REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 276 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

BAKERY CONFECTIONERY FOOD MANUFACTURING

AND ALLIED WORKERS UNION .....CLAIMANT

VERSUS

RAZCO LIMITED .....RESPONDENT

JUDGMENT

The Claimant is a registered trade union with the mandate of representing workers in the food manufacturing and related industries within the republic of Kenya.

The Respondent is a limited liability company dully registered under the company's act of the laws of Kenya.

The Respondent and the Claimant have a valid recognition agreement. They have negotiated and signed successive collective bargaining agreements governing the employment terms and conditions of the Respondents unionisable employees. The grievants – Thomas Amungui, Abraham Musa Mulagilo, Christopher Otikho, William Wanjala Sifuna and Elisha Adede Oloo were the Respondent's employees before they were terminated from employment.

The Claimant approached the court vide the memorandum of claim dated 9th February, 2016 seeking;

a) Declaration that the grievants were wrongfully and unlawfully locked out and or wrongfully declared redundant by the Respondent.

b) Payment of terminal and redundancy benefits in accordance with the provisions of clause 7 of the collective agreement in force and the provisions of the Employment Act 2007 including notice pay, severance pay, maximum compensation, prorate leave, travelling allowance, leave travelling allowance as particularized

c) Interests at courts rates from the day of unlawful termination to payment in full

d) Cost of the suit.

The Respondents filed a notice of preliminary objection dated 26th August 2019 but the same was struck out on 26th November 2019 on the grounds that it was filed without leave of court and without the Respondents setting aside directions that had earlier been issued for the matter to be heard undefended.

Directions were given that the matter proceeds by way of written submissions. The Claimant was directed to file witness affidavits together with its submissions.

Claimant's Case

The Claimant filed the witness affidavit sworn by **THOMAS AMANGUI** on his behalf and that of his co-grievants.

In the witness statement the affiant confirms that he and his co grievants were employed by the Respondent at different times and served in

different positions with different salaries.

The Claimant alleges that the grievants were on different days and without an explanation locked out of the Respondents premises –

a. Thomas Amungui 1st December 2009

b. Abraham Musa 3rd May 2010

c. Christopher L. Otikho 3rd May 2010

d. William N. Sifuna 3rd May 2010

e. Elisha Adede Oloo 31st January 2011

The Claimant states that the matter was raised with the Shop steward who escalated the matter to the union the Claimant herein.

The Claimant vide several letters tried to engage the Respondent through correspondences and scheduling of meetings but the Respondent kept devising excuses and the efforts to settle the matter were frustrated.

The Claimant having not succeeded in resolving the dispute reported a trade dispute to the minister over the victimization and lock out and/or redundancy of the five employees. The dispute was admitted and forwarded to the conciliator on 23rd October 2012. After several meetings with the conciliator the minister made his findings on 14th November 2013 as follows –

"FINDING BY THE CONCILIATOR

That the five employees were engaged on a one year contract which they had signed with the company and which on expiry were not renewed.

RECOMMENDATIONS

That the employees should be paid service gratuity in accordance with the CBA and the leave balance if any"

The Conciliator vide a letter dated 14th November 2013 issued a certificate authorizing the referral of the dispute to the court for adjudication.

The Claimant maintains that the operative Collective Agreement does not recognize term contracts imposed on them and it provides that all employees who have served for a period of more than three months were deemed as permanent employees and were to be issued with letters of appointment as provided in clause no. 2 of the collective agreement.

The grievants contend that having worked for the Respondent from the date of employment to the date when they were unlawfully locked out from the Respondent's premises they were entitled to be regarded as permanent employees enjoying permanent terms of service as per the collective agreement. They maintain that the Respondent violated their constitutional right to fair labour Practices under Article 41 for failure to issue them with letters of appointment. They further contend they were rendered redundant in violation of Section 40 of the Employment Act, 2007

The Claimant urges the court to allow the prayers as per the memorandum of claim and the remedies on redundancy and compensation for unlawful termination of employment.

Claimant's Submissions

The Claimant in its submissions alleges that the grievants who are its members, were employed by the Respondent and were unlawfully terminated from employment.

The Claimant submits that the Respondents did not file any defence to the memorandum of claim and as such the facts pleaded by the Claimant remain uncontroverted.

The Claimant submits that prior to the present court case the Grievants tried severally to engage the Respondent as evidenced by the letters annexed to the memorandum of claim to no success.

The Claimant further submits that the terms of engagement of unionisable employees of the Respondent are guided by the collective bargaining agreement which provides that all employees be engaged first on probationary terms of one month and thereafter be issued with a letter of appointment. The Claimant contends that the collective bargaining agreement has no room for the Respondent to issue fixed term contracts to unionisable employees.

The Claimant relied in the holding in **Bakery Confectionary Food Manufacturing & Allied Workers Union (K) v Kenafric Industries**

Limited (2018) eKLR.

The Claimant submits that the employees of the Respondent be they members of the union or non-members were in terms of the collective bargaining agreement, unionisable and were all entitled to equal treatment and provision of equal terms and conditions of service. Any deviation from the collective bargaining agreement terms without following the negotiation procedure such as employing some employees on inferior terms of service as happened to the grievants was a violation of the terms and conditions of the collective bargaining agreement.

The Claimant also relied on the finding in **Kenya shoe and Leather Union v Bata shoe Company Limited (2017) eKLR** which held that

> *"It follows therefore that all unionisable employees of the Respondent must be employed in terms of the CBA. Any terms of the employment contract between a unionisable employee of the Respondent and the Respondent which contradicts and or is not in conformity with the CBA violated the CBA and such employees are entitled to enforcement of the terms and conditions of service as contained in the CBA."*

The Claimant urges the court to adopt the same reasoning as in the cases above and uphold the Claimant's arguments that the grievants were engaged on regular terms in accordance with CBA in place and that their placement on fixed term contracts by the Respondent was unlawful, illegal and void. Further that termination of grievants services on account of expiry of fixed term contract was unlawful, null and void.

The Claimant submits that the termination of the grievants was not in accordance with clause 6 of the CBA which provides for termination of contracts of employment of the employees who had served beyond the probationary period. The Claimant contends that the grievants were never issued with a notice as provided for in in the CBA. The Claimant further submits that the grievants were never paid leave entitlement of their last year of employment and the leave travelling allowance.

The Claimant submits that the grievants are entitled to unlawful termination compensation as provided in Section 49 of the Employment Act.

The Claimant submits that the grievants are entitled to compensation at the rate of 12 months for the time served and the manner of grievants' termination. It also prays for costs.

Respondent's Submissions

The Respondent submits that this court lacks jurisdiction to entertain the Claimant's claim on the grounds that it was brought outside the three years limitation period as provided under Section 90 of the Employment Act. The Respondent submits that the claim is statute barred, relying on the case of **Interim Independent Electoral Commission S.C Constitutional Application No. 2 of 2011** and in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others S.C Application No. 2 of 2012 (2012) eKLR** where the court held that the assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution, statute law and judicial precedent. The Court held as follows:

> *"A court's jurisdiction flows from either the constitution, legislation or both. Such a court may not arrogate itself jurisdiction through the craft 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"*

The Respondents also relied on the case of **Gathoni v Kenya Co-operative Creameries Ltd Civil Application No. 122 of 1981** where **Poter J.** observed in obiter that: *" the law on limitation is intended to protect the defendants against unreasonable delay in bringing of suits against them. The statute expects the intended plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."*

The Respondent submits that the Claimant has not provided any reason for delay in filling of the claim. It also submits the Employment Act 2007 does not provide room for discretion to extend time in employment matters citing the case of **Maria Machocho v Total (K) Industrial Court No. 2 of 2012.**

The Respondent further relied on the decision in **Nicodemus Marani v Timsales Limited Industrial cause No. 204 of 2013** where **Ongaya J.** held that no power of the court has been established empowering the court to extend the time of 3 years prescribed in Section 90 of the Employment Act to justify the courts entertainment of the suit outside the three year limitation period. Section 90 of the Employment Act provides a limitation period of 3 years.

The Respondent further submits that any contention that the parties were undergoing conciliation and that such conciliation was a pre curser to them filling the present suit in time must fail relying on the decision in **David Ngugi Waweru v Attorney General & Another (2017) eKLR** where the Court of Appeal relied in the holding in the case of **Boniface Inodi Otieni** *"that the pursuit of a parallel remedy does not stop time from running thus overruling the ELRC which had extended sympathy to the appellant on account of having pursued similar remedy before another court."*

The Respondent submits that the memorandum of claim herein ought to be dismissed as the inordinate delay in filling these claims had highly prejudiced the Respondent particularly in producing documents to support the defence as section 10(6) of the Employment Act provides that an employer can keep records of the particulars of its employees for five years after termination

Analysis and Determination

Having considered the pleadings and the submissions before the court the issues for determination are;

a. Whether the claim is statute barred.

b. Whether the Claimant is entitled to the reliefs sought.

Whether the claim is statute barred

It is in contest that this claim was filed in court vide a memorandum of claim dated 9th February 2016. The Respondent despite entering appearance did not respond to the claim. As directed by court both parties filed their submissions in court.

The Respondent submitted that the claim is statute barred even though it did not file a defence and the suit confirmed for hearing as an undefended claim.

The court cannot however turn a blind eye on the issue of jurisdiction as observed in **Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd [1989] KLR 1) that–**

> **"***jurisdiction is everything and if a court has no jurisdiction it must down its tools".*

In Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR, the Court held that the assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, statute law, and judicial precedent. It stated:

> **"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 endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity".**

Section 90 of the Employment Act, 2007 provides as follows:

> **Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based on or arising out of this Act or 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.**

In **David Ngugi Waweru v Attorney General & Another (2017) eKLR** the Court citing the case of ***Andrew Maina Githinji case*** observed as follows:-

> *"Time limits in the former Act were subject to the Limitation of Actions Act which in some cases could be as long as 12 years and amenable to extension. By expressly inserting Section 90, the intention of Parliament , in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word shall?"*

It is not in dispute that the cause of Action for the five grievants arose in the year 2009, 2010 and 2011 respectively. Pursuant to the provisions of Section 90 of the Employment Act these claims became statute barred between the years 2012 and 2014 three years after their respective causes of action arose.

The Claimant in its memorandum of claim states that the disputes were referred to the minister for conciliation and a finding was reached and a certificate authorizing the matter to be referred to court for adjudication was issued on 14th November 2013.

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.

The Claimant reported this matter to the minister on the 13th June

2012 which is over 1 year after the last cause of action that happened on the 31st January 2011.

Vide Section 67(1)(a) of the Labour Relations Act, 2007, the conciliator or conciliation committee shall attempt to resolve the trade dispute referred to them within 30 days or any extended period agreed to by the parties to the dispute.

Section 69 of the Labour Relations Act, 2007 provides that a trade dispute is deemed to be unresolved after conciliation if the conciliator issues a certificate that the dispute has not been resolved by conciliation or thirty days from appointment of the conciliator or any longer period agreed by the parties expires.

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** where it was held as follows:

"While there is no doubt that section 15 of the Employment and Industrial Relations Court 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 Claimant to bear in mind the provisions of Section 90 of the Employment Act even as the parties engaged in the negotiations. The claim went stale three years from the date of the termination of the grievants' contracts of service."

The Claimant did not file the matter in court until 25th February 2016 which is 5 years after the last cause of action arose. As such the suit is statute barred and the court does not have jurisdiction to hear and determine the claim.

The suit is accordingly struck out but with no orders for costs as the Respondent did not file any defence.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF MAY 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE