



**Mboe & another v Masai Mara Sopa Lodge Ltd (Cause 764 of 2017)
[2023] KEELRC 105 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 105 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 764 OF 2017
SC RUTTO, J
JANUARY 20, 2023**

BETWEEN

JECKONIAH MAGHANGA MBOE 1ST CLAIMANT

PETER MUTHIANI DEON 2ND CLAIMANT

AND

MASAI MARA SOPA LODGE LTD RESPONDENT

JUDGMENT

1. The claimants instituted the instant claim through a Memorandum of Claim dated 29th March, 2017. The claimants aver that they were employed on diverse dates by the respondent. At the time of filing the suit, both claimants had left the respondent's employment. The genesis of the claim by the claimants is the pay cut effected from their salaries between March, 2015 upto January, 2016.
2. The claimants aver that upon exiting the respondent's employment, it refunded the other employees the amounts earlier deducted from their salaries between March 2015 upto January, 2016. It is on this account that the claimants have asked the Court inter alia, to order the respondent to pay their deducted salary for the period in question.
3. The claim was opposed through the respondent's Reply to Memorandum of Claim dated 2nd June, 2017. The respondent denied effecting pay cuts on the claimants' salaries and averred that the same was voluntary and consensual. The respondent further attributes the salary reduction from the claimants' pay on what it termed as a major economic down turn in 2014, owing to negative travel advisories against Kenya and increased terrorism activities.
4. It is noteworthy that the 1st claimant's case was dismissed on 22nd June, 2022 for want of prosecution. Therefore, the claim that now fall for determination is the 2nd claimant's.



5. The matter proceeded for part hearing on 24th March, 2022 when the 2nd claimant presented and closed his case. The matter was adjourned for further hearing on 22nd June, 2022 when the respondent's side had the opportunity to present its case. Subsequently, trial closed.

2nd Claimant's case

6. At the commencement of the hearing, the 2nd claimant adopted his witness statement together with the bundle of documents filed with his claim to constitute his evidence in chief. He also produced the said documents as his exhibits before court.
7. The claimant testified that as per his employment contract, he was earning a basic salary of Kshs 441,956.00. That on 30th March, 2015, he received a letter from the Director of Operations, through which he was informed that the respondent was undergoing tough times and had thus decided to take certain initiatives to sustain the lodge. That in view of that, a management meeting had been held on 20th and 21st February 2015 and it had been decided that moving forward, a 20% pay cut would be effected immediately. That there were no consultations with the employees.
8. The claimant stated in evidence that the 20% pay cut continued upto September, 2015 when it was reduced to 10% in October, 2015 and thereafter continued upto January, 2016 when he left employment.
9. Although the claimant admitted being in the Naivasha meeting where the issue of the pay cut was discussed, he stated that there was no conclusion on the issue as there were divergent views. That nonetheless, the team in Nairobi went ahead and made the final decision to effect the pay cut.
10. That it came to his attention in October, 2016 that those still in the employment of the respondent had had their deducted amounts refunded to them. That subsequently, he did a demand for the refund of the same through his advocates but the respondent refused to refund the same and further denied owing him any money.

Respondent's case

11. The respondent tendered oral evidence through Mr. Andreas Vogt who testified as RW1. He identified himself as the Chief Operating Officer of the respondent. Similarly, he adopted his witness statement and the respondent's bundle of documents as well as the supplementary bundle of documents to constitute his evidence in chief. The said documents were also produced as exhibits before Court.
12. RW1 testified that in 2014, the tourism industry was experiencing economic challenges due to frequent negative travel advisories placed against Kenya on account of increased terrorism attacks. That in order to sustain their operations against the existing harsh economic environment, the respondent sought to come up with various cost cutting measures to remain in business as opposed to retrenching its members of staff until business improves. That these measures included having the directors of the respondent take a 50% salary cut and the management staff taking 20% cuts on their basic salary.
13. That the respondent laid out the proposal to the management including the claimants at a staff meeting. That the claimants agreed to this proposal with the recognition of the difficult times the business was facing. That by a letter dated 30th March, 2015, the respondent informed the 2nd claimant that he would be receiving 20% salary cut starting from March, 2015.
14. It was RW1's further testimony that as business in the tourism industry began to improve, the salary cuts were reduced to 10% from 20% and the 2nd claimant's full salary was restored in January, 2016. That the 2nd claimant participated and was fully aware of the deliberations relating to the salary cuts.



15. That at no time, prior to his resignation did the 2nd claimant express his reservation and objection to the reduction in his salary. That further, the 2nd claimant executed a clearance certificate confirming that he had been paid all his dues and had no further claims against the respondent.

Submissions

16. Both parties filed written submissions upon close of the hearing. On his part, the 2nd claimant submitted that he was unfairly treated by his salary being deducted without his consent. That Article 47 allows him to seek fair administrative actions and it is within his right to bring the suit against his former employer, the respondent. He further urged that he was not given a chance to negotiate his salary reduction as he produced letters to show that the decision was made without his consent. In support of the 2nd claimant's submissions, reliance was placed on several authorities including *Kenya County Government Workers Union v Wajir County Government & another* [2020] eKLR and *Fredrick Ouma v Spectre International Ltd* [2013] eKLR.
17. On its part, the respondent submitted that the 2nd claimant and his colleagues voluntarily agreed to take a salary cut to save the company from hard economic times and to save their jobs. That the 2nd claimant was at the management meeting where the salary cuts were discussed and endorsed. It was the respondent's further submission that the claimant's claim is caught by the doctrine of acquiescence and waiver to the extent that he acquiesced to the salary cut and waived his right to complain when he accepted the reduced salary for 7 months without complaint. To buttress its submissions, the respondent placed reliance on the case of *748 Air Services Limited v Theuri Munyi* (2017) eKLR, *Sita Steel Rolling Mills Limited vs Jubilee Insurance Company Limited* (2007) eKLR and *Lawrence Omondi v Creative Eye Limited* [[2015] eKLR.
18. The respondent stated in further submission, that the claim for the outstanding salary was a continuing injury that ought to have been brought within one year from the date the cause of action arose. That the claim is therefore time barred by dint of section 90 of the *Employment Act*. To support this argument, the respondent cited the case of *James Wathigo v Lesukut Limited* [2019] eKLR.

Analysis and Determination

19. From the record before me, the questions calling for resolution are:
- i. Is the claim statute barred?
 - ii. If the answer to (i) is in the negative, whether the 2nd claimant's pay cut was lawful.
 - iii. Is the claimant entitled to the reliefs sought?

Is the claim statute barred?

20. The respondent has termed the claim as a continuing injury hence submitted that by dint of section 90 of the *Employment Act*, the same is time barred.
21. A continuing injury is a wrong that is not committed by a single event or breach. It is committed continuously over a period of time. An example is withholding part of an employee's pay, an unlawful deduction from an employee's salary, an underpayment etc.
22. The instant claim is for reimbursement of the money deducted from the 2nd claimant's salary between March 2015 and January, 2016 when the respondent effected pay cuts from the salary of its employees. No doubt the claim is in the nature of a continuing injury as the pay cuts persisted for 11 months.



23. The limitation period in respect of a continuing injury is provided for under section 90 of the Employment Act, 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.” Underlined for emphasis

24. Essentially, a time bar of 12 months is placed on a continuing injury, from the date of cessation of the said injury. Cessation of the injury occurs when the breach is halted for instance, upon full payment of salary in the event the injury constituted an underpayment. Cessation can also occur where the employment relationship is terminated in the midst of the continuing injury.

25. Therefore, a claim for a continuing injury as the one herein should be made within 12 months upon cessation of the ‘continuing injury’.

26. In the instant case, the 2nd claimant’s pay cut was effected from March 2015 upto January, 2016. As such, the continuing injury ceased when the 2nd claimant’s full salary was restored in January, 2016.

27. What this means is that time started to run from January, 2016 for one year, until January, 2017, whereas the suit was filed on 24th April, 2017. Clearly, this was outside the stipulated time for a claim for continuing injury and as such, the claim was statute barred by the time it was filed.

28. I am fortified by the determination of the Court of Appeal in the case of G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR, where it was held that:

“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.”

29. Having found that the claim was statute barred by the time it was filed, the Court lacks jurisdiction to determine the matter. This is in consonance with the determination in the case of Thuranira Karauri v Agnes Ncheche [1997] eKLR, where it was held that the issue of limitation of time goes to the jurisdiction of the Court.

30. In the circumstances, the Court has to down its tools and cannot determine the matter further.

31. The total sum of my consideration is that the Claim filed on 24th April, 2017, is hereby struck out for being time barred.

32. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2023.

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STELLA RUTTO

JUDGE



Appearance:

For the 2nd Claimant Mr. Kimathi

For the Respondent Mr. Ochieng

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justiceaimant on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

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