REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COUR TOF KENYA AT NAIROBI

CAUSE NO.2001 OF 2014

AMALGAMATED UNION OF KENYA METAL WORKERS..... CLAIMANT

VERSUS

MASHARIKI MOTORS LIMITED.....1ST RESPONDENT

KARUNA HOLDINGS LIMITED.....2ND RESPONDENT

SIMBA COLT MOTORS LIMITED..... 3RD RESPONDENT

JUDGEMENT

Issue in dispute – refusal by the respondents to pay redundancy benefits to Stephen Oluoch, Maurice Okoth, Francis Ndung'u, Peter Oluoch, Jonathan Mulonzi, Nancy Macharia and Duncan Naman (the grievants)

Claim

The claimant is a registered trade union representing unionisable employees in the metal and motor vehicles industry. The 1st respondent was the sole authorised importer of BMW cars and motor cycles situated in Nairobi. The 2nd respondent directors are the same directors who own the 1st respondent and responsible for transactions that led to declaration of redundancy. The 3rd respondent is enjoined herein following a joint venture with the 2nd respondent leading to redundancy of the grievant.

The claim is that the grievants were employed by the 1st respondent at all material time before the unfair redundancy on 31st October, 2008.

The 2nd respondent made some redundancy payments to some of the claimant members whose dispute had been reported to the Minister and the grievants herein were not paid. The redundancy was caused by the joint venture between the 2nd and

3rd respondents and communicated to the grievants by the 1st respondent and who indicated that they would pay redundancy benefits as per their tabulations.

The claimant tried to resolve the matter but the respondents declined and a dispute was reported to the Minister. A conciliator was appointed but there was no resolution and the claimant was forced to file suit.

The claim is that there is breach of section 40 and 41 of the Employment Act, and Article 41 of the Constitution with regard to redundancy provisions and fair labour relations.

The claimant is seeking the following orders;

1. That the court deem fit and find the actions of the respondents to be unfair and order the payment of the grievants as tabulated by the respondents as per appendix 2 of the Memorandum of Claim and 12 months salaries to each of them as compensation for unfair termination plus interest on the dues at the court rate from the date of redundancy.

2. The respondents be ordered to issue the grievants with certificates of service.

3. The respondents are fined as per section 88 of the Employment Act, 2007 and or section 82 of the Labour Relations Act, 2007.

4. The respondents do meet the costs of this suit.

5. Any other order the court may deem fit to grant.

In evidence, the claimant called Jonathan Mulonzi and who testified in support of the claimant's case that the grievants were employees of the respondents who declared them redundant on 31st October, 2008 and were never paid their terminal dues and which dues had been calculated by the 1st respondent and amounting to ksh.4,327,and 004.80 due to the 10 grievants.

Mr Mulonzi also testified that the 1st and 2nd respondents should pay them the terminal dues because Elias Muthondu singed documents for both respondents and also had an agreement with Karuna Holdings as the mother Company and holding shares with majority shares held by Mr Gichaga.

In the letter terminating employment, it is said that Karuna and Simba Colt Limited had gone into a joint venture and there is evidence that the directors of the

respondents were the same. The 3rd respondent should pay the terminal dues as it is noted in the letter terminating employment as the entity going into a joint venture with the 1st respondent once operations ceased. Since there is a joint venture between the respondents they jointly should pay the due terminal dues.

The terminal dues have been owing since the year 2008 and interests are payable with costs of the suit.

Upon cross-examination by the 1st and 2nd respondent's Counsel, Mr Mulonzi testified that he was an employee of the 1st respondent for over 20 years. he had a letter of employment and conversant with matters leading to the redundancy declared by the 1st respondent and which notes there was a joint venture between the 1st and 2nd respondents and 3rd respondent, Simba Colt Motors Limited and that the 1st respondent has since ceased operations. The 2nd respondent was a shareholder in 1st respondent as noted in the letter terminating employment. the 2nd respondent had other directors holding different number of shares.

The 2nd respondent had the majority shares in the 1st respondent. The joint venture agreement with the 3rd respondent had not been signed when employment was terminated. The 1st and 2nd respondents are not directors of 3rd respondent which is a separate entity. The 1st respondent would pay the due salaries and statutory deductions and then declared the redundancy and transferred him to Bavaria Auto Limited after attending an interview but with introduction by the 1st respondent.

Upon cross-examination by Counsel for the 3rd respondent, Mr Mulonzi testified that the redundancy was declared by the 1st respondent. the joint venture agreement with the 3rd respondent was never signed. The dispute reported to the Minister did not include the 3rd respondent. that the 3rd respondent is enjoined in these proceedings since the 1st respondent stated there was a joint venture agreement between them and the 2nd respondent.

1st and 2nd respondents

The 1st respondent's defence is that it was the sole franchise holder of BMW motor vehicles in Kenya since 1978 with its sole business being the sae and maintenance of BMW vehicles under a franchise agreement with BMW manufacturers in Germany until 31st October, 2008 when its franchise business was taken over by Bavaria Auto

Limited. The 2rd respondent directors do not own the 1st respondent company as alleged and are not responsible for any transaction and material circumstances that led to the redundancy of the grievants.

The alleged joint venture between the 2nd and 3rd respondents does not exist. It was not in any manner the subject of redundancy. The BMW franchise held by the 1st respondent was terminated on 31st December, 2007 and which drastic move was catastrophic to the 1st respondent operations and trading leading to its closure of business on 31st October, 2008.

The claimant was aware of these developments 10 month prior to the unanticipated and premature closure of the 1st respondent and further were fully informed on the financial implications of this adverse move taken by BMW Germany.

To ensure smooth transition and cushion former employees against adverse effect of the harsh reality following redundancy, the 1st respondent approached the new BMW franchise holder Bavaria Auto Limited by holding several meetings with a view of giving these former employees a soft landing and absorb them including claimant members, the grievants who were offered new employment.

The 1st respondent had employed the grievants and there was a collective agreement (CBA) with the claimant and pursuant to its terms, there was no unfair termination of employment. the 2nd respondent did not pay any terminal dues to some employees as alleged as it was the 1st respondent who paid in good faith upon a report to the Minister.

The 1st respondent has always been willing to pay the terminal dues to it former employees save for the factors which led to lack of finances;

· Upon declaration of redundancy there was anticipation that debtors would settle but failed to do so;

· The secured creditors in the books had to be paid first;

· Some creditors dashed to court upon learning that the 1st respondent would cease trading and obtained judgements and made threats to attach vehicles and stock in trade forcing the 1st respondent to deal with suits already in court;

· At the time of closure, the 1st respondent had moving stocks in the form of spare parts valued at Ksh.19,387,943 and which it had anticipated would be taken up by the new BMW franchise holder or by a third party but this did not happen forcing the 1st respondent to be left holding stock and which remains at its stores and affecting cash flow;

· Some suits filed includes;

i. Milimani HCCC No.724 of 2002;

ii. Milimani CMCC No.7341 of 2002;

iii. Milimani CMCC No.7216 of 2006;

iv. Milimani CMCC No.1380 of 2006;

v. Milimani CMCC No.2000 OF 2007;

vi. Milimani RMCC No.886 OF 2007.

The 1st respondent has been willing and ready to settle the terminal dues for its former employees amicably and this is demonstrated by negotiating for new employment with the new BMW franchise holder. It has always communicated its financial position to the claimant as an act of good faith and well aware off the financial obligations even the independent auditors M/S Manohar Lall & Rai have factored the same in the books of accounts.

The 1st respondent is not in breach of the Employment act as alleged and termination arose due to redundancy and the suit was filed prematurely and should be dismissed with costs.

In evidence, the 1st respondent called Benjamin Kebagedi Ongeri and who testified that in the year 2008 he was employed by the 1st respondent as the Finance Controller. The 1st respondent was registered on 7th April, 1977 as Mashariki Motors (1977) Limited as a motor vehicle dealer and on 6th April, 1978 changed its name to Mashariki Motors Limited (MML).

The claimants were employed on different dates under contracts of employment.

in 2003 the 1st respondent renewed its contract with BMW manufacturer as the distributor in East and Central Africa. In 2004 and 2005 there were reports of poor financial car sales by 50% and the company made a loss of Ksh.13 million as at 30th June, 2005. The next financial year there was low trading and by April, 2006 BMW noted severe losses and by July, 2006 trading was dismal and the franchise was in jeopardy and this was taken away leaving the 1st respondent without any business.

In December, 1997 there was no supply of stock. Efforts were made to do repairs but this was difficult. In the year 2008 the company closed down operations. The human resource negotiated with Braria Auto Limited who took over the employees. The 1st respondent was not able to pay terminal dues as it was heavily in debts.

Mr Kebagedi also testified that the 1st and 2nd respondents are two different companies. Each registered under own name. both have the same directors but separate entities. The 2nd respondent is the majority shareholder in the 1st respondent. there are no profits sharing and the books of account show the status off the 1st respondent.

Upon declaration of redundancy, some debts were secured and the grievants were part of the unsecured creditors. Some were paid for leave days and unpaid wages and terminal dues are till owing.

There was an intention to go into joint venture with the 3rd respondent but this did not materialise. Bavaria Auto Limited was an independent entity and took over all the 1st respondent employees.

The 1st respondent does not have stock. It was written off.

3rd respondent

The 3rd respondent's case is that the claims made are denied and the suit should be dismissed with costs. Simba Colt Motors Limited does not exist as a legal entity as it changed its name to Simba Corporation Limited vide certificate of Change of Name on 15th July, 2010 and the suit against the 3rd respondent should be struck out.

The defence is also that the alleged joint venture agreement with the 2nd respondent for the distributorship of the BMW brand of vehicles did

not materialise. The 3rd respondent did not sign the agreement and was subsequently abandoned. The distributorship was acquired by Bavaria Auto Limited directly from BMW Group in Germany.

The 3rd respondent is not party to the dispute between the claimant and the 1st respondent as there was no employment. the 3rd respondent offered to employ some former employees of the 1st respondent following a competitive process. The grievants are not employees of the 3rd respondent and the claims made have no basis and should be dismissed with costs.

In evidence, the 3rd respondent called John Ikinya and who testified that he is the human resource manager for the 3rd respondent. in the year 2008 there were negotiations with the 1st and 2nd respondents for a joint venture on the BMW franchise but this did not materialise and the agreement was not concluded. The grievants were never employed by the 3rd respondent.

Bavaria Auto Limited employed the former employees of the 1st respondent upon consultations with the 1st respondent. the 3rd respondent had expected to take over the experienced employees but was not invited before the County Labour Officer for negotiations.

There was no employment between the former employees of the 1st respondent and the 3rd claimant to justify the claims that there were violations of section 40 and 88 of the Employment Act and section 82 of the Labour Relations Act.

The parties filed written submissions.

Court directions for submissions on the application of section 90 of the Employment Act, 2007.

Pending judgement, the court directed the parties to attend and address the provisions of section 90 of the Employment Act, 2007 (the Act) with regard to the instant suit.

The claimant submitted that dispute handling is a process. No party addressed itself to the provisions of section 90 of the Employment Act, 2007 having taken note of the dispute resolution mechanisms involved.

Section 90 of the Act has a cure under section 69(a) of the Labour Relations Act, 2007 (LRA). To the Memorandum of Claim the claimant attaché the Conciliation Certificate as required under Rule 5(1)(vi) of the Employment and Labour Relations Court (Procedure) Rules, 2016 where a dispute is subject to conciliation, the claim should be filed together with the issued certificate from the Conciliator. Such requirement is mandatory and lawful as section 69 of the LRA Is not optional. I **Nakuru Cause No.48 of 2019 – Kenya Hotels and Allied Workers Union versus Hotel Waterbuck & another**, the court held that the suit was premature since the parties had not concluded the conciliation process. Therefore, conciliation period is not subject to the provisions of section 90 of the Act.

The claimant proceeded with the dispute resolution mechanisms required under the law and hence properly before this court.

The 3rd respondent submitted that section 90 of the Act is mandatory. The suit must be filed within 3 years since the cause of action arose. In this case, termination of employment was done way back in the year 2005 and this court lacks jurisdiction to hear the matter as it is time barred.

The Court of Appeal in **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** and in **Attorney General & another v Andrew Maina Githinji** & **another [2016] eKLR** held that conciliation period does not stop time running in tabulation of time pursuant to section 90 of the Act. this court has no jurisdiction as the suit was filed out of time and should be dismissed with costs.

The 1st and 2nd respondent supported the 3rd respondent in their submissions.

Determination

On the pleadings, the evidence and written submissions the issues which emerge for determination can be summarised as follows;

Who was the employer;

Whether there was unfair termination of employment;

Whether the grievants should be issued with Certificates of Service;

Whether the respondents should be fined pursuant to section 88 of the Employment Act and or section 82 of the Labour Relations Act; and

Who should meet the costs of the suit.

It is common cause that by letter and notice dated 31st October, 2008 the 1st respondent terminated the employment of the grievants on the grounds that;

> *RE: TERMINATION OF SERVICE*
>
> *Following the approval for the Joint Venture between Simba Colt Motors Limited and Karuna Holdings Limited to proceed and in which you have been offered an employment opportunity, Mashariki Motors Limited will cease trading on 31st October 2008.*
>
> *In view of the above, the management has no alternative but to regrettably terminate your services with effect from 1st November 2008.*
>
> *All staff will therefore from 1st November 2008, proceed to take their outstanding leave as at 31st October 2008 where applicable. Payments relating to notice pay, October 2008 pay and service terminal benefits are being worked upon and the time and manner of payment will be communicated with you shortly. …*

This letter is done by the 1st respondent. termination of employment is effected by the employer, Mashariki Motors Limited on the grounds that *Mashariki Trading will cease trading on 31st October 2008* and that there was approval for the joint venture between Simba Colt Motors Limited and Karuna Holdings Limited where the grievants had been offered employment.

The 1st respondent in defence admitted it was the employer of the grievants. It further admitted to owing them terminal dues ad which has not been paid to date due to financial constraints after the BMW franchise was taken over by Bavaria Auto Limited. That there were negotiations between the employer and Bavaria Auto Limited and who agreed to take over the former employees of the 1st respondent who had knowledge and skills in the BMW products and thus easy for employment.

The 2nd respondent denied there was employment between the parties save that it had majority shares in the 1st respondent but these were two different legal entities.

The 3rd respondent contested ever employing the grievants.

An employer and an employee is defined under section 2 of the Employment and Labour Relations Court Act, 2011; the Employment Act, 2007; and the Labour Relations Act,2007 as follows;

> ***"employee"*** *means a person employed for wages or a salary and includes an apprentice and indentured learner;*
>
> ***"employer"*** *means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;*

The 1st respondent has admitted to being the employer. It ceased trading and terminated employment. upon such an operational requirement, there existed a redundancy situation leading to loss of employment. such defence is not challenged. A redundancy is also defined in law to mean;

> ***"redundancy"*** *means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;*

Employment is lost due to no fault of the employees. It arises from an operational requirement as held in **Kenya Airways Limited versus Aviation & Allied Workers Union & Others (2013) eKLR,**

> **…** *.redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase '****based on operational requirements of the employer'*** *must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.*

The validity of the redundancy is not contested. What is in dispute is the payment of terminal dues. Such have not been paid by the 1st respondent as the employer since 31st October, 2008.

The joint venture between the 2nd and 3rd respondents was to cushion the former employees of the 1st respondent. no employment exists or existed between the grievants and these respondents. The joinder of these parties was irregular.

Where the former employees moved to another employer following negotiations and consultations, employment with the 1st respondent ceased. It was terminated by letter dated 31st October, 2008. There was no continuity of such employment to a third party. Bavaria Auto

Limited offered employment to the former employees of the 1st respondent and issued letter of employment as new and separate employment. even where the acquired skills and knowledge from the former employer was relevant, this was a new employer as defined under the Employment Act, 2007.

In any event, the 1st respondent offered to pay its employees in terminal dues upon such employment ceasing. In the case of **Elizabeth Washeke & 62 Others Versus Airtel Networks Limited & Another Cause No.1972 of 2012** the court held that;

> *It was contended that the claimants had notice of the partnership between the respondents and that it had been made clear that the 1st respondent Call Centre was to be taken over by the 2nd respondent who specialised in these services. That there were emails sent that were received and read by the claimants as confirmed by the claimants witnesses that upon receipt of these emails they went further and searched to know what 'outsourcing' meant, an indication that they were aware of what was going to happen to them. Subsequent to these emails, there were morning hurdles with their manager at work. A follow up meeting held at Panari hotel with a session of questions and answers meaning they were aware and had ample notice. They then went ahead to sign new contracts and hence became employees of the 2nd respondent who was to recognise their years of service for time served with 1st respondent. They were not required to change work stations only the employer changed. …*
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> *That after the meeting on 19th January 2011, letters were issued to all the claimants save claimant number 23rd and 25th. That there was an offer of new employment which the claimants accepted and signed new contracts to start work at the 2nd respondent on 1st February 2011. That each claimant had time to read and accept the new contract. That the effect of this was that the claimants were fully informed of the decision to terminate their services and their transfer to 2nd respondent on comparable terms comparable to those under which the claimants served while at the 1st respondent employment. That the claimants accepted the new offer without any compulsion or unilateral transfer and that the 2nd respondent had agreed to recognise all years of service as accumulated under the 1st respondent employment. That the condition that was given by the 1st respondent was by accepting the employment offered by the 2nd respondents, the claimants ceased being employees of the 1st respondent.*

In such new employment, the employees cannot claim for the payment of their terminal dues from the new employer with regard to dues owe by the former employer. The former employer upon declaration of redundancy and termination of employment should pay such terminal dues pursuant to the provisions of section 40 of the Employment Act, 2007. The 1st respondent has been willing to pay such terminal dues but is unable to pay due to financial constraints following closure of operations.

The employer to the grievants remained the 1st respondent at all material times with regard to the suit herein. The 1st respondent has admitted owing these grievants in terminal dues.

As noted above, upon close of hearing, the court adjourned to write judgement. Such was placed in abeyance and parties invited to make submissions with regard to the application of section 90 of the Act. this was necessary as held in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** that;

> **…** *it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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.*

The application of section 69 of the LRA notwithstanding, and which allow parties such as herein to proceed and file a dispute with the Minister and attend conciliation, where section 90 of the Act became relevant, such should have been addressed instantly.

The reason is that;

> *It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court <u>may</u> not be heard to raise the issue after the matter is heard and determined*

In this case, the cause of action with regard to termination of employment and non-payment of terminal dues arose on 31st October, 2008. At the time, the applicable law was the Employment Act, 2007 and under section 90, such cause of action ought to have been filed with the court within 3 years.

The suit herein was filed on 11th November, 2014. This is a period of 6 years after the cause of action arose. For all intents and purposes, the suit is time barred.

Such matter ought to have been addressed instantly. The suit has remained alive and in the court system for many years.

In the case of **Ephraim Gachigua Mwangi v Teachers Service Commission & Board of Management Thogoto Teachers College [2018] eKLR** the Court held that;

> **…** *By parity of reasoning, after dismissal a person may suffer economic hardship and his social standing irreparably altered or*

damaged. That does not however entitle the dismissed employees to claim 4 or 5 years later on *account of the dismissal being a continuing wrong since the effect of the dismissal may be continuing.*

The Court of Appeal in the case of held that;

> ***…*** *there is no discretion to extend the time limitation of six years set under* **section 4 (1)** *of LAA - see the* **Divecon case (supra)**. … *the pursuit of a parallel remedy does not stop time from running,*
>
> > ***… the fact of the lateness was that he was litigating in claim No. 559 of 2007 against the respondent and based on his submissions, the period when he was litigating should be disregarded in computation of time. Again that may well be the case but the fact of this litigation does not stop the time running. .... As to the issue that courts must have human face, it is our view that the sword of justice cuts both ways. It applies to the appellant as well as to the respondent. Being courts of justice, we cannot look at only one side and shut our eyes to the other side as there are always competing interests. As an Arbiter, we are called upon to take the interests of each of the parties and to dispense justice without fear or favour. We therefore cannot bend backwards to accommodate the appellant as this would be injustice to the respondent.***

Similarly in this case, though parties did not raise the issue of time and application of section 90 of the Employment Act, 2007 in the pleadings or at any stage of the hearing and this only arose upon the court directions; this element is apparent to the court and stands out in all fronts. The matter had been reported to the Minister for conciliation but such process does not extend time within which to file suit as require under the law.

In the case of **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR** the court held that;

> *The statutory framework on the conciliation process is as provided for by the provisions of the Labour Relations Act, 2007. Section 62 (3) of the Labour* *Relations Act, 2007 provides that a trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister* ***within 90 days*** ***of the dismissal*** *or any longer* ***period*** *that the Minister, on good cause, permits. It is not clear exactly when the respondents reported this matter for conciliation.*
>
> *[23] Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law. This is fortified by the decision of this court in the case of* ***Rift Valley Railways (Kenya) Ltd V Hawkins Wagunza Musonye and another [2016] eKLR*** *which held as follows:*
>
> > ***"While there is no doubt that 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 negotiations. It was incumbent upon the respondents 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 the termination of the respondents' contracts of service."***

The claim herein was filed out of time. The court is denied jurisdiction to award as prayed.

Accordingly, the suit herein is struck out. Each party shall pay own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2021.

M. MBAR?

JUDGE

In the presence of:

Court Assistant: …….....

……

and …….....