IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAI, JJA)

CIVIL APPEAL NO. 297 OF 2012

BETWEEN

DOMINICIANO KINYUA MAGAMBO.....1ST APPELLANT

PATRICK MBUTHIA.....2NDAPPELLANT

CHRISTOPHER MATHEKA.....3RD APPELLANT

GEORGE NDUNGU KAMAU.....4TH APPELLANT

DOROTHY NKIROTE RINGERA.....5TH APPELLANT

AND

INVESCO ASSURANCE COMPANY.....RESPONDENT

(Being an appeal from the Ruling and decree of the Employment and Labour Relations Court

at Nairobi (Ndolo J.,) dated 25th November, 2016

in

Cause Nos. 1197, 1198, 1200, 1201, and 1202 of 2016)

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JUDGMENT OF THE COURT

[1] This is an appeal against the ruling and orders of the Employment and Labour Relations Court (ELRC) in which Ndolo, J. ordered that the appellants' claims be struck out with no orders as to costs. A brief background of the matter will put it into perspective. All the five appellants filed separate claims before ELRC against ***Invesco Assurance Company*** (**respondent**) on the 20th June, 2016. The claims were consolidated for purposes of hearing and determination. In the said suits, the appellants alleged that they were on various dates employed by the respondent according to different terms and conditions as per their respective letters of employment. The appellants contended that they performed their duties diligently in their respective designations until sometimes in the month of February, 2008 when the respondent was placed under statutory management.

[2] Consequently, the statutory manager sent to the appellants and all other employees an internal memo dated 1st March, 2008 informing them that they were to proceed on unpaid leave as they awaited further communication. The appellants claimed that by that time the respondent had withheld their respective salaries and un-paid leave for the periods tabulated as per their individual memorandum of claims.

[3] The appellants further alleged that on or about the month of February, 2010 the respondent resumed operations but when the appellants went to inquire on when they would resume work, they were orally told to wait for communication via mail on when to report. After waiting for communication for what appeared as eternity without any success, they filed the aforesaid claims alleging that the respondent withheld their dues without any colour of right and that the respondent failed to allow them return to work in the positions that they occupied. Each of the appellant tabulated their claim of unpaid salaries and other dues.

[4] The respondent entered appearance and countered each of the claims with a Preliminary Objection on the grounds that the claims were time barred as per the provisions of ***Section 90*** of the **Employment Act**. The Preliminary objection was canvassed before the learned trial Judge vide written submissions. In a brief kind of extempore two page ruling, the subject of the instant appeal, the appellants' claims were struck out as aforesaid. This is what the learned Judge stated in dismissing the suit: -

> ***"Emerging jurisprudence on the import of Section 90 of the Employment Act is that the court has no jurisdiction to extend time for filing of claims falling under the Act…***
>
> ***In the submissions filed on behalf of the claimants, the decision of this court in George Hiran Ndiragu v Equity Bank Limited [2015] e KLR was cited. In that decision the court defined the phrase 'continuing injury or damage' appearing in Section 90 of the Employment Act as;***
>
> > ***"Violation of rights under an employment contract such as salary underpayment or failure to pay accrued dues"***
>
> ***In my view, the claimants' claims would fall under the category of continuing injury or damage and they therefore ought to have been brought within twelve months after the last violation. From the respective memoranda of claim, the claimants' claims relate to salaries and accrued benefits dating as far back as their respective dates of appointments, the latest claim being for the year 2008.***
>
> ***The claims are evidently statute barred and the court lacks jurisdiction to entertain them"***

[5] This is what provoked the instant appeal that is predicated on some 5 grounds of appeal. The appellants fault the learned trial Judge for: failing to appreciate that the appellants cause of action against the respondent was for non-payment of employment dues accrued over the years and not wrongful termination as was alleged by the respondent; holding that the appellants' cause of action against the respondent was statute barred under ***Section 90*** of the **Employment Act**; misapprehending the facts and relying on extraneous matters thereby arriving at an erroneous decision; and entertaining and allowing the respondent's preliminary objection that did not raise a pure point of law. The appellants entreated us to allow the appeal, set aside the ruling and substitute thereto an order dismissing the preliminary objection; and remit the matter for retrial before another Judge in the ELRC.

[6] When the appeal came up for plenary hearing on 24th September, 2019 **Mr. Naututu** holding brief for **Mr. Waiganjo** learned counsel for the appellants relied on their clients written submissions filed in Court on 19th September, 2019. Counsel for the appellants also made some brief highlights emphasizing that the claims by the appellants were not statute barred as they were never given a letter of termination stating that their respective services were no longer required; and that the learned Judge ignored the fact that the appellants merely found a notice on their areas of work stating that the respondent was under statutory management; and that according to the notice all staff were sent on compulsory unpaid leave and told to await further communication, and that no such communication has ever been issued.

[7] Although the statutory management was lifted in 2010, when the appellants reported to work, they were turned away and advised to wait for communication which they have never received to-date. According to counsel for the appellants this was a continuing injury which is a violation of the rights of the appellants under the employment contract. Counsel also cited the provisions of ***Section 67*** of the **Insurance Act** which gives power to the Commissioner of Insurance to appoint a statutory manager. However, there is nothing in the said provision that provides for termination of employees. Furthermore, the responsibilities of a statutory manager are well defined. Counsel refuted the contention by counsel for the respondent that the contract of employment was terminated upon appointment of the statutory manager. Counsel for the appellants concluded by submitting that the appellants are still employees of the respondent and their claims were running up to the date of filing the suit. Counsel urged us to allow the appeal as prayed in the memorandum of appeal.

[8] Opposing the appeal was **Mr. Anyona** learned counsel holding brief for **Muma & Kanjama Advocates** for the respondent. Counsel also relied on their written submissions and made some oral highlights. Counsel supported the impugned ruling submitting that the Judge focused on the cause of action relating to salaries and accrued benefits and not wrongful termination. Counsel cited the provisions of ***Section 90*** of the **Employment Act** and laid emphasize on the cases of **New Kenya Co-operative Creameries Ltd vs. Peter Manthi Mwau [2007] eKLR;** and **Rift Valley Railways (Kenya) Ltd vs. Hawkins Wanguza Musonye & Another [2006] eKLR;** where the courts consistently held that the three (3) year limitation period related to contracts of employment and that even a claim of continuing injury should be brought within a span of one year. Counsel for the respondent argued that the appellants' claims were filed after a period of about eight (8) years after the alleged dismissal from employment. To counsel, the claims were rightly struck out for being statute barred. Counsel urged us to dismiss the appeal with costs to the respondents.

[9] This being a first appeal, it behoves this Court to re-evaluate, re-assess and reanalyse the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of **Kenya Ports Authority vs. Kuston (Kenya) limited (2009) 2EA 212** this Court espoused that mandate or duty 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.**"

[10] This matter was however determined on a preliminary point on the basis that it was statute barred as per the provisions of ***Section 90*** of the **Employment Act** which provides as follows: -

> "**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 of or <u>in the case of</u> <u>continuing injury or damage within twelve months next after the cessation thereof</u>." (Emphasis added)

The issue(s) for determination remains whether the Judge erred by finding the appellants' claims of continuing injury time barred. The principles that guide the court in determining a preliminary objection are well articulated in the ancient case of **<u>Mukisa Biscuit Manufacturing Co. Ltd vs. West Distributors Ltd</u> [1969] EA 696, where Law, JA.** stated as follows: -

> ***"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration…"***

Sir Charles Newbold, P at Page 701 proceeded as follows: -

> ***"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and on occasion, confuse the issue. The improper practice should stop."***

[11] As stated above, a preliminary objection should raise a pure point of law which is not contested and all facts pleaded by the other side should be correct and none should be disputed. In this case the appellants were not alleging that there was termination of employment. In fact, their position was that they were still in employment as they claimed they never received any communication terminating their contracts of employment. On the other hand, the respondent contends that the appellants' employment was terminated with the appointment of the statutory manager in February, 2008. The respondent did not adduce any documentary evidence to support that contention. As matters stood, we think this was not an appropriate matter to determine on a preliminary point. Because there was no way of proving who among the appellants and the respondent's position was correct short of conducting a hearing where oral evidence would have been adduced.

[12] We think it was necessary for the court to interrogate the allegations on whether or not the appellants' contracts of employment were terminated and if at all they were, how and when. The appellants produced a Memo dated 1st March, 2008 informing all the employees that they were sent on compulsory unpaid leave and there would be further communication. We do not see any further communication on record from the respondent terminating the appellants' contracts. The Judge rightly found the appellants' claims fell within the realm of continuing injury but without documentary evidence of when the claim crystallized, it was an error on the part of the Judge to dismiss the claims on a preliminary objection.

[13] Having found as we have that there were contested matters that could not have been wished away without being subjected to court room trial process, it follows that the learned Judge erred in relying on the allegation by the respondent that the appellants' contracts of employment were terminated in 2008 when the statutory manager took over the management of the respondent as the basis of dismissing the claim on a preliminary objection.

[13] Accordingly, we find this appeal has merit and is hereby allowed with costs. We set aside the ruling dated 25th November, 2016 in its entirety and substitute the same with an order dismissing the preliminary objection. The appellants' claims are hereby reinstated to be placed before a Judge, other than Ndolo J, for hearing.

Dated and delivered at Nairobi this 7th day of February, 2020.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR