



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E437 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

JOSEPH MEJALA PERALTA.....CLAIMANT

VERSUS

VIGELO AND GERO CONSTRUCTION

COMPANY LIMITED (VGCL).....RESPONDENT

RULING

1. Before me for determination is the Respondent's Preliminary Objection dated 19th July 2021. The preliminary objection relates to eight claims under Claim No. E437/2021 as the lead file. The other claims are E438/2021, E49/2021, E541/2021, 452/2021, 453/2021, 454/2021 and E459/2021. All the Claimants were employed on 28th November 2014 and claim unpaid salary for various months with the salary for February 2016 as the last.

2. The Respondent prays for dismissal of the suit in its entirety with costs on the grounds that:

a) The suit has been filed contrary to the provisions of Section

90 of the Employment Act, 2007.

b) This suit as filed is fatally defective, incompetent and an abuse of the Court process deserving to be summarily dismissed with costs.

3. The Claimant responded to the preliminary objection by way of grounds of opposition dated 18th January 2022.

4. The Claimant states that the preliminary objection is misconceived, lacks merit given the uncontested facts set out in the memorandum of claim where the Respondent on express written admission acknowledges the debts owed to the Claimant.

5. The Claimant states that the preliminary objection does not meet the legal threshold set out in **Mukhisa Biscuit Manufacturers Ltd. v West End Distributors Ltd. [1969] E.A. 696** and as such the same should be dismissed.

6. On the 7th December 2021 parties took directions to have the Preliminary objection disposed off by way of written submissions

Respondent's Submissions

7. The Respondent submits that where a party has not come to

Court within time the issue of jurisdiction arises since the Court is only supposed to deal with claims filed in compliance with the law. Reliance is made on the holding in **Owners of Motor vessel "Lillian" v Caltex Oil (Kenya) Limited [1989] KLR1** where the Court of Appeal reaffirmed the pivotal role of jurisdiction as follows –

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter

before it the moment it holds the opinion that it is without jurisdiction...

By jurisdiction is meant the authority which a Court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

8. The Respondent also relies on the holding in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others S.C Application No. 2 of 2012** where the Court observed as follows –

“A Court’s jurisdiction flows from either the constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of parliament where the wording of legislation is clear and there is no ambiguity.”

9. The Respondent submits that Employment Act 2007 provides for limitation of actions based or arising out of the Act. Section

90 of the Employment Act provides that –

Notwithstanding the provisions of Section 4(1) of the Limitations 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 commences 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.

10. It is the Respondent submission that consistent with the holding in **Fred Mudave Gogo v G4s Security Services (K) limited [2014] eKLR** a claim based on the provisions of Employment Act 2007 must comply with the mandatory provisions of Section 90 of the Act and be filed within 3 years from the date of accrual of the cause of action. Reliance is also made on the decision in **Josephat Ndirangu v Henkel Chemicals (EA) Ltd [2013] eKLR** to underline the non-applicability of Section 4(1) of the Limitation of Actions Act in employment contracts.

11. The Respondent further submits that much as the Court has jurisdiction to hear and determine disputes between the Claimant and the Respondent, it lacks jurisdiction since the claim violates express provisions of Section 90 of the Employment Act.

12. It is also submitted that the alleged cause of action arose in February 2016 and the memorandum of claim is dated 26th May 2021 which is past three years from the date the cause of action arose and thus violates Section 90 of the Employment Act 2007. The decision in **Rift Valley Railways (Kenya) LTD v Hawkins Wagonza Musonye & Another [2016] eKLR** where the Court stated as follows:

“While there is no doubt section 15 of the Employment and Industrial Relations Act encourages alternative Dispute resolution, it must be Court based and conducted within the law. Time does not stop running merely because parties are engaged in an out of Court negotiation. It was incumbent upon the Respondent to bear in mind the provisions of section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of termination of the Respondent’s contract of service.”

13. In summation, the Respondent submits that the claim is statute barred and urges the Court to uphold the preliminary objection.

Claimant’s Submissions

14. According to the Claimant, the issue for determination is whether the suit herein is time barred for having been filed out of time and whether the preliminary objection meets the threshold established in **Mukhisa Biscuits Case**.

15. The Claimant in opposition to the preliminary objection submits the payment of salaries and other dues amounting to USD 10,584 owed to the Claimant by the Respondent was expressly acknowledged and an undertaking to pay the same made.

16. It is submitted that the correspondence between the parties indicate that the suit seeks for payment of liquidated amount owed to each Claimant.

17. The Claimant relies on Section 23 and 24 of the Limitation of Actions Act. Section 23(3) provides that –

Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the

remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.

18. The Claimant further submits that because the claim is for liquidated sum which has been squarely acknowledged by the Respondent, it falls within the provisions of Section 23 of the Limitation of Actions Act.

19. The Claimant relies on the Court of Appeal decision in **Shire v Thabiti Finance Co. Ltd [2002]1 EA 279** that in the absence of a contrary provision in the Employment Act or any other law the acknowledgement made by the Respondent's letter dated 18th November 2020 reviewed the cause of action and gave it a new birthday and time for filling the suit starts running from the date of acknowledgement.

20. The Claimant further states that a Preliminary Objection as stated in the **Mukhisa Biscuit** case must confine itself to the law. The Claimant submits that the preliminary objection before the Court deals with factual information which this Court will have to delve into the pleadings and all documents filed by the Claimant for its determination.

21. The holding in **Oraro v Mbaja [2005] eKLR** is relied upon to enforce the submission where the Court stated that –

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

22. The Claimant urges the Court to dismiss the preliminary Objection on the premise that it does not meet the legal threshold as set out in the Mukhisa Biscuits Case and is thus an abuse of the Court's process.

Analysis and determination

23. I have carefully considered the submissions for and against the preliminary objection before me and the submissions and authorities relied upon by both parties. The singular issue for determination is whether the action before the Court is statute barred.

24. The first point of call is the law of limitation of actions. Section 90 of the Employment Act, 2017 provides: **“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.**

[Emphasis added]

25. It is not in contest that the suit herein was filed on 26th May 2021 seeking recovery of unpaid salaries for the months of November 2015, January 2016, February 2016 and other allowances. It would appear to follow that the cause of action arose in February 2016 and the period of three years lapsed in February 2019. The Claimant does not dispute these facts but alleges that the Respondent/Applicant acknowledged the debt after the three years and thereby gave the statute barred action a new lease of life.

26. The decisions in **Shire v Thabiti Finance Co. Ltd (supra)**, **Telkom Kenya Limited v Kenya Railways Corporation [2018] eKLR** and **Oraro v Mbaja (supra)** are relied upon to buttress the proposition that the acknowledgment of a statute barred debt gives the debt a new birthday from the date of acknowledgment as provided by Section 23 of the Limitations of Actions Act which provides that –

(1) Where—

(a) a right of action (including a foreclosure action) to recover land; or

(b) a right of a mortgagee of movable property to bring a foreclosure action in respect of the property, has accrued, and—

(i) the person in possession of the land or movable property acknowledges the title of the person to whom the right of action has accrued; or

(ii) in the case of a foreclosure or other action by a mortgagee, the person in possession of the land or movable property or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right accrues on and not before the date of the acknowledgement or payment.

(2) Where a mortgagee is, by virtue of the mortgage, in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges the titles of the mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the end of twelve years from the date of the payment or acknowledgement.

(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.

27. Noteworthy of the two decisions relied upon by the Claimant, one was decided before the Employment Act, 2007 was enacted and the two relate to recovery of debts. None is based on an employment relationship.

28. The Court is in agreement with the proposition that the acknowledgment of a statute barred debt under Section 23(3) of the Limitation of Acts does not create a new or fresh cause of action but only extend the accrual of the right of action in respect of the cause from the original date to the date of acknowledgment. See **Kamconsult Limited v Telkom Kenya Limited & another [2016] eKLR**.

29. The persuasiveness of these decisions withstanding, Section 90 of the Employment Act is unambiguous that –

“... 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, ...”

30. As regards the standing of preliminary objection, the sentiments expressed by the Court in **Mukhisa Biscuit Manufacturers Ltd. v West End Distributors Ltd (supra)** are still authoritative. The Court stated that –

“A preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as Preliminary Objection 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.”

31. Much as the Claimant contends that the preliminary objection herein deals with factual information, no particulars have been provided to exemplify the submission. More importantly, the preliminary objection raises points of law, specifically jurisdiction and limitation of time as adverted to in the **Mukhisa Biscuits Case**.

32. The Court is persuaded that the preliminary objection before the Court meets the threshold established in the Mukhisa Biscuits Case.

33. The effect of the provisions of Section 90 of the Employment Act is that the Court has no jurisdiction to entertain a suit that is time barred. This was stated in the celebrated case of **Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited [1989] KLR**

“Jurisdiction is everything and without it the Court cannot make one more step.”

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF FEBRUARY 2022

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