



**Kasiu v Mombasa Cement Ltd (Cause E104 of 2021)
[2023] KEELRC 1150 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1150 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E104 OF 2021**

**AK NZEI, J
MAY 8, 2023**

BETWEEN

PETER NDAMBUKI KASIU CLAIMANT

AND

MOMBASA CEMENT LTD RESPONDENT

RULING

1. The Claimant sued the Respondent on December 16, 2021 vide a statement of claim dated December 14, 2021 and pleaded *inter-alia*:
 - a. that the Claimant was employed by the Respondent as a Mechanical Technician vide a letter of offer of employment dated September 18, 2009 and was subsequently prompted on various occasions from Mechanical Technician to Section In-charge and Senior In-charge at the time of termination.
 - b. that despite the Claimant working for the Respondent until 31/1/2020, for eleven years, the Respondent failed to issue fresh contracts for each subsequent position, which ultimately contributed to the Claimant's wrongful and unfair termination.
 - c. that the Claimant's termination vide a dismissal letter dated 25/1/2020 and served on the Claimant on 31/1/2020 was unfair, wrongful and unlawful.
2. Particulars of the alleged unfair termination are pleaded in the Claimant's statement of claim.
3. Further, the Claimant pleaded gross salary underpayment during the period of his employment and stated particulars of salary underpayment from January 2012 to January 31, 2020. Particulars of the alleged gross underpayment are set out in the Claimant's statement of claim.
4. The Respondent defended the suit vide a statement of Response dated January 27, 2022 and denied the Claimant's claim. The Respondent specifically denied having terminated the Claimant's employment



- unfairly, having grossly underpaid his salary and having underpaid the Claimant's gratuity, stating that the Claimant had been paid the gratuity to which he was entitled and had acknowledged receipt thereof.
5. The Respondent further pleaded that the Claimant's underpayment claims dating before November 11, 2017 were statute barred pursuant to Section 90 of the [Employment Act, 2007](#), and should be struck out *prima facie*.
 6. Trial opened on 16/1/2023 when the Claimant testified, and was stood down for cross-examination on 8/5/2023. On 20/4/2023, however, the Respondent filed a Notice of Preliminary Objection pursuant to Section 90 of the [Employment Act, 2007](#) stating:-
 - a. that the Claimant's claim for underpayment in paragraphs 9 and 10 of the statement of claim between January 1, 2012 and January 31, 2017 is statute barred under Section 90 of the [Employment Act](#).
 - b. that the Claimant's gratuity claim under paragraph 11 of the statement of claim beyond January 31, 2017 backwards is statute barred under Section 90 of the [Employment Act](#).
 7. The foregoing preliminary objection is what is before me for consideration and determination. The Court of Appeal stated as follows in [Munene & another v Muturi & 7 others](#) Civil Appeal No E350 of 2022[2022] KECA 912] (KLR):-

“...a preliminary objection is an issue of law which can be raised at any time of the proceedings and any tribunal or Court should consider and dispense with it first. Raising it late in the day cannot be the reason not to deal with it and sweep it under the carpet as the PPDT purported to do.”
 8. I will, therefore, proceed to address the issues raised in the Preliminary Objection regardless of the fact that trial has already commenced. Regarding what a Preliminary Objection is and ought to raise, it was held as follows in the case of [Mukisa Biscuits Manufacturing Co Ltd v 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.”
 9. Sir Charles Newbold stated as follows in the [Mukisa Biscuits](#) Case (*supra*)

“...a preliminary objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was argued on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion...”
 10. In the present case, the preliminary objection raised by the Respondent, though pleaded by the Respondent, relates to a part of the Claimant's claim. Determination of the Preliminary Objection, whether or not the same is upheld, will not dispose of the suit. It will only lead to piecemeal determination of the suit. This, in my view, will not be in the interest of justice. Justice will be better served if the remaining evidence is taken and a determination made by the Court on all the issues involved.



11. Further, the issues raised by the Respondent are not pure points. An issue of limitation has been raised regarding part of the claim for salary underpayment over part of the period of the alleged employment. The Court will have to consider matters of fact before making a finding on whether there was salary underpayment in the first place, and if so, whether the claim for recovery of the sum underpaid over part of the period of employment is statute barred. Once an otherwise pure point of law becomes clouded with matters of fact, it ceases to be a pure point of law.
12. On the Respondent's assertion that the Claimant's gratuity claim as pleaded in paragraph 11 of the statement of claim beyond January 31, 2017 backwards is statute barred, it is to be noted that the Respondent pleaded at paragraph 22 of his Response to Claim that the Claimant had been paid the gratuity to which he was entitled. Further, gratuity, where payable, is paid by an employer to an employee or his estate at the end of a contract, upon resignation, retirement or upon death. Under such circumstances, limitation period can only start running upon the end/termination of the contract of employment, resignation, retirement or death of an employee. The Claimant's employment is pleaded to have been terminated on January 31, 2020.
13. The Court of Appeal held as follows in *Bamburi Cement Limited v William Kilonzi* [2016] eKLR:-

“turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of an employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of pension scheme.”
14. In *Pathfinder International Kenya Limited* [2019] eKLR, the Court of Appeal, while referring to its earlier decision in the *Bamburi Cement* case (*supra*) added:-

“we are persuaded by the above reasoning and would further add that for an employee to claim gratuity, it must be provided in the contract of employment or provided for in a Collective Bargaining Agreement or statute. Suffice to state that the *Employment Act* of 2007 does not make it mandatory for employers to pay gratuity to employees.”
15. In the present case, the Court will, upon taking all the evidence, make a finding on whether the Claimant was entitled to payment of gratuity and if so, whether the same has been fully paid to the Claimant as pleaded by the Respondent; and finally, whether the claim for gratuity is statute barred.
16. Having said that, it is my finding that the respondent's preliminary objection is not merited. The same lacks merit, and is hereby overruled with costs.
17. Hearing of the suit will proceed as scheduled.
18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A



signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant/Applicant

..... for Respondent

