



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G.B.M KARIUKI, MOHAMMED & KANTAI, JJA)**

**CIVIL APPEAL NO. 158 OF 2015**

**BETWEEN**

**G4S SECURITY SERVICES (K) LIMITED.....APPELLANT**

**AND**

**JOSEPH KAMAU & 468 OTHERS.....RESPONDENT**

*(Appeal from the Ruling of the Employment and Labor Relations Court of Kenya at Nairobi (Mathews Nderi Nduma J) dated 15th May, 2015)*

**in**

**Cause No. 56 of 2014**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

**BACKGROUND**

[1] This is an appeal from a ruling of the Employment and Labor Relations Court at Nairobi dated 15th May, 2015 in which the learned judge dismissed the appellant's preliminary objection seeking to have the claim struck out for being time barred.

[2] A brief background of the matter is that the respondents lodged a claim against the appellants before the Employment & Labor Relations Court at Nairobi being Cause No. 56 of 2014. In the claim, the appellants averred that before May, 2008, the respondents were employed by Armor Group (K) Limited, whose parent company was Armor Group International PLC.; that in May, 2008, through international competitive bidding, all properties and assets including the labor force employed by Armor Group (K) Limited were officially acquired by the appellant; that during the acquisition process, Armor Group (K) Limited assured the respondents that they would retain their terms and conditions of service once acquired by the appellants; that after the acquisition process, the appellant, through their Managing Director, signed a staff memo to the effect that the respondents would maintain their jobs and that there would be no change of employment terms; that on various occasions after the acquisition process was carried out, the appellant terminated the respondents' services on various dates and time; that while the appellant was computing their terminal dues, they only computed dues owed from when the acquisition took place and withheld dues for all the years the respondents worked for Armor Group (K) Limited before the acquisition took place. **The appellant sought a declaration to have the appellant pay the respondents the accrued terminal dues.**

[3] The appellant filed a notice of preliminary objection on grounds that the claim is time barred for the causes of action that accrued between 2008 and 2010 except for five claimants whose causes of action arose between the years 2011 and 2012 under the provisions of Section 90 of the Employment Act, 2007 and that the Court lacked jurisdiction to entertain those claims; that the claimant's right to sue having lapsed, they lacked the capacity to bring any cause of action against the appellant; that since the respondents filed their claim on 22nd January, 2014, three years after the limitation period had passed, their right to sue for alleged wrongful dismissal had lapsed; and that once a Court lacks jurisdiction to handle a claim, then it must down its tools.

[4] The respondents in reply to the preliminary objection contended that after they were unfairly terminated, they lodged a complaint at the Ministry of Labour for conciliation on 24th January, 2011 wherein the appellant and respondents were involved in negotiations and adduced evidence to that effect; that since the conciliation process was futile, they filed the cause in 2014, two years from the year 2012 after conciliation failed, and hence, they were within the time limit.

[5] The learned judge upon hearing the parties, delivered his ruling and dismissed the appellants' preliminary objection expressing himself as follows:

***“...It is the Court’s considered view that termination of employment does not extinguish payment of work emoluments and terminal benefits due and owing to the employees by fact of service rendered and so long as the emoluments and benefits remain unpaid, the same constitute “continuing injury or damage within the meaning of Section 90 of the Employment Act,2007... The terminal benefits claimed constitute basic minimum conditions of employment provided under part V of the Employment Act, 2007, and enhanced in the contracts of employment. Once earned and accrued, the benefits remain due and owing to the employees continuously until paid in full...”***

[6] Aggrieved by that decision the appellant filed this appeal which is predicated on the grounds that the learned judge erred in law by holding that:-

***i) Termination of employment does not extinguish payment of work emolument and terminal dues even where the claims thereof are made beyond the limitation period fixed by Section 90(1) of the Employment Act, 2007.***

***ii) So long as emoluments and benefits remain unpaid, they constitute “continuing injury or damage within the meaning of Section 90 of the Employment Act, 2007.***

***iii) Finding that parties had referred the matter to conciliation when there was no evidence before him to show that any dispute had been declared, sent to conciliation and remained unresolved.***

***iv) That the conciliation process in any way suspended the running of time for purposes of commencing proceedings in the Employment and Labor Relations Act.***

***v) Failing to hold that all claims by the 464 Claimants’ were time barred under the mandatory provisions of Section 90 of the Employment Act, 2007.***

The appellant sought the following orders:

(1) That the appeal be allowed

(2) The ruling of the Employment and Labour Relations Court made on 15th May, 2015 be set aside and submitted with an Order upholding the preliminary objection and striking out the Claimant’s case with costs.

(3) That the cost of this appeal and of the Employment and Labour Relations Court be awarded to the appellant.

#### **SUBMISSIONS BY COUNSEL**

[7] At the hearing of this appeal, learned Counsel Ms. Kirimi appeared for the appellant while learned counsel Ms. A.O. Ameyo appeared for the respondents. Both parties had filed their submissions and their respective list of authorities.

[8] On grounds 1 and 2 of the appeal, Counsel for the appellant submitted that for the claimants whose services were terminated in the years 2008 to 2010, their causes of action became time barred between the years 2011-2013 which was three years from the date the causes of action arose and thus time barred as per the provisions of section 90 of the Employment Act *vis~ a~ vis* Section 4 (1) of the Limitation of Actions Act; that unpaid terminal dues are civil actions or proceedings arising out of the Employment Act or contract of service and as such, no action can be instituted unless it was commenced within three years after the act or default complained of; that unpaid terminal dues do not constitute a continuing injury as such a claim should be made within twelve months once the ‘continuing injury’ stops, which period the learned judge failed to clarify; that the learned judge erred in concluding that the claim for unpaid terminal dues had no limitation of time and that the learned judge misinterpreted the law in declaring the claim as continuing injury.

[9] On grounds 3 and 4 of the appeal on the issue of conciliation, counsel for the appellant submitted that no evidence was placed before the learned judge to show that there was any conciliation before the year 2014 or that the filing of the suit had been delayed due to ongoing negotiations and that the learned judge erred in finding that there was a conciliation process proceeding whereas there was no proof of the same.

[10] Counsel for the appellant concluded by submitting that since their preliminary objection was based on Section 90 of the Employment Act, it was based on a point of law and thus the learned judge erred in failing to hold that the court had no jurisdiction to hear and determine claims lodged out of time.

[11] Counsel for the Respondent in response to the appellant’s submissions submitted that the learned judge was right in finding that once a benefit is earned and accrued, it remains due and owing until paid in full and since the benefits were never paid in full, they amounted to a continuing injury. Counsel submitted that the preliminary objection filed sought to dismiss the claim without hearing it on merit; that the respondents acted within the law by referring the matter to conciliation and relied on the provisions of Article 159(2)(c) of the Constitution of Kenya which encourage parties to pursue alternative dispute resolution mechanisms and that it would be in bad faith to start the reconciliation process then simultaneously institute a claim in Court; that the appellant having actively participated in the conciliation process, the respondents were hopeful that the conciliation process would be successful and relied on Sections 39(1) (b) of the Limitation of

Actions Act which provides that a period of limitation does not run if a person attempting to plead limitation is estopped from doing so. Counsel urged the Court to dismiss the appeal.

## **DETERMINATION**

[12] We have considered the oral and written submissions by counsel, the authorities cited and the law. As stated in the renowned case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] EA 696** :

***“...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;*

***“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”***

The test to be applied in determining whether the preliminary objection met the threshold is as in the **Mukisa** case (Supra) which are whether the preliminary objection raises a pure point of law, that there is a demonstration that all the facts pleaded by the other side are correct and that there is no fact that needs to be ascertained.

When dismissing the appellant’s preliminary objection, the learned judge stated as follows:-

***“It is the Court’s considered view that termination of employment does not extinguish payment of work emoluments and terminal benefits due and owing to the employees by fact of service rendered and so long as the emoluments and benefits remain unpaid, the same constitute “continuing injury or damage within the meaning of section 90 of the Employment Act. It follows that the injury and damage the subject of the suit (sic) will abate upon resolution of the dispute.”***

[13] In this case, the preliminary objection raised by the appellant herein was based on Section 90 of the Employment Act. The appellant raised the preliminary objection on the following 2 grounds:

- a) In so far as the suit relates to causes of action that allegedly accrued between 2008 and 2010, this claim is time barred under the provisions of Section 90 of the Employment Act of 2007. The Court therefore lacks jurisdiction to entertain this claim and the same ought to be struck out with costs to the respondent.
- b) The Claimant’s rights to sue having lapsed, the Claimants lack capacity to agitate any cause of action against the respondent. The Claim is therefore an abuse of the court process.

[14] Section 90 of the Employment Act 2007 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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.” (Emphasis supplied).***

[15] It is not in dispute that the alleged causes of action arose in the years 2008, 2009 and 2010 upon the respondent’s termination of employment by their employer. Pursuant to the provisions of Section 90 of the Employment Act, those claims became time barred in 2011, 2012 and 2013 respectively, three years after the respective causes of action arose.

[16] The 469 respondents filed their claim on 22nd January, 2014. Of the 469 respondents, the right to sue for alleged terminal dues for 464 respondents lapsed and they therefore have no capacity to bring any cause(s) against the appellant in respect of their termination of employment. 5 of the respondents’ claims were not time barred as their employment was terminated in the years 2011 and 2012 and their claim was in 2014.

[17] The learned Judge heard the preliminary objection and dismissed it on the ground that the claims were not time barred notwithstanding that they were filed outside the three year limitation period stipulated in the Employment Act. The learned Judge found that the respondents’ claims was for unpaid terminal dues which constituted a continuing injury. He defined ‘continuing’ based on the English term as ‘remain in existence, operation or a specified state’. The learned Judge on this basis held that the terminal benefits once accrued, remained due and owing to the employees continuously until paid.

[18] This position is fortified by the decision of this Court in the case of **Attorney General & another v Andrew Maina Githinji and another [2016] eKLR** where in upholding a Preliminary Objection based on Section 90 of the Employment Act, Waki JA held as follows:

***“...The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not. Having found that the cause of action arose on 2nd February 2010 and that the claim was filed on 16th June 2014, it follows by simple arithmetic that the limitation period of 3 years was surpassed by a long margin. The claim was time barred as at 1st February 2013, and I so hold.”***

[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.

[21] On the respondent’s contention that the parties were undergoing a conciliation process which occasioned a delay in the respondents’ filing suit pending the outcome of the conciliation process, we note that there is no documentary evidence to prove that contention. Indeed, there appears to have been no evidence to prove this fact before the learned Judge.

[22] The statutory framework on the conciliation process is as provided for by the provisions of the Labour Relations Act, 2007. Section 62 (3) of the Labour Relations Act, 2007 provides that a trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister **within 90 days of the dismissal** or any longer **period** that the Minister, on good cause, permits. It is not clear exactly when the respondents reported this matter for conciliation.

[23] Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law. This is fortified by the decision of this court in the case of **Rift Valley Railways (Kenya) Ltd V Hawkins Wagonza Musonye and another [2016] eKLR** which held as follows:

***“While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents’ contracts of service.”***

**See:Times Newspapers Ltd v O’Regan [1977] I.R.L.R 101** where the Court sitting on appeal held that an employment tribunal had erred in law in finding that it was not reasonably practicable for an employee to make her complaint for unfair dismissal within the requisite period on grounds of her belief that the period to file her claim ran from the end of negotiations between her union and the employer.

[24] In the circumstances of this case, we are satisfied that 464 respondents having conceded that their employment was terminated in the years 2008, 2009 and 2010 and filed their claim on 22nd January, 2014, that they filed their claims outside the limitation period of 3 years. The Employment and Labour Relations Court therefore erred in holding that it had jurisdiction to hear and determine claims that were filed outside the statutory limitation period.

[25] Accordingly, this appeal has merit and we allow it with costs with the effect that the appellant’s preliminary objection dated 11th November, 2014 is upheld and the claims by 464 respondents filed in the years 2008, 2009 and 2010 are hereby struck out as they are statute barred.

[26] For the sake of clarity, the claims of 5 respondents who claim to have had their employment terminated in 2011 and 2012, and who filed then claims in 2014, we hold that their claims are *prima facie* not statute barred. The 5 claimants are:

- a) Julius Abura
- b) Dennis Mwaniki
- c) Douglas Gisemba
- d) Enock Bogonko and
- e) Maritinus Masoka Onguso.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of February, 2018.**

**G.B.M. KARIUKI, SC**

.....

**JUDGE OF APPEAL**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**