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Equator Bottlers Limited v Gatobu (Appeal E058 of 2021) [2023] KEELRC 574 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 574 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E058 OF 2021

CN BAARI, J

MARCH 9, 2023

BETWEEN

EQUATOR BOTTLERS LIMITED .... APPELLANT

AND

MUREGA ERIC GATOBU .... RESPONDENT

(Being an appeal against the Ruling of the Chief Magistrate Hon. P. Gesora delivered on 10th December, 2021)

JUDGMENT

1. This appeal arises from a Ruling rendered on December 10, 2021, where the Trial Court dismissed the Appellant's notice of Preliminary Objection seeking to strike out the Respondent's claim on the ground that it is statute barred.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on December 23, 2021.
3. The appeal is premised on the following grounds amongst others:
   i. That the Learned Magistrate erred in fact and law in failing to take into account considerations that he should have taken into account before ruling against the Appellant's notice of Preliminary Objection on a point of law, seeking dismissal of the Respondent's claim for being statutorily time barred.
   ii. That the Learned Magistrate erred in fact and in law by failing to take into account the fact that the Respondent's cause of action arose on January 4, 2017, and was filed in court on January 16, 2020, twelve days beyond the statutory three years stipulated under Section 90 of the *Employment Act, 2007*.

iii. That the Learned Magistrate erred in law by failing to consider that the Respondent's right to sue had lapsed when he filed the claim against the Appellant and as such, the Respondent lacked the capacity to institute and maintain the suit against the Appellant.

iv. That the learned Trial Magistrate erred in law by failing to consider that the time limitation under Section 90 of the *Employment Act*, is a statutory provision which does not amount to a procedural technicality under Article 159(2)(d) of the *Constitution*.

v. That the Learned Magistrate erred in law in failing to consider that it lacked jurisdiction to exercise discretion to extend the statutory limitation under Section 90 of the *Employment Act*, thereby wrongfully admitting the Respondent's claim that was statutorily time barred.

vi. That the Learned Magistrate erred in law and in fact by dismissing the Appellant's Notice of Preliminary Objection and allowing the Respondent's claim against the Appellant which being statutorily time barred, was an illegality, a nullity ab initio and an abuse of the court process deserving only to be struck out.

4. Parties sought to canvass the appeal through written submissions, and submissions were filed for both parties.

The Appellant's Submissions

5. It is submitted for the Appellant that the Trial Court erred by deciding that the Respondent had demonstrated a continuing injury and thus extending the time for the Respondent to prosecute his claim. The Appellant further submits that the suit is time barred as per the strict and mandatory provisions of Section 90 of the *Employment Act, 2007*. The Appellant had reliance in *John Kiiru Njiiri v University of Nairob*i (2021) eKLR to buttress the position that a claim based on a contract of employment must be filed within 3 years.

6. It is the Appellant's submission that for reason that the Respondent's claim is time barred, the Respondent lacks capacity to maintain a cause of action against the Appellant, and should not be granted the right to sue for lack of capacity. The Appellant sought to rely in the Court of Appeal's decision in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* (2018) eKLR to support this position.

7. The Appellant submits that the Trial Court has no jurisdiction to hear and determine this suit, and neither does it have jurisdiction to extend time. The Appellant placed reliance in the holding of Justice S Radido in *Maria Machocho v Total Kenya Limited* (2013) eKLR.

8. The Appellant prays that this Court finds the claim in the Trial Court improperly before it.

The Respondent's Submissions

9. The Respondent submits that he agrees with the decision of the Trial Court, for reason that termination of employment does not extinguish payment of work involvement and terminal dues owing and which remain unpaid, as the same constitutes a continuing injury within the meaning of Section 90 of the *Employment Act*.

10. It is the Respondent's submission that the Preliminary Objection and the response filed thereto, call for an investigation into the facts and the same can only be determined after a full hearing, thereby rendering the Appellant's Preliminary Objection a non-starter. The Respondent sought to rely in *Oraro v Mbaja* (2005) eKLR to support this position.

11. It is the Respondent's submission that the threshold set in the Mukisa Biscuits case was not met as to settle the matter with finality.

12. The Respondent finally submits that the Trial Court did not err in dismissing the Appellant's Preliminary Objection, and urge that this Court upholds the decision and dismiss the appeal.

Analysis and Determination

13. I have considered the Appellant's Record of Appeal together with the submissions by both parties. The grounds of appeal are summarized as follows:

    a. That the Learned Magistrate erred in fact and in law by failing to consider the fact that the Respondent's cause of action arose on January 4, 2017, and was filed in court on January 16, 2020, twelve days beyond the statutory three years stipulated under Section 90 of the *Employment Act, 2007*.

    b. That the Learned Magistrate erred in law by failing to consider that the Respondent's right to sue had lapsed when he filed the claim against the Appellant, and as such, the Respondent lacked the capacity to institute and maintain the suit against the Appellant.

    c. That the Learned Magistrate erred in law in failing to consider that it lacked jurisdiction to exercise discretion to extend the statutory limitation period under Section 90 of the *Employment Act*, thereby wrongfully admitting the Respondent's claim that was statutorily time barred.

14. This being a first appeal, it is now settled that the role of the court in a first appeal is to re-evaluate, re-assess and re-analyse the record of appeal and determine whether the conclusions reached by the learned Trial Court are to stand or not. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated thus: -

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect."

15. Section 90 of the *Employment Act, 2007*, states:

> " 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."

16. The Appellant's contention is that the Respondent's claim before the Trial Court is statute barred having been filed twelve (12) days after the three-year statutory limitation period. The Trial Court's interpretation, and which the Respondent agrees with, is that the Respondent's claim for terminal dues is a continuing injury, and which in the Trial Court's view, should not be extinguished on the basis that the Respondent continued engaging the Appellant for payment until he was out of time.

17. It is not disputed that both the Trial Court and the Respondent agree with the Appellant that the claim was filed out of time. The question for this court then becomes whether the Trial Court could

extend time to file suit, and further whether the continued negotiation between parties stopped the running of time.

18. In Nrb Industrial Cause No 953 of 2010 *Benjamin Wachira Ndiithi v Public Service Commission & Another* (2014) eKLR, the court held that the fact that an employee whose employment has been terminated seeks review or an appeal, does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal.

19. Further, in *Peris Maina v Nairobi City Water & Sewerage Company Limited* (2018) eKLR, Ongaya J stated as follows on when time starts to run in employment related disputes:

> " As submitted for the Respondent, the administrative appeal proceedings did not postpone or adjourn the running of the time of limitation after the dismissal…". This position was again affirmed in the case of Hilarion Mwabolo v Kenya Commercial Bank (2013) eKLR, where the court stated that:
>
> "… termination kicks in from the date stated in the termination letter…"

20. I would thus firstly conclude that the fact the Respondent continued imploring on the Appellant to pay his dues, did not stop the running of time. Time continued to run as he negotiated in vain.

21. On whether the Respondent's claim is a continuing injury, the *Black's Law Dictionary* 10th Edition, defines a continuing injury as follows: -

> " An injury that is still in the process of being committed."

22. The Respondent was terminated from the service of the Appellant on January 4, 2017. This by all means cannot thus be defined as a continuing injury. In any event, a continuing injury has a time limitation of one year.

23. The *Employment Act, 2007*, no doubt requires that a claim premised on an employment agreement or contract, should be instituted within three years upon the accrual of the cause of action, and one year for a continuing injury upon the cessation thereof.

24. Further, it is now settled that extension of time is only allowed on claims founded on tort. Neither this Court nor the Trial Court has the discretion to extend time for matters founded on contracts of service. (See *John Kiiru Njiiri v University of Nairobi* (2021) eKLR.)

25. As correctly submitted by the Appellant, the Respondent's claim was filed out of time, and he thus had no capacity to institute suit upon the lapse of the three-year statutory period. In *G4S Security services (K) Limited v Joseph Kamau & 486 Others* (2018) eKLR, the Court of Appeal stated: -

> " Of the 469 Respondents, the right to sue for alleged terminal dues for 464 Respondents lapsed, and they therefore have no capacity to bring causes against the Appellant in respect of their termination of employment…."

26. Jurisdiction they say is everything, and without which, a court must down its tools. Having found the Respondent's claim statute barred, the Trial Court has no jurisdiction to entertain the Respondent's claim. (See *Owners of Motor Vessel Lilian "s" v Caltex Oil(K) Limited* (1989) KLR 1)

27. In the upshot, the Appellant's Preliminary Objection is upheld and the Respondent's claim before the lower court is struck out.

28. Parties shall bear their own costs of the suit.

29. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 9TH DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Nyambura h/b for Ms. Wathuta for the Appellant

N/A for the Respondent

MS. Christine Omolo - Court Assistant.