IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: AZANGALALA, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO.10 OF 2011

BETWEEN

GERALD MULI KILLU……...…...APPELLANT

AND

BARCLAYS BANK OF KENYA……..……RESPONDENT

(An Appeal from the award of the Industrial Court of Kenya at Nairobi (Rika, J.), dated 29th October, 2010

in

Industrial Court Cause No.124 of 2010)

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JUDGMENT OF THE COURT

Gerald Muli Kiilu ("the appellant") was employed on 13th May, 1993 by Barclays Bank of Kenya Limited ("the respondent") as a Clerk and rose through the ranks to the position of Section Head but some malpractice was alleged and after some disciplinary hearing the employment was terminated by a letter dated 31st January, 2005.

Believing the termination to be wrongful, the appellant approached the then Industrial Court of Kenya (now called the Employment and Labour Relations Court) through a Memorandum of Claim filed on 15th February, 2010. He prayed that the said termination be declared wrongful; that he be reinstated to employment with payment of salary arrears; general damages for wrongful termination of employment; compensation for lack of means as a result of wrongful termination; in the alternative payment of severance pay and award of a certificate of service as per ***section 51 of the Employment Act 2007***.

The respondent delivered a defence where the appellant's claim was denied and a preliminary objection was taken on the grounds *inter alia* that the suit offended ***section 90 of the Employment Act 2007***; that the suit offended ***section 4(4) of the Trade Disputes Act*** (repealed) and that the suit was time barred.

The suit was heard by ***James Rika, J,*** sitting with two members and in an award made on 29th October, 2010, the preliminary points taken by the respondent were upheld with the result that the claim was dismissed in its entirety. Those findings provoked this appeal premised on the Memorandum of Appeal

drawn by the appellant's then lawyers. In that Memorandum the appellant faults the learned judge for applying the provisions of the Employment Act, 2007 retrospectively and finding the appellant's cause to be time barred. The appellant further faults the learned judge for failing to find that the repealed ***Employment Act Cap226*** having not had corresponding provisions to those of the new

Employment Act, 2007 on limitation of action in employment disputes, the appellant's cause of action which arose prior to the commencement of the 2007 Act was governed by the ***Limitation of Actions Act, Cap 22 Laws of Kenya***. The appellant further faults the learned judge for applying the provisions of the repealed Trade Disputes Act to the appellant's cause and also in applying the provisions of the ***Labour Relations Act, 2007***.

By the time the appeal came for hearing before us, the appellant had parted company with his legal advisers and had decided, through a Notice to Act in person filed in court on 2nd April, 2015, to represent himself. He filed written submissions on 23rd June, 2015 and the respondent, represented by the Federation of Kenya Employers, filed its submissions on 1st September, 2015.

In a brief address when the appeal came for hearing on 8th December, 2015 the respondent's advocate, ***Mr. Molenje Raimond*** entirely relied on the written submissions. The appellant in a highlight of written submissions reminded us of ***Article 159 of the Constitution*** where justice is to be administered without undue regard to technicalities and asked us to hold that the preliminary objection taken in the court below should not have been allowed.

We have considered the record of appeal, the grounds raised, submissions made and the law.

This is a first appeal and it is our duty to reappraise and reevaluate the evidence on record, where that becomes necessary, and interfere with the trial court's findings of fact if it is based on no evidence, or on a misapprehension of evidence, or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding. This principle was succinctly enunciated by the predecessor of this Court in the celebrated case of ***Selle & Anor v Associated Motor Boat Company Limited [1968] EA 123 at 126*** and has since been followed in subsequent cases like ***Mwanasokoni v Kenya Bus Services Limited [1985] KLR 931*** and ***Kima International School of Theology v Ben Julius Achila (Kisumu) C.A. No.4 of 2014 (ur).***

The appellants employment was terminated on 31st January, 2005.

The claim was filed at the Industrial Court on 5th February, 2010, about 5 years after the contract was terminated.

After hearing the preliminary objection the trial court held:

> ***"…In 2005 when this dispute arose, the Industrial Court existed and derived its mandate from the Trade Disputes act, Cap 234 the Laws of Kenya. That Act defined the parameters in the process of adjudicatory and non-adjudicatory dispute settlement mechanisms. The Act was repealed through section 84 of the Labour Relations Act No.14 of 2007. The Industrial Court was reconstituted under the Labour Institutions Act. The employment Act in force in 2005 was repealed through section 92 of the Employment Act 2007.***
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> ***As of 2005, an employee claiming to have been unjustifiably dismissed from employment could only access the Industrial Court through the procedure in the Trade Disputes Act. The transitional provisions in the repealing law, the Labour Relations Act under section 84, stated that matters that arose before the commencement of the Labour Relations Act, that is on 26th October, 2007, should be dealt with under the Trade Disputes Act. The effect of this is that the report to the Minister of a dispute that arose in 2005, should have been reported and processed under the Trade disputes Act. It follows that the Industrial Court would be wrong to assume jurisdiction in a claim governed by the Trade Disputes Act, in any other manner, other than***

what that law provides."

The Memorandum of Claim filed by the appellant at the then Industrial Court on 5th February, 2010 was filed in accordance with the provisions of the Employment Act, 2007. The prayers sought were remedies contained in that Act which remedies did not exist in the repealed ***Employment Act Cap 226***, or the ***Trade Disputes Act Cap 234***.

Section 90 of the Employment Act 2007 bars a claim arising out of a contract of employment from being filed after 3 years. The said section is in the following terms:

> ***"(90) Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, 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."***

Even if the appellant was entitled to base his claim on the 2007 Act his claim which was filed over 5 years after the date of termination was time barred as the said ***section 90*** required that such claim be filed within 3 years of the date of termination. It is common ground that the cause of action in the case filed at the Industrial Court was based on a breach of contract of employment which occurred in 2005, before the ***Employment Act, 2007***, came into effect. The ***Employment Act, 2007***, by ***sections 92*** and ***93*** being saving provisions, do not give that Act retrospective application. They provide for the continuity of valid contracts of service and foreign contracts of service provided that those terms are not inconsistent with the Employment Act.

The ***Employment Act, 2007***, came into effect on 2nd June, 2008 and through ***section 90*** a 3 year limitation period is created for filing claims related to employment that arose from the said date of commencement. In the case before the learned judge of the Industrial Court, the cause of action had accrued pre-2007 Act and the appellant's remedy lay under the repealed ***Employment Act, Cap 226 Laws of Kenya***. That Act did not have a time limitation for lodging claims and the issue of limitation was therefore covered by the ***Limitation of Actions Act, Cap 22 Laws of Kenya. Section 4(1)*** thereof provides that a cause of action founded on contract had to be filed within 6 years.

The appellant's employment having been terminated on 31st January, 2005 his cause of action had a 6 year life-span within which it had to be filed. That cause of action if filed at the Industrial Court was governed by the repealed ***Trade Disputes Act, Cap 234 Laws of Kenya*** and which was replaced by the ***Labour Relations Act, 2007*** which, by ***section 84*** thereof preserves the application of the repealed Act by stating:

> ***"(84(1) The Trade Union's Act and the Trade disputes Act are repealed.***
>
> ***(2) Transitional provisions dealing with the transition from the Trade Unions Act and the Trade Disputes Act to this Act are contained in Fifth Schedule."***

It was obligatory on the part of the appellant to follow the procedure set out in the Trade Disputes Act. By that Act where a trade dispute had arisen, a report had to be made to the Minister for the time being responsible for labour relations. By ***section 4(4)***:

> ***"4(4) Any trade dispute involving the dismissal of an employee or the termination of any contract of employment except termination by way of redundancy shall be reported to the Minister within twenty-eight days of the dismissal of termination of employment: Provided that the Minister may, if he considers that the circumstances of a particular case so warrant, accept the report of a trade dispute concerning a case of dismissal or termination not so reported to him within twenty-eight days."***

The Minister had, upon receipt of a complaint in relation to a trade dispute, to carry out investigations and

attempt conciliation between the parties but if the conciliation efforts failed the Minister made a report to the Industrial Court. That is what section 8 of that Act said.

By section 14 thereof the Industrial Court could only be seised of a trade dispute if 21 days had lapsed since the dispute was reported to the Minister or when the conciliation and investigation process or other proceedings under the Act had been completed and upon receiving a certificate under the hand of the Labour Commissioner stating that the

Minister had accepted the report of the trade dispute and that all available machinery for the settlement of the dispute prior to reference of the dispute to the Industrial Court had been exhausted.

On matters relating to dismissal or reinstatement of an employee the Industrial Court would only assume jurisdiction upon receipt of the certificate signed by the Commissioner of Labour.

We note from the record that by a report made on 16th December, 2009 the conciliator appointed by the Minister wrote a report in essence stating that conciliation efforts had not succeeded and the matter should be taken ***"...to the next level for necessary action."*** That report was received by the Industrial Court whose Registrar by a letter dated 17th

February, 2010 invited the parties to a mention in court the issue being:

> ***"…wrongful termination of Employment of Gerald Muli Kiilu by respondent."***

The applicant had thus followed the said procedure set out in the Trade Disputes Act which Act also allowed the minister to accept the notification of disputes outside of the limited time of 28 days. Although the appellant followed the said procedure we do not see on record compliance of the requirement that the appellant obtain a certificate from the Commissioner of Labour expressing the minister's acceptance that all available machinery for settlement of the dispute prior to the reference to the Industrial Court had been exhausted. By dint of **section 14(9)(f**) of the said ***Trade Disputes Act*** the Industrial Court could not assume jurisdiction without a certificate issued under the hand of the Commissioner of Labour. Of this the learned judge of the Industrial Court observed in the award appealed from:

> ***"… The claimant invoked the Employment Act 2007 in his pleadings. He did not follow the procedure under the repealed Trade Disputes Act, and quite clearly his claim is not based on the old Employment Act. Having invoked the Employment Act 2007, then the correct law on time limits, would be the law defined under this Act. Section 90 categorically bars claims filed 3 years after they arose.***
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> ***Section 90 outs the longer limitations of time that may exist under the Limitation of Actions Act Cap 22 the Laws of Kenya.***
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> ***The upshot of this is that we find the Minister had no jurisdiction in receiving a dispute that arose under the Trade Disputes Act, using the current Labour Relations Act. Repealing law offers transitional guidance to the Court and other non-adjudicatory office is dealing with disputes such as the one filed herein. Where the Employment Act 2007 is invoked, it would serve parties well to consider section 90 before filing expired claims.***

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 learned judge of the Industrial Court was right to uphold the preliminary points taken and we find no merit in this appeal which we accordingly dismiss but in the circumstances order that each party pay their own costs.

Dated and delivered at Nairobi this 22nd day of April, 2016.

F. AZANGALALA

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JUDGE OF APPEAL

F. SICHALE

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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