REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 55 OF 2020

DR. JOHNSON KAZUNGU...CLAIMANT

- VERSUS -

KENYA MARINE & FISHERIES RESEARCH INSTITUTE....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th June, 2021)

RULING

The respondent filed the notice of preliminary objection on 01.04.2021 through learned Litigation Counsel Rukiya A. Ibrahim, for the Attorney General. The respondent raised the preliminary objection upon the following grounds:

1. The Court lacks the jurisdiction to hear and determine the suit by virtue of the cause of action being barred by time and specifically under section 90 of the Employment Act, 2007.

2. The claim is incompetent, bad in law and the same should be struck out with costs.

The claimant opposed the preliminary objection by filing his replying affidavit on 21.05.2021 and through S.Musalia Mwenesi Advocates. The claimant urged as follows:

1. His counsel has explained to him and he has understood the notice of preliminary objection dated 01.04.2021 and the submissions thereon dated 28.04.2021.

2. The suit is competent and properly before the Court and section 90 of the Employment Act, 2007 does not apply in the circumstances of the case.

3. The respondent filed a response out of time without any extension of time at all and there is no defence on record. In the belated response the respondent purports to admit paragraph 47 of the memorandum of claim which states, "**This Court has jurisdiction to hear and determine the suit.**"

4. Under Rule 13(2) (f) of the Employment and Labour Relations Court (Procedure) Rules, 2016, a respondent's statement of response shall contain any principle, policy, convention, law, industrial relations or management practice to be relied upon. Under Rule 14(3) of the Rules a party may, through pleadings raise any point of law or quote any provision, statement or principle of law. A preliminary objection must also stem or germinate from the pleadings filed by the parties. Rule 2 states that a "**pleading**" includes the statements in writing of the claim or demand of an applicant, petition, judicial review application, and the defence by a respondent thereto, the reply of an applicant to any defence or counterclaim of a respondent. Further as at 01.04.2021 when the notice of preliminary objection was filed, there is no pleading that the suit is caught up by section 90 of the Employment Act. The preliminary objection as filed does not arise from pleadings validly on record.

5. On 02.10.2019 the claimant received a letter titled "**Exit Salary**" inviting the claimant to appear before the respondent's Board on 23.10.2019 to conclude his case. The meeting was rescheduled to 31.10.2019 and the respondent is aware of those facts. At the meeting the claimant was confronted with a document to sign and accept payment of Kshs.8, 928, 672.00 as salary arrears for what the respondent called "**the dated 1st July, 2014 to 31st October, 2019**". The claimant states he has had no such contract. The claimant states that the respondent has not given a breakdown on how the figure of Kshs. 8, 928, 672.00 was arrived at and as demanded by law in section 20 of the Employment Act. Further, he only received Kshs. 5, 070, 138.20 on 11.11.2019 and not Kshs. 8, 928, 672.00 that he had been forced to sign for on 31.10.2019. That fact of short payment is pleaded at paragraph 20 in the memorandum of claim.

6. The claimant was also confronted by another document at page 215 of the claim bundle stating that the claimant was accepting the position of Chief Research Officer effective 01.11.2019 at a basic salary of Kshs. 144,920.00 in addition to other remunerative allowances. The claimant says the respondent's Board told him that he had to sign that document or otherwise he would not receive the Kshs. 8, 928, 672.00 indicated in the document at page 214 of the claim bundle and which was served on 25.01.2021.

7. Section 13 of the Employment Act, 2007 provides that where there is a change in particulars of terms and conditions of employment, the employer should provide to the employee a statement of change but, prior to 31.10.2019 the respondent had not given to the claimant a notice of the nature and reasons for the administrative action to justify the respondent's actions. Thus as at 31.10.2019 there were numerous constitutional and statutory causes of action and the claimant denies that his cause of action was time barred under section 90 of the Employment Act, 2007.

8. The claimant believes the letter titled "**Exit Salary**" had invited him before the Board to specifically deal with his issue of CEO as per letter dated 02.10.2019 and not a new contract or a contract for 01.07.2014 to 31.10.2019. The claimant states that he was paid a fraction of arrears due to him under the CEO exit salary. That was a new cause of action in 2019 and a continuing injury.

9. The failure by the Board to maintain the claimant at CEO salary and failure to act on the opinion dated 25.06.2019 rendered to the respondent by the Solicitor General is a continuing injury within the purview of section 90 of the Employment Act and which injury has so far not ceased. No evidence is before Court to show that the continuing injury had ceased. Further the respondent in its submissions admits to the continuing injury.

10. The respondent created a new cause of action at the Board meeting of 31.10.2019 by making the claimant to sign for salary arrears which he had been asking for and which the Solicitor General had advised be paid at CEO exit salary rate but turning everything topsy-turvy and coercing the claimant to sign for what the respondent called "the contract dated 1st July 2014 to 31st October 2019" for Kshs. 8, 928, 672.00 without any basis or justification and which was less than what the claimant was entitled to. The claim based on the supposed contract is clearly a fresh cause of action.

11. Section 23(3) of the Limitation of Actions Act Cap. 22 provides for accrual of right of action where the person liable to pay a debt or a pecuniary claim acknowledges the claim or makes any payment in respect of it and the right accrues on the acknowledgement or last payment. The claimant states that at the meeting of 31.10.2019 the respondent acknowledged its indebtedness to the claimant for salary arrears for the underpayments for 01.07.2014 to 31.10.2019. Thus there was a fresh accrual of right of action on 31.10.2019 which expires on 31.10.2022. Section 23(3) of the Limitation of Actions Act Cap. 22 being a provision of general application has not been ousted by section 90 of the Employment Act, 2007.

12. The claimant also has a cause of action under section 25 of the Employment Act, 2007 as pleaded at paragraph 43 of the memorandum of claim that the respondent contravened section 25 by wrongfully withholding his salary for April to November 2020 and for under payments for 1st July 2014 – November 2020. Under section 25(2) of the Act an employee may file a complaint not later than three years after the alleged unlawful deduction has been made. The claim to sue under section 25 arose on 31.10.2019 and will expire on 31.10.2022 per section 90 of the Act but, the claimant has already sued.

13. The claimant has also alleged violation of Article 41 on the right to fair labour practices and Article 47 for violation of his right to fair administrative action in addition to violation of the Employment Act. Further there is no limitation to a claim based on such violation brought under the Constitution of Kenya, 2010. Further, the claimant was entitled to file a composite claim with all the causes of action as pleaded.

Parties filed their respective submissions on the preliminary objections and counsel highlighted the submissions accordingly. The Court has considered the respective submissions and the material on record and makes findings as follows.

To answer the **1st issue** for determination, the Court finds that the parties were in agreement that a preliminary objection must arise from pleadings before the Court. It is true that the memorandum of response on record has been filed without leave of Court and in any event, the respondent admits the Court's jurisdiction. As urged for the claimant, such purported admission of jurisdiction by the respondent would preclude the respondent from denying the jurisdiction at same go as has been done in the notice of preliminary objection – the trite law being that parties must be bound by their own pleadings. However, the memorandum of response being admittedly filed without leave and belatedly the Court considers that it will not be relied upon to bind the respondent because it is irregularly on record. The Court has considered the submission for the respondent that a notice of preliminary objection is by itself a pleading. The Court finds that it is obvious that by definition of "**pleading**" in rule 2 of the Employment and Labour Relations Court (Procedure) Rules, 2016, a notice of preliminary objection is clearly not a pleading. It should also appear to the Court and to be rather absurd that a preliminary objection is based on a pleading and the notice setting out such preliminary objection by itself, is the pleading. The Court finds that must be impossible as not conceivable.

It was submitted for the respondent that the preliminary objection was based on the memorandum of claim as filed for the claimant. Both parties have cited and relied upon **Mukisa Biscuit Manufacturing Co. Ltd –Versus- West End Distributors Ltd [1969] EA 696 at 701** where it was held that a preliminary objection consist 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 and examples are an objection to 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. Further, per Sir Charles Newbold, P at pg. 701, "**The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop**." It was submitted that the respondent's preliminary objection was based on the memorandum of claim and to that extent, the Court finds that parties have not established a principle in law and practice that a preliminary objection must be based on

the pleadings filed for the party raising the preliminary objection. Thus, as based on the pleadings by the claimant in the memorandum of claim, the Court returns that the respondent was entitled to raise the preliminary objection and will not be faulted in that regard.

The **2nd issue** for determination is whether the suit is time barred under section 90 of the Employment Act, 2007. The section provides thus, "**90. 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 the cessation thereof**."

It was submitted for the respondent that the crux of the preliminary objection is the letter dated 21.08.2015 as pleaded at paragraph 14 of the memorandum of claim and as annexed on the claimant's bundle of documents as JK14 at pages 188-189. By that letter it was conveyed to the claimant that further to the respondent's letter dated 01.07.2015 translating the claimant's terms of service from contract to permanent and pensionable and the claimant retaining his salary under the former contract terms of service as CEO as personal to the claimant, the claimant's basic salary and allowances had been adjusted in line with his current position as Chief Research Officer Job Group RI.14 within salary scale as stated in the letter and entering the scale at Kshs. 144, 928.00 pm effective 01.08.2015 with remunerative allowance of house allowance Kshs. 40, 000.00 pm; commuter allowance Kshs.16, 000.00 pm; and medical allowance Kshs. 2, 490.00pm. The letter further stated that other terms and conditions of service remained the same.

It was further submitted for the respondent (and in the Court's opinion, correctly so, and, as also submitted for the respondent) thus, " **13. The claimant still being an employee of the respondent can be deemed to having a cause of action under the purview of *continuing injury* as stated in the second part of section 90 of the Employment Act which states "*….in the case of continuing injury or damage within twelve months next after the cessation thereof*.**" The Court finds that nowhere in section 90 of the Act is it stated (and as submitted for the respondent) that in event of a continuing injury, the 12 months of limitation are an extension to a time of three years from the date the continuing injury commenced. The Court therefore finds that it was misconceived when it was submitted for the respondent thus, "**15. The claimant having filed his Claim in Court on 16th December 2020 has well exceeded the four (4 years) as provided for by statute. In fact, it has been five years since the cause of action.**" Instead and as submitted for the claimant, the Court holds that under section 90 of the Act, for continuing injuries (which in the present case both parties have admitted is the case), the time of limitation is twelve months next after the cessation thereof. The claimant is still in the respondent's employment and his pleaded case is that he continues to be underpaid as conveyed in the respondent's letter dated 21.08.2015. The Court finds that there is no evidence, upon the material on record, that that alleged continuing injury has ever ceased. The Court therefore finds that the issue of limitation of 12 months from cessation of the continuing injury under section 90 of the Act does not even begin to arise in the instant case. Upon that finding the Court returns that the preliminary objection wholly collapses.

For avoidance of doubt the Court has perused the prayers in the memorandum of claim being (i) to (xiii) and, it is clear that the prayers are with respect to a continuing injury as well as alleged violations of constitutional and statutory provisions as arising from the composite and cumulative facts of the case as pleaded and also highlighted in the claimant's replying affidavit in opposition to the preliminary objection.

The Court further considers that the parties are in agreement that per the holding in **Mukisa Biscuit Manufacturing Co. Ltd –Versus- West End Distributors Ltd [1969] EA 696 at 701** a preliminary objection would only pass the test if the facts as pleaded are not in dispute. It has been submitted for the respondent that the preliminary objection is based on the claimant's memorandum of claim. The claimant's case is that the pleaded facts are as elaborated in the claimant's replying affidavit in response or opposition to the notice of preliminary objection. Indeed, the respondent has not filed an affidavit to oppose any of the facts as set out in that claimant's replying affidavit. The Court therefore finds that in absence of any further material in that regard, the claimant has established other causes of action as set out in the memorandum of claim and explained in his replying affidavit. The Court will not delve further into the issues.

To answer the **3rd issue** for determination, the Court returns that the claimant did not need to file a separate constitutional petition to urge the alleged contravention of his right to fair labour practices under Article 41, and, the right to fair administrative action under Article 47 of the Constitution. It was submitted for the respondent that a constitutional petition needed to be filed if the claimant wished to allege breach of Articles 41 and 47 of the Constitution. The Court considers that it is sufficient to refer to Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides as follows:

> **1. A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.**
>
> **2. A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.**
>
> **3. Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court**.

In conclusion, the preliminary objection is hereby dismissed with costs and parties to consider taking directions for further steps towards the expeditious determination of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH JUNE, 2021

BYRAM ONGAYA

JUDGE