



**Musee v International School Of Kenya Ltd (Cause 60 of 2020)
[2023] KEELRC 2102 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2102 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 60 OF 2020
JK GAKERI, J
SEPTEMBER 19, 2023**

BETWEEN

KATHERINE AMA MUSEE CLAIMANT

AND

INTERNATIONAL SCHOOL OF KENYA LTD RESPONDENT

RULING

1. Before the court for determination is the Respondent’s Notice of Preliminary Objection dated 12th May, 2023.
2. The Respondent argues that the court has no jurisdiction to the extent that ;
 - a. The Claimant’s claim on alleged underpayment of Kshs.9,833,274/= if for the period 2014 – 2019 and the suit was filed on 4th February, 2020. That the Claim was time barred on 4th February, 2017 by virtue of the provisions of Section 90 of the *Employment Act*, 2007.
 - b. The Claimant’s claim for housing allowance covers the period 2014 – 2019 and the amended claim was filed on 19th September, 2022 and thus fell outside the 3 year period from the date of accrual.
 - c. The court had no jurisdiction to determine whether the Respondent’s expatriate teachers should be taxed by the Kenya Revenue Authority as the same was vested on the Tax Appeal Tribunal and the tribunal had ruled on the issue.



- d. The employment contracts in question were governed by the United States of America law and any disputes “with regard to the benefits” set forth therein are subject to the jurisdiction of the courts in the United States of America (USA).
3. According to the Respondent, the claim herein is incompetent, misconceived and bad in law.

Respondent’s submissions

4. Counsel isolated three issues for determination on statute barred claims for house allowance and underpayment, tax dispute and whether the court had jurisdiction as per the contract of employment.
5. As to whether the claims for house allowance and underpayment were statute barred, counsel relied on the provisions of Section 90 of the Employment Act to submit that the claim was statute barred.
6. That the claim for house allowance was made in the Amended Statement of Claim on 19th September, 2022 and was thus statute barred.
7. Reliance was made on the decisions in Charloy Sikuku Madiangi v Bunson Travel Service Ltd [2018] eKLR, Teresia Wanjiku Ngugi v Kiambu Institute of Science & Technology [2021] eKLR to urge that the claims were statute barred.
8. Reliance was also made on the Court of Appeal decision in G4S Security Services (K) Ltd v Joseph Kamau & 468 others [2018] eKLR to reinforce the submission.
9. As regards tax liability, counsel urged that since the tax dispute between the Respondent and the Kenya Revenue Authority was resolved in Tax Appeal No. 46 of 2016 AND THE Tribunal resolved that taxes were payable, the court had no jurisdiction to determine the liability of any person under the Income Tax Act as the same was exclusively vested in the Tax Appeal Tribunal and a ruling had been made.
10. As to whether the court’s jurisdiction was ousted by the contractual provisions, counsel submitted that the court had no jurisdiction on the Claimant’s contracts for the period 2011 – 2015 as they were governed by the USA law.
11. Reliance was made on the decisions in National Bank of Kenya Ltd V Hamida Bana & 103 others [2017] eKLR as well as Krystalline Salt Ltd v Kwekwe Mwakele & 67 others [2017] eKLR to urge that an employment relationship was basically a contract between the parties.
12. Also relied upon was the decision in Kenya Union of Employees of Voluntary and Charitable Organization v Sudan Catholic Bishops Regional Conference [2013] eKLR where the court held that it had no jurisdiction to hear and determine the case since the law applicable was the law of Sudan.

Claimant’s submissions

13. As to whether the claims are statute barred, counsel submitted that the underpayment of the Claimant was a continuing injury as explained in George Hiram Ndirangu v Equity Bank Ltd [2015] eKLR and the same became apparent after retirement and the suit was brought within 12 months.
14. The decisions in Samuel Otiende Lukoko v Shiners Girls High School [2015] eKLR, G4S Security Services (K) Ltd v Joseph Kamau & 468 others (Supra) were cited to buttress the submission that the claim was not statute barred.
15. As to whether the court had jurisdiction to hear and determine the suit, counsel urged that the issue before the court was whether the Claimant was entitled to equal pay for equal work with expatriate teachers with or without tax deductions.



16. That the Respondent's tax policy distorted the compensation of expatriate and foreign teachers and was thus discriminatory since the expatriate teachers had higher pay compared to locally employed teachers.
17. That the Claimant's claim was vindicated by the Tax Appeal Tribunal.
18. On ouster clauses, counsel submitted that the clauses cannot be used to defeat Kenyan law.
19. Reliance was made on the sentiments of Rika J. in *Dede Esi Annie Amanor-Wilks v Action Aid International* [2014] eKLR to urge that a state cannot cede its sovereignty on implementation of labour standards.
20. Reliance was also made on paragraph 354 of Halsbury's Laws of England, 4th Edition on the effect of choice of law as was the decision in *United Insurance Co. Ltd v E.A Underwriters (K) Ltd* [1985] KLR 998 on the factors to consider in determining the choice of law.
21. The sentiments of Onyango J. in *Joao Soares v Tuegest & another* [2014] eKLR were also cited to buttress the submission that an ouster clause does not deny the party the protection afforded by the applicable law.
22. Counsel urged that the Claimant's case related to violation of the Claimant's constitutional rights by the Respondent.
23. Finally, counsel wondered why the Respondent filed its tax dispute before the Tax Appeals Tribunal under the laws of Kenya but insisted that the employment contracts were governed by USA law.
24. Counsel urged that since the parties are in Kenya and all the evidence relating to the suit is in Kenya, subjecting the Claimant to a foreign jurisdiction would be disadvantageous to her.

Determination

25. The issues for determination are;
 - i. Whether the Respondent's Notice of Preliminary Objection meets the threshold of a Preliminary Objection.
 - ii. Depending on the answer to (i) whether the Preliminary Objection is merited.
26. As to whether the Respondent's Notice dated 12th May meets the threshold of a Preliminary Objection, the homeport are the sentiments of the Court of Appeal in the celebrated decision in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 where Law JA stated as follows;

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which raises 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 . . .”
27. According to Sir Charles Newbold P.

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law . . .”



28. From the foregoing, it is evidence that the Respondent is challenging the court's jurisdiction to hear and determine the Claimant's suit on the basis of the ouster clauses and Limitation of time under the provisions of Section 90 of the *Employment Act*, 2007.
29. Evidently, the Respondent's Notice of Preliminary Objection meets the threshold in the Mukisa Biscuits case (Supra).
30. The gravamen of the Respondent's Preliminary Objection is that the Claimant's prayer for house allowance for the period 2014 – 2019 are statute barred.
31. It is common ground that the Claimant initiated the instant suit on 4th February, 2020 by a Statement of Claim dated 3rd February, 2020 claiming the sum of Kshs.9,831,003.00 as compensation for discrimination and unfair labour practices.
32. The Claimant also sought several declarations.
33. The Respondent submitted that the Claimant amended her claim on 29th August, 2022. The amendment was made pursuant to a court order.
34. Section 90 of the *Employment Act*, 2007 provides that;
- “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 cessation thereof.”
35. Clearly, where there is a continuing injury or damage, the suit must be instituted within 12 months after the cessation thereof.
36. On this issue while the Respondent argues that claims in question are statute barred by virtue of Section 90 above. The Claimant further submitted that the claim fall within the confines of continuing injury.
37. The *Employment Act*, 2007 has no definition of the phrase “continuing injury” and postulation by courts have been helpful.
38. According to the Supreme Court of India in Balakrishna S.P. Wghmare V Shree Dhyaneswar Maharj Santhan AIR 1959 SC 798;
- “It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even if the damage resulting from the act may continue. If however, a wrongful act is of such a character that the injury caused by itself continues, then the act constitutes a continuing wrong . . .”
39. Similarly, in M.R. Gupta V Union of India (1995) (5) SCC 628, the Supreme Court stated as follows;
- “The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each tie he was paid a salary which was not computed in accordance with the rules. So long



as the appellant is in service a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to the rules.”

40. Equally, in *Siddiq v Suresh Das* [2020] 1 SCC 1, the Court stated as follows;

“ . . . A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise there must on the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise . . .

What makes a wrong a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist the breach of such a duty creates a continuing wrong and hence a defense to a plea of limitation.”

41. Finally, in the *German School Society V Helga Ohany* Civil Appeal No. 325 of 2018 consolidated with Civil Appeal No. 342 of 2018, the Court of Appeal expressed itself as follows;

“The employment relationship is the legal link between employer and employees. It exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined that reciprocal rights and obligations are created between the employee and the employer. It has been and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law. The existence of an employment relationship is the condition that determines the application of the labour law provisions. It is the key point of reference for determining the nature and extent of employer’s rights and obligations towards their workers.

Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrongs, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the Respondent continued to work under the same circumstances we find and hold that the breach complained of was of a continuing nature capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant’s argument that the claims were time barred fails. On the contrary, the claims fall within the ambit of a continuing contemplated under Section 90.”

42. The court is not only bound but is in agreement with these sentiments and is guided accordingly.

43. According to the Claimant’s counsel, since the instant suit was filed within 12 months of cessation of employment, and the provisions of Section 90 of the *Employment Act*, 2007 apply, the claims were within the prescribed duration.

44. The Respondent is of a different persuasion and argues that the claims are statute barred.



45. In the court's view, since the matter being contested are factual in nature and evidence is yet to be canvassed, it is only fair, that the Claimant be accorded the opportunity to prove her case and the same is determined on merit.
46. The foregoing view is informed by the reality that the suit herein was filed on 4th February, 2020 and the Claimant retired on 7th June, 2019 and assuming that the claims for house allowance and underpayment were in the nature of "continuing injury" the court has the jurisdiction to hear and determine the suit. Even assuming they were not, the court would still have jurisdiction to hear and determine the suit as it was filed within 3 years prescribed by Section 90 of the Employment Act, 2007.
47. On ouster clauses, in contracts of employment, while the court is in agreement with the Respondent counsel's submission that a contract of employment was still governed by general principles of contract law as affirmed by the Court of Appeal in *Krystalline Salt Ltd v Kwekwe Mwakele & 67 others* (Supra) and other decisions, the court was also categorical that the employment relationship governed by the Employment Act, 2007 and other related statutes.
48. Similarly, in the *German School. Society Helga Ohany* (Supra), the Court of Appeal was unambiguous that the employment contract was the basis of the reciprocal rights and obligations of the employer and employees and it was the vehicle through which employees access rights and benefits associated employment which are not exclusive to the contract of employment itself.
49. Article 41 of the Constitution of Kenya, 2010 recognizes the employment relationship and guarantee the right to fair labour practices to every person.
50. The decision in *Kenya Union of Employees of Voluntary Charitable Organization V Sudan Catholic Bishops Regional Conference* (Supra) cited by the Respondent's counsel where the court clowned its tools for want of jurisdiction is distinguishable in that the grievants second contract was entered into and performed entirely in the Sudan and was emphatic that the law applicable was the law of Sudan.
51. In this case, the contracts were concluded in Kenya and performed in Kenya.
52. The court finds the authorities relied upon by the Claimant's counsel exceedingly persuasive.
53. Paragraph 354 of the *Halsbury's Law of England*, 4th Edition is emphatic that;
- "In a contract of employment, notwithstanding the rules regarding the express choice of applicable law, the choice of applicable law does not deprive the employee of the protection afforded to him by the mandatory rules of the law which would have been applicable to the contract in the absence of choice."
54. Onyango J. relied on the foregoing paragraph in *Joao Soares v Tuegest Guerma & another* (Supra).
55. The court is further guided by the sentiments of Rika J. in *Dede Esi Annie Amanor-Wilks v Action Aid International* (Supra) that;
- "Labour standards are viewed as falling within international public policy. States will not cede their sovereignty easily over issues that concern implementation of labour standards within their territorial boundaries. Like criminal law, labour law is highly territorial. The maxim in labour is *Lex Loci Laboris* which means law should be applied to every labour relationship created within the territorial boundaries of the respective state."



56. Finally, the sentiments of the court in *United India Insurance Co. V E.A. Underwriters K Ltd (Supra)* on what the court takes into account in determining which country's law is applicable are also instructive.
57. For the foregoing reasons, it is the finding of the court that the court has jurisdiction to hear and determine the instant suit, the ouster clauses in the contract of employment notwithstanding.
58. Flowing directly from the foregoing analysis, it is clear that the Respondent's Notice of Preliminary Objection dated 12th May, 2023 is for dismissal and it is accordingly dismissed.
59. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF SEPTEMBER 2023

DR. JACOB GAKERI

JUDGE

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 Justice 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 has 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.

DR. JACOB GAKERI

JUDGE

DRAFT

