. 1,777,520.00.

ii. Medical cover up to ten years from date of retirement - Kshs. 319,750.00.

iii. Provident Fund for Kenya National Assurance Kshs. - 140,832.60.

iv. Leave - Kshs. 52,595.00.

v. Leave accrued from 01.12.1997 to 31.07.98 - Kshs. 1,644.00.

vi. Gratuity for 11 years worked - Kshs. 406,318.00.

c). Exemplary damages - Kshs. 150,000,000.00.

d) Letter of termination or retirement.

e) Costs and interest.

f) Any other or further relief the Honourable Court may deem fit to grant."

3. The appellant's case was that he was employed by the respondent for whom he worked for a period of 11 years and 8 months; that, while in employment, he was advanced a loan of Kshs. 1,371,600 under the respondent's staff loan scheme; that the loan was to be repaid within 25 years out of his monthly salary until full recovery; that, on 27th July 1998, the appellant requested for early retirement under the then existing voluntary early retirement scheme (VERS), which the respondent allegedly accepted; that the respondent agreed to pay all benefits recoverable under the VERS at the age of retirement, and to deduct from the said benefits any money the appellant owed the respondent; that the respondent was also to pay to the appellant the sum of Kshs. 140,832/60 out of the respondent's provident fund, which had been received by the respondent from the Kenya National Assurance Co. Ltd, but that that sum had not been paid to date; and that the appellant had not been paid his benefits amounting to Kshs. 2,097,270.

4. The appellant averred further that he had not been issued with any letter or document indicating his official and lawful exit from employment as at that date; that a term of the voluntary retirement stipulated that the appellant was free to seek employment from another organisation on condition that the respondent was duly notified; that the appellant got a job with Cooperative Bank, who notified the respondent of their intention to hire him; that, in contravention of the terms of retirement, the respondent misinformed the human resource of the Cooperative Bank that the appellant had been dismissed thus prejudicing his opportunity for gainful employment; and that the respondent restrained and/or denied the appellant from seeking other job opportunities and, when contacted, the respondent gave bad recommendations.

5. According to the appellant, the respondent alleged to have applied the appellant's benefits to his loan account without giving him any statement of account showing how the money had been computed and applied; that, if properly computed, his terminal benefits were more than sufficient to settle his alleged indebtedness to the respondent; and that the interest claimed by the respondent was inordinately high, excessive, illegal and unconscionable.

6. The respondent filed its defence dated 2nd October 2012 and amended on 12th September 2015 in HCCC No. 164 of 2005. After transfer of the appellant's case as aforesaid, the respondent filed a "Further Amended Defence" in ELRC Cause No. 616 of 2015 essentially denying the appellant's claim. In its defence, the respondent averred that it advanced to the appellant an aggregate sum of Kshs. 1,371,600 on the security of the suit property and subject to the terms, conditions and interests stipulated in the Charge dated 25th November 1994 for Kshs. 585,000, the Further Charge dated 3rd May 1996 for Kshs. 497,700 and the Second Further Charge dated 27th May 1997 for Kshs. 288,900.

7. The respondent averred further that, after giving credit of Kshs. 509,860, the appellant was liable to the respondent for Kshs. 866,140/15, subject to interest payable under the aforesaid Charges; that on demand, the appellant failed to pay any interest and the amounts payable under the Charges for several years aggregating to Kshs. 2,134,124 as at 30th June 2002 in consequence whereof the respondent's right to exercise its statutory power of sale accrued; that appropriate steps were taken under the *Auctioneers Act* to have the charged property valued by a registered valuer; and that, according to the valuer's report dated 4th June 2004, the property was found to have:

   (i) an open market value of Kshs. 1,300,000;

   (ii) a mortgage value of Kshs. 1,100,000; and

   (iii) a forced-sale value of Kshs. 940,000.

8. According to the respondent, all sums due to the appellant were credited to his account, and there were no sums due or owing to him; that the sum due and owing to the respondent as at August 2016 stood at Kshs. 14,427,266/20, which continues to accrue interest at bank rates; that full particulars of payment credited to the appellant's loan account had been given to the appellant's advocates and were within the appellant's knowledge; and that the interest rates charged on the sums due were the rates applicable from time to time.

9. With regard to the appellant's dismissal, the respondent averred that the appellant wrongfully participated in an illegal strike on 3rd August 1998 and, consequently, it terminated his employment on 5th August 1998; that the appellant's request for early retirement in place of dismissal was declined; that any correspondence with Cooperative Bank of Kenya with respect to his dismissal was confidential, and that the appellant was not entitled to use such disclosure; and that, in any event, the respondent merely disclosed the fact of the appellant's dismissal to the Cooperative Bank of Kenya in confidence and without any malice.

10. The respondent's further defence was that, on termination of the appellant's employment, the respondent settled the appellant's dues in accordance with the award in Industrial Court of Kenya Cause No. 77 of 1999.

11. With regard to the impugned judgment, the respondent contended that the ELRC had no jurisdiction to rule on the interest rates applicable by the bank; that the appellant, on all three occasions, signed Charge documents accepting the said interest rates; that the ELRC had no jurisdiction to write off the debt due and owing to the respondent on account of the loans advanced to him, and had no jurisdiction to make a declaration that the appellant does not owe the respondent any moneys; that the ELRC did

not have jurisdiction to make a declaration that the respondent's correspondence with the Cooperative Bank was malicious and scandalous since, at the time, there was no employer/employee relationship between the appellant and the respondent; and that the ELRC had no jurisdiction to order and direct reinstatement or compensation since the issue was res judicata, having been dealt with by the Industrial Court of Kenya in Cause No. 77 of 1999.

12. Along with its statement of defence in which it prayed for the appellant's suit to be dismissed with costs, the respondent also filed a counterclaim essentially reiterating its averments in its further amended defence and praying for judgment in the sum of Kshs. 14,427,266/20 with costs of the counterclaim. It is instructive that the respondent's counterclaim is founded on the mortgage debt aforesaid, and on account of moneys allegedly due under the three Charges under which the appellant's debt was secured. We purpose not to say more on this claim in the absence of a cross-appeal on this account, and in view of our finding on the trial court's jurisdiction to which we will shortly return.

13. In addition to the defence and counterclaim, the respondent raised a preliminary objection dated 13th September 2016 on the grounds that: the matter was res judicata, the parties having been represented in the award delivered in Industrial Court of Kenya Cause No. 77 of 1999, which had been heard and determined conclusively; and that the ELRC had no jurisdiction to waive the appellant's debt and issue a declaration that the appellant does not owe the respondent any moneys.

14. In his defence to the appellant's counterclaim dated 20th June 2017, the appellant reiterated the contents of his further amended memorandum of claim and denied owing the respondent the sums claimed. He prayed that the counterclaim be dismissed with costs.

15. By a ruling dated 24th March 2017, the trial court rejected the respondent's preliminary objection and directed that the main claim be set down for hearing. Accordingly, the appellant's suit and the respondent's counterclaim proceeded to hearing on 6th February 2018 and 5th February 2020.

16. In its judgment dated 16th July 2021, the ELRC (Byram Ongaya, J.) dismissed both the appellant's suit and the respondent's counterclaim on the grounds that the parties' suit and counterclaim were time barred. As the learned Judge observed:

> " The Court has considered the submissions and pleadings on record. It is clear that the suit was filed in 2005 in the High Court and the claimant only objected to the respondent's exercise of the power of sale in view of the charges concluded by the parties. The amendments to urge the claims as based on the contract of service and as claimed and prayed for were introduced in 2012 and 2015 amendments as submitted for the respondent. The Court finds that as based on section 90 of the *Employment Act*, 2007 and section 4 of the *Limitation of Actions Act*, the three and six years of limitation as respectively prescribed had lapsed whether the cause of action was triggered in 2005 when the notice of sale was issued as urged for the claimant or in 1998 when the benefits were due as urged for the respondent. Needless to state, by the same finding the counterclaim as filed for the respondent on 14.09.2016 was equally time barred. Accordingly, the claimant's suit and the counterclaim are both liable to dismissal as time barred and with orders each party to bear own costs of the proceedings herein."

17. Dissatisfied by the learned Judge's decision, the appellant moved to this Court on appeal on a legion of 13 grounds against the grain of rule 88 of the Court of Appeal Rules, which requires a memorandum of appeal to concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying: (i) the points alleged to have been wrongly decided; and (ii) the nature of the order which it is proposed to ask the Court to make.

18. Be that as it may, the appeal was anchored on the following argumentative grounds, which we take the liberty to replicate as hereunder:

> " 1. THAT the learned Judge erred in fact and in law in finding the Claimant Suit was time barred without appreciating that Claimant suit was first lodged as HCC No. 164 of 2005.
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> 2. THAT the learned Judge erred in fact and in law by failing to appreciate that the Honourable Court had become functus officio in regards to the question of time having admitted that the suit was properly before it and made determinations on a Preliminary Objections raised by the Respondent seeking to terminate the suit for being time barred.
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> 2. THAT the learned Judge erred in fact and in law by having the impression that the action of the Minister of Labour declaring the National Bankers unionize employees strike of 3rd August, 1998 illegal then all the employees who participated were summarily terminated and/or dismissed.
>
> 3. THAT the learned Judge erred in fact and in law by failing to appreciate that functions to terminate job and/or service is within the ambit of the Employer and not the Ministry of Labour whereof by declaring the strike illegal does not presuppose that all the employees who participated in the strike were summarily terminated and/or dismissed.
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> 4. THAT the learned Judge erred in fact and in law by failing to appreciate that the act and/or process of termination of an employee's services is a process pursuant the labour Laws as at 1998 requiring the employer to issue Three [3] written warning letters before the actual termination.
>
> 5. THAT the learned Judge erred in fact in evaluating the judgment of Honourable Justice Seed R. Cockar, M.B.S In Industrial Court Cause No. 77 of 1999 whereof Honourable judge directed that the member of the Central Staff Committees and all Banks Shop stewards Committee which member were in the Nairobi Headquarter offices and which was the decision making organ were the one whose services were terminated and not the branch shop stewards.
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> 2. THAT the learned Judge erred in fact and in law by declaring that the Minister's declaration that the national strike was illegal in itself constituted termination of employment contract between an employer and the employee.
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> 3. THAT the learned Judge erred in fact and in law by failing to appreciate that all the employees of Fifty Two [52] banks registered in Kenya went on strike and to terminate services of the Appellant on that basis could have been illegal and discriminatory.
>
> 4. THAT the learned Judge erred in fact and in law by failing to appreciate that participating in a national strike does not in itself constitute an act of gross misconduct to warrant summary dismissal.

5. THAT the learned Judge erred in fact and in law by failing to appreciate that the Appellant as at today has neither been served with termination letter nor process of termination instituted against him.

6. THAT the learned Judge erred in fact and in law by failing to appreciate that the Appellant and the Respondent as at 2nd September, 1998 had agreed in terms whereof the Appellant was admitted for Voluntary Early Retirement and his benefits tabulated.

7. THAT the learned Judge erred in fact and in law by failing to appreciate that it is the Respondent who reneged on the mutual agreement of 2nd September, 1998 for Voluntary Early Retirement thereby plunging the Appellant into disastrous economic quagmire.

8. THAT the learned Judge erred in fact and in law by failing to appreciate that it is the Respondent who acted out of bad faith and malice in writing a false letter dated 8th February, 1999 to the Co-operative bank of Kenya which act was an act of economic sabotage and/or crime."

19. In support of the appeal, learned counsel for the appellant, M/s. Marende Necheza & Company, filed written submissions and list of authorities dated 20th June 2022 and supplementary submissions dated 7th November 2022 citing the cases of Francis X. O. K'ombut vs. University of Nairobi [2020] eKLR, submitting that the appellant's claim was not statute barred; Benson Njuguna vs. Postal Corporation of Kenya [2013] eKLR where the court held that the claimant therein was entitled to voluntary early retirement, based on the conduct of the respondent therein indicating that the claimant's application had been approved; and John Njoroge vs. National Bank of Kenya Ltd [2018] eKLR where the ELRC noted that exemplary damages will be awarded where the respondent has acted maliciously with improper motives. They urged us to allow the appeal with orders as prayed in the memorandum of appeal.

20. On their part in opposition to the appeal, learned counsel for the respondent, M/s. Kittony Maina Karanja Advocates, filed written submissions and list of authorities dated 16th January 2023 citing the cases of Rajnikantkhetshi Shah vs. Habib Bank A. G. Zurich [2016] eKLR for the proposition that, as long as a Charge is subsisting and has not been discharged, and as long as the debt for which such charge was given as security or guarantee remains unpaid, the cause of action to recover the debt through lawful realization of the security or enforcement of the guarantee thereof is also alive; Nicholas Mahihu Muriithi vs. Barclays Bank Kenya Limited [2018] eKLR for the proposition that, before a chargee has taken steps to realise the debt, the cause of action has not arisen and, therefore time has not started running; and Kenneth Wandera & Another vs. National Bank of Kenya [2016] eKLR, submitting that the effect of acknowledgement of the debt was to reboot the bank's right of action to recover the debt. Counsel urged us to uphold the finding of the trial court that the appellant's suit was time barred; make a finding that the trial court's declaration that the respondent's counterclaim was time barred was erroneous; and allow the counterclaim with costs to the respondent.

21. This being a first appeal, this Court's mandate was espoused in Ng'ati Farmers' Co-Operative Society Ltd. vs. Ledidi & 15 Others [2009] KLR 331 as follows:

> " An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though

it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

22. This mandate was reiterated in the case of Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212 as follows:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

23. We are however conscious as cautioned by the predecessor to this Court in Peters vs. Sunday Post Ltd [1958] E.A 424 that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

24. In our view, the relevant issues that fall for determination in this appeal are twofold, namely: whether the appellant's suit and the respondent's counterclaim were statute barred; and whether the ELRC had jurisdiction to hear and determine the parties' dispute relating to the mortgage debt secured by a Charge, Further Charge and Second Further Charge

25. On the 1st issue, it is noteworthy that the appellant was dismissed from his employment on for participating in an unlawful strike on 3rd August 1998; that his plea for forgiveness and reinstatement vide his letter dated 2nd September 1998 did not attract the respondent's favour; that his request to be allowed to proceed on early retirement was likewise declined; that, in effect, his employment was at an end on 5th August 1998; and that, in its judgment dated 7th March 2001, the Industrial Court of Kenya upheld the appellant's dismissal in Cause No. 77 of 199 in which the appellant was among the union members represented in their unsuccessful cause.

26. Subsequent to the Industrial Court decision on 7th March 2001, the appellant filed suit against the respondent in the High Court of Kenya at Mombasa in HCCC No. 164 of 2005 in which he was essentially resisting the respondent's exercise of its statutory power of sale to realise the securities to wit the three Charges over his plot No. MN/192/II. That suit had nothing to do with his termination, save for his plea in his amended plaint dated 24th October 2012 in which he alleged to have been offered early retirement and the appurtenant benefits that were allegedly agreed to be applied in discharge of his mortgage debt. In effect, fourteen (14) years had passed before the appellant introduced the issue of his dismissal/early retirement in the High Court for the very first time.

27. It is also instructive that it was not until his High Court case was transferred to the ELRC and registered as ELRC Cause No. 616 of 2015 that the appellant amended his amended plaint and filed his "Further Amended Memorandum of Claim" under which he raised a substantive claim for compensation for

termination of his employment in August 1998. To our mind, his claim in the ELRC came seventeen (17) years after his dismissal. Yet, the appellant faults the learned Judge for holding that his claim was time barred.

28. Section 90 of the *Employment Act* (Cap.226), which is couched in mandatory terms, expressly limits time within which claims bounded on employment relations may be brought; It provides that:

> 90. Limitations
>
> Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

29. In Attorney General & another vs. Andrew Maina Githinji & another [2016] eKLR, Waki, JA held that:

> " Such provision did not exist in the repealed *Employment Act*, Cap 229 which did not have elaborate provisions on 'Termination and Dismissal' as its supplanter does. Time limits in the former Act were subject to the *Limitation of Actions Act* which in some cases could be as long as 12 years and amenable to extension. By expressly inserting Section 90, the intention of Parliament , in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word 'shall'."

30. In G4S Security Services (K) Limited vs. Joseph Kamau & 468 others [2018] eKLR, this Court also held that:

> " (19) In the circumstances of this case we find that the contracts of 464 respondents were terminated in 2008, 2009 and 2010 and the claim was filed in 2014. Pursuant to Section 90 of the *Employment Act*, the claims should have been filed within three years of the termination of employment. The claims in respect of the 464 respondents were therefore time barred.
>
> [20] In the circumstances of this case we find that such 'unpaid terminal dues' do not constitute a continuing injury as contemplated under the proviso to Section 90 of the *Employment Act*. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month. Regarding 'a continuing injury', the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred."

31. Our reading of section 90 of the *Employment Act*, and on the authority of Attorney General & another vs. Andrew Maina Githinji & another; and G4S Security Services (K) Limited vs. Joseph Kamau & 468

others (ibid), we reach the inescapable conclusion that the learned Judge was not at fault in finding, as we do, that the appellant's suit founded on his contract of service was statute barred.

32. With regard to the respondent's counterclaim, we take to mind the fact that the learned Judge pronounced himself thereon and concluded that it was equally statute barred. In the absence of a cross-appeal in this regard, the most we can do is to address ourselves on the trial court's jurisdiction to consider the counterclaim and make such a finding. Put differently, did the trial court have jurisdiction to consider and make a finding either way on the respondent's counterclaim? The decisive question is whether the counterclaim was properly before the ELRC, which raises a jurisdictional issue for our determination.

33. On the issue as to whether the ELRC had jurisdiction to entertain the respondent's counterclaim with regard to the mortgage debt contracted by the appellant, the enforcement of the securities in issue, and the issue of accounts in that regard, we take to mind the provisions of Article 162 of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act*, which delimit the jurisdiction of the ELRC in no uncertain terms.

34. Article 162 of *the Constitution* lays the foundation for the legislative framework for the establishment of the Employment and Labour Relations Court and provides that:

> 162. System of courts
>
> (1) ...
>
> 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
>
> a. employment and labour relations; and
>
> b. the environment and the use and occupation of, and title to, land.
>
> 3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

35. Pursuant to Article 162(2) (a) and (3) of *the Constitution*, section 12 of the *Employment and Labour Relations Court Act*, No. 20 of 2011 delimits the jurisdiction of the Employment and Labour Relations Court in the following terms:

> 12. Jurisdiction of the Court
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> 1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
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> a. disputes relating to or arising out of employment between an employer and an employee;
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> b. disputes between an employer and a trade union;
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> c. disputes between an employers' organisation and a trade unions organisation;
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> d. disputes between trade unions;
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> e. disputes between employer organizations;
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> f. disputes between an employers' organisation and a trade union;

g. disputes between a trade union and a member thereof;

h. disputes between an employer's organisation or a federation and a member thereof;

i. disputes concerning the registration and election of trade union officials; and

j. disputes relating to the registration and enforcement of collective agreements.

36. Addressing itself to the distinction between the High Court, the ELRC and the ELC, and the distinct jurisdictional remits of the three superior courts, the Supreme Court had this to say in its holding in Republic vs. Chengo & 2 others [2017] KESC 15 (KLR):

> " 52. In addition to the above, we note that pursuant to Article 162(3) of *the Constitution*, Parliament enacted the *Environment and Land Court Act* and the Employment and *Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of *the Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with suis generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa.
>
> The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court" [Emphasis ours]

37. In the same vein, this Court in National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 others [2023] KECA 80 (KLR) held that:

> " The intention of Parliament is clear both from the preamble and section 12(1)(a)-(f). The ELRC Act was enacted to resolve employer-employee disputes as
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> provided by article 162 (a) of *the Constitution*. That is the purpose and context which cannot be ignored in interpreting provisions of the act .... The germane issue framed by the court did not arise in an employer-employee dispute nor does it fall under section 12(1)(a)-(f)." [Emphasis added]

38. The foregoing constitutional and statutory provisions lend clarity to the jurisdictional remit of the ELRC. Its jurisdiction does not extend to disputes over mortgage debts, which do not fall within the scope of the employer/employee disputes contemplated in section 12 of the ELRC Act. In effect, the ELRC had no jurisdiction to entertain the respondent's counterclaim or pronounce itself on the issue as to whether or not it was barred by the statute of limitation.

39. Having carefully considered the record of appeal, the impugned judgment, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal herein succeeds in part. Consequently, we hereby order and direct that:

a. the judgment and decree of the ELRC (Byram Ongaya, J.) dated 16th July 2021 be and is hereby set aside and substituted therefor:

i. a declaration that the appellant's suit in ELRC Cause No. 616 of 2015 was time barred;

ii. the ELRC had no jurisdiction to entertain the respondent's counterclaim or make any finding thereon; and

b. each party shall bear their own costs of the appeal.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR