IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, KARANJA & G.B.M. KARIUKI, JJ.A

CIVIL APPEAL NO. 21 OF 2012

BETWEEN

NEW KENYA CO-OPERATIVE CREAMERIES LIMITED…..APPELLANT

AND

PETER MANTHI MWAU…….....RESPONDENT

(An appeal from the Ruling and Order of the Industrial Court of Kenya at Nairobi (P. K. Kosgei, J.) dated 21st July 2011 in Industrial Court Cause No. 1267 of 2010)

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JUDGMENT OF THE COURT

Peter Manthi Mwau, (the respondent) was employed by **New Kenya Co-Operative Creameries Limited (New KCC Ltd)** (the appellant) as a sales delivery clerk on or about 13th September, 2004. From the letter of appointment produced in evidence before the trial court, his salary was Ksh. 8,473 per month. In his memorandum of claim however, he states that he was earning a monthly salary of Ksh. 24,333/=.

The job did not last too long as, for reasons we do not need to delve into for purposes of this judgment, his contract was terminated barely two (2) years later. He was also arrested and taken to court to answer charges of theft by servant, for which he was tried and acquitted on 10th September, 2008 under **Section 210 Criminal Procedure Code**.

He subsequently filed suit against the appellant, being **Milimani Civil Case No. 2618 of 2009** seeking *inter alia*, special damages for loss of employment and salary from 24th March, 2006 up to the time of filing that claim. We were made to understand that the said suit is still pending before the Chief Magistrate's Court at Milimani.

While that suit was still pending, the appellant moved to the then Industrial Court, now the Employment and Labour Relations Court, by way of a memorandum of claim dated 14th October 2010, filed through Betty Rashid and Co. Advocates. He sought, as against the appellant herein monetary relief under different heads; totalling to Ksh. 316,330/=, and also for an order that he be issued with a certificate of service. He also prayed for costs and interest.

In response to the claim, filed in court on 4th November 2010, the appellant averred that the respondent

was earning a monthly salary of Ksh. 8,473/= as per the letter of appointment issued to him upon his employment, and denied that the he was earning Ksh. 24,333/=, as claimed in the statement of claim.

According to the appellant, the respondent was summarily dismissed on the reasonable and fair suspicion of stealing the employer's property. In that suit, the appellant gave notice that it was going to raise a preliminary objection on the issue of the court's jurisdiction and that it would be moving the court to dismiss the suit. It also raised another important legal point to the effect that the appellant's claim was time barred by statute, and urged the court to dismiss the matter.

In his reply to the appellant's response filed on 17th November, 2010, the respondent stated that Milimani CMCC No. 2618 of 2009 was a claim pegged on malicious prosecution and not unlawful termination of employment, and could not therefore bar him from filing the subsequent suit before the Industrial court.

On the issue of the claim being time barred, the respondent contended that since he was acquitted by the court, the appellant was supposed to reinstate him, and failure to do so gave the respondent a fresh cause of action. This cause of action arose upon his acquittal on 10th September, 2008, and as the claim herein was lodged in 2010, he was still within time to file the same. He maintained therefore that his claim was not time barred.

True to its earlier notice given in its response to the claim, the respondent filed a notice of preliminary objection on 4th April, 2011 which was premised on the following two grounds:-

> *1. That the Claimant's claim contravenes the mandatory provisions of Section 90 of the Employment Act, 2007 by which the Claimant was required to have lodged his claim on or before 24th March 2009, being the statutory 3 years after the date of his alleged cause of action on 24th March, 2006.*
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> *2. That by virtue of the provisions of Section 3 of the Employment Act, 2007, this Honourable Court lacks jurisdiction to hear the claim, the subject employment contract having been terminated almost two (2) years prior to the commencement of the Act on 20th December, 2007.*

This notice of preliminary objection was heard *"in limine"*, but was dismissed vide the Ruling dated 21st of July 2011. In its Ruling, the court held that the limitation period of three years under **Section 90 of the Employment Act 2007** came into force on 2nd June, 2008 and cannot be applied to the claimant's termination of 2006 since there is no express intention to give the statute retrospective application.

That Ruling dismissing the preliminary objection is the subject of this appeal, in which the appellant has proffered five (5) grounds of appeal in its memorandum of appeal filed on 17th February, 2012.

In a nutshell, these grounds are that the trial court erred in contravening the mandatory provisions of **Section 90 of the Employment Act 2007**; failing to find that the Industrial Court lacked jurisdiction to hear the respondent's claim, by virtue of the provisions of **Section 3 of the employment Act, 2007** and failing to find that the claim was totally defective and incompetent.

Ms. Karanja, learned counsel appearing for the appellant in this appeal reiterated the contents of her written submissions. She stated that the law governing the respondent's contract of employment and the termination of the same was the old Employment Act. That being so, the claim ought to have been filed under the repealed Trade Disputes Act, and not under the Employment Act 2007. She called in aid this Court's decision in **Gerald Muli Kiilu vs Barclays Bank of Kenya [2016] eKLR**. In that case a preliminary objection was taken on exactly the same points raised in this appeal. The Court pronounced itself as hereunder:-

> *"The appellant's employment having been terminated in 2005, the cause of action was governed by the repealed Employment Act Cap 226 and the repealed Trade Disputes Act Cap 234 Laws of Kenya through the saving provisions in the new laws that replaced them. It was wrong for the*

appellant to base his claim on the new laws and seek remedies that were not available in the repealed laws."

The Court in the Kiilu *case (supra)* upheld the decision of the Industrial Court upholding the preliminary objection.

We now turn to consider if the trial court erred in failing to uphold the preliminary objection. It is common ground that the respondent herein stopped working for the appellant on 24th March, 2006 when he was arrested and charged in court for stealing by servant. Although, in his statement of claim he says he was

"*wrongly and unlawfully retired*", he has tactfully avoided giving dates of the said retirement. All he said was that he was not given a letter of termination. We note however, that as the main suit has not been heard, that information is not available to this Court. We appreciate that such information was very material given the challenge of the temporal jurisdiction which has now been challenged in the trial court and which is an issue in this appeal.

It would appear to us however that if the respondent was summarily dismissed, then the effective date must be 24th March, 2006 when he was taken to court and charged. It would have assisted the respondent if he was more specific instead of stating that the appellant was "*duty bound"* to reinstate him after he was acquitted. (No law was cited in respect of that proposition).

On our part, from the material presented before us, the only logical conclusion we can make is that the cause of action arose on 24th March, 2006. That being so, the cause of action crystallized before the Employment Act 2007 came into force. The applicable law was therefore the repealed Employment Act and the repealed Trade Disputes Act. Although under the repealed Employment Act the respondent had six years to ruminate on his dismissal and decide what action he wanted to take, he did not move the court until 2010 – two years after the Employment Act 2007 had come into force.

Having done so, he was caught up by **Section 90 of the Employment Act 2007** which expressly removed contracts of Employment from the ambit of the **Limitation of Actions Act – Cap 22 Laws of Kenya**. That would therefore mean that his claim was time barred by statute, and consequently the trial court had no jurisdiction to entertain his claim.

Furthermore, even if the respondent were to argue that he had six (6) years within which to file the claim, then under the repealed Trade Disputes Act which provided for the procedure, the court lacked jurisdiction to entertain the claim as the same was in contravention of **Section 4(4) of the repealed Trade Disputes Act**. Either way, his claim was fatally defective and thus incompetent.

As pronounced by this Court in the *locus classicus* case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** as per Nyarangi J.A,

"It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

We find that the issue of jurisdiction was properly taken, and clearly, the Industrial Court did not have jurisdiction to entertain the respondent's claim.

The learned Judge fell into grave error when he made the following finding:-

"The limitation period that was applicable to the claimant's matter on 24th March 2006, i.e. the

date of termination was that provided for in the Limitations Act…. The limitation period of three years under Section 90 of the Employment Act 2007 came into force on 2nd June 2008 and cannot be applied to the claimant's termination of 2006 since there is no express intention to give the statute retrospective application."

With respect to the learned Judge, he failed to appreciate that **Section 90 of the Employment Act 2007**, ousted the application of **Section 4(1) of the Limitation of**

Actions Act.

For the foregoing reasons, our conclusion is that this appeal has merit. We allow the same, but in view of the financial standing of the parties herein order each party bears its own costs of the appeal.

Dated and Delivered at Nairobi this 28th day of April, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR