REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 586 OF 2012

CHARLES OGOLA.....1ST CLAIMANT

DANIEL KIOKO.....2ND CLAIMANT

KIMEU NYAMAI.....3RD CLAIMANT

VERSUS

MANSION HART KENYA LIMITED.....RESPONDENT

CONSOLIDATED WITH CAUSE 314 OF 2013

KIMEU NYAMAI.....1ST CLAIMANT

PETER KAMAMI..... 2ND CLAIMANT

JULIUS KARIUKI.....3RD CLAIMANT

DOMISIANO MBAE.....4TH CLAIMANT

KIILU MUTUKU.....5TH CLAIMANT

VERSUS

MANSION HART KENYA LIMITED..... RESPONDENT

CONSOLIDATED WITH CAUSE 315 OF 2013

GEORGE NGESA.....1ST CLAIMANT

DAVID OTIENO.....2ND CLAIMANT

VERSUS

MANSION HART KENYA LIMITED.....RESPONDENT

CONSOLIDATED WITH CAUSE 316 OF 2013

FELIX KYALO.....1ST CLAIMANT

FREDRICK OWINO.....2ND CLAIMANT

AGREY ODHIAMBO.....3RD CLAIMANT

AMBROSE MAKENZI.....4TH CLAIMANT

PETER MWANGANGI.....5TH CLAIMANT

VERSUS

MANSION HART KENYA LIMITED.....RESPONDENT

CONSOLIDATED WITH CAUSE 317 OF 2013

JAVAN MUTEBI.....1ST CLAIMANT

MICHAEL OTIENO.....2ND CLAIMANT

VERSUS

MANSION HART KENYA LIMITED.....RESPONDENT

CONSOLIDATED WITH CAUSE 318 OF 2013

JEREMIAH MWENDA.....1ST CLAIMANT

BENSON MUTUKU.....2ND CLAIMANT

ROBIN OCHIENG.....3RD CLAIMANT

LAZARUS KIILU.....4TH CLAIMANT

MWANZIA MASILA.....5TH CLAIMANT

VERSUS

MANSION HART KENYA LIMITED.....RESPONDENT

CONSOLIDATED WITH CAUSE 319 OF 2013

THOMAS MULWA.....CLAIMANT

VERSUS

MANSION HART KENYA LIMITED.....RESPONDENT

JUDGMENT

The claimants herein are all former employees of the respondent. In their various claims filed variously on 10th April 2012, for Cause 586 of 2012 and on 12th March 2013 for all the others, the claimants aver that they were employed by the respondent on diverse dates and that they were summarily dismissed by the respondent in January 2011. They aver that upon dismissal they reported a dispute with the District Labour Officer and have attached correspondence to the effect. They pray for the following orders –

1. CAUSE 586 OF 2012

(a) Unpaid wages, the extra one hour worked for, for fourteen (14) years, seventeen (17) years and twenty four (24) years due to the Claimants under the contract or under the provisions of the Regulation of Wages and Conditions of Employment Act as tabulated below –

(b) Cost of the suit.

(c) Interest on (a) and (b) above

Charles Ogola

May 1996 – December 2008 (1 hour x 5 days x 12 months x 11 years, 7 months x Kshs.303) Kshs.242,400

January – December 2009 (1 hour x 5 days x 12 months x 1 year x Kshs.327) Kshs.19,620

January – December 2010 (1 hour x 5 days x 12 months x 1 year

x Kshs.350)..... Kshs.21,000

Total unpaid hours = Kshs.283,020

May 1996 – December 2008 - claimant was paid Kshs.260 instead of Kshs.303 (303 – 260) = Kshs.43 x 12 months x 11 years, 7 months Kshs.5,977

2009 Claimant was paid Kshs.281 instead of Kshs.327 (327 – 281) Kshs.46 x 12 x 1..... Kshs.552

2010 claimant was paid Kshs.281 instead of Kshs.350 (350 – 280) Kshs.69 x 12 x 1..... Kshs.828

Total = Kshs.7,357

Total amounts owing to the 1st Claimant =

Kshs.283,020 + Kshs.7,357..... Kshs.290,377

Daniel Kioko

January 1993 – December 2008 (1 hour x 5 days x 12 months x 15 years x Kshs.303) Kshs.272,700

January – December 2009 (1 hour x 5 days x 12 months x 1 year x Kshs.327) Kshs.19,620

January – December 2010 (1 hour x 5 days x 12 months x 1 year, x Kshs.350)..... Kshs.21,000

Total unpaid hours = Kshs.313,320

January 1993 – December 2008 – claimant was paid Kshs.260 instead of Kshs.303

(303 – 260) = 43 x 12 months x 15 years..... Kshs.7,740

2009 Claimant was paid Kshs.281 instead of Kshs.327

(327 – 281) Kshs.46 x 12 x 1..... Kshs.552

2010 Claimant was paid Kshs.281 instead of Kshs.350

(350 – 280) =Kshs.69 x 12 x 1..... Kshs.828

Total = Kshs.9,120

Total amounts owing to the 2nd Claimant

Kshs.313,320+ Kshs.9,120..... Kshs.322,440

Kimeu Nyamai

January 1986 – December 2008 (1 hour x 5 days x 12 months x 22 years x Kshs.303) Kshs.399,960

January – December 2009 1 hour x 5 days x 12 months x 1 year x Kshs.327) Kshs.19,620

January – December 2010 (1 hour x 5 days x 12 months x 1 year, x Kshs.350)..... Kshs.21,000

Total unpaid hours = Kshs.440,580

January 1986 – December 2008 - claimant was paid Kshs.260 instead of Kshs.303

(303 – 260) Kshs.43 x 12 months x 22 years..... Kshs.11,352

2009 Claimant was paid Kshs.281 instead of Kshs.327

(327 – 281) Kshs.46 x 12 x 1..... Kshs.552

2010 Claimant was paid Kshs.281 instead of Kshs.350

(350 – 280) =Kshs.69 x 12 x 1..... Kshs.828

Total = Kshs.12,732

Total amounts owing to the 3rd Claimant =

Kshs.440,580 + Kshs.12,732..... Kshs.453,312

2.... CAUSE 314 OF 2013

Kimeu Nyamai..... 1st Claimant

Peter Kamami..... 2nd Claimant

Julius Kariuki..... 3rd Claimant

Domisiano Mbae..... 4th Claimant

Kiilu Mutuku..... 5th Claimant

(a) Unpaid wages, the extra one hour worked for eighteen (18) years, due to the Claimant under the contract or under the provisions of the Regulation of Wages and Conditions of Employment Act as tabulated below –

Period	Amount paid	Statutory amount	Difference	Calculation of underpayment	Total
January 1992 – – December 2010	Kshs.0 for the overtime	Kshs.303	Kshs.303	1 hour x 5 days x 12 months x Kshs.303 x 18 years	Kshs.327,240
January – – December 2009	Kshs.0 for the	Kshs.327	Kshs.327	1 hour x 5 days x 12 months x	Kshs.19,620

	overtime			Kshs.327 x 1 year	
January – – December 2010	Kshs.0 for the overtime	Kshs.350	Kshs.350	1 hour x 5 days x 12 months x Kshs.350 x 1 year	Kshs.21,000
January 1992 – – December 2010	Kshs.260	Kshs.303	Kshs.43	Kshs.43 x 12 months x 18 years	Kshs.9,288
January – – December 2009	Kshs.281	Kshs.327	Kshs.46	Kshs.46 x 12 months x 1 year	Kshs.552
January – – December 2010	Kshs.281	Kshs.350	Kshs.69	Kshs.69 x 12 months x 1 year	Kshs.828
Total amount per worker who had worked for 18 years					Kshs.378,528
The total amount of claim for workers who had worked for 12 years is Kshs.378,528 x 5 = Kshs.1,892,640					

(b) Cost of the suit.

(c) Interest on (a) and (b) above

3. CAUSE 315 OF 2013

George Ngesa..... 1st Claimant

David Otieno..... 2nd Claimant

(a) Unpaid wages, the extra one hour worked for twelve (12) years, due to the Claimants under the contract or under the provisions of the Regulation of Wages and Conditions of Employment Act as tabulated below –

Period	Amount paid	Statutory amount	Difference	Calculation	Total

				of underpayment	
January 1998 – – December 2010	Kshs.0 for the overtime	Kshs.303	Kshs.303	1 hour x 5 days x 12 months x Kshs.303 x 12 years	Kshs.218,216
January – – December 2009	Kshs.0 for the overtime	Kshs.327	Kshs.327	1 hour x 5 days x 12 months x Kshs.327 x 1 year	Kshs.19,620
January – – December 2010	Kshs.0 for the overtime	Kshs.350	Kshs.350	1 hour x 5 days x 12 months x Kshs.350 x 1 year	Kshs.21,000
January 1998 – – December 2010	Kshs.260	Kshs.303	Kshs.43	Kshs.43 x 12 months x 12 years	Kshs.6,192
January – – December 2009	Kshs.281	Kshs.327	Kshs.46	Kshs.46 x 12 months x 1 year	Kshs.552
January – – December 2010	Kshs.281	Kshs.350	Kshs.69	Kshs.69 x 12 months x 1 year	Kshs.828
Total amount per worker who had worked for 12 years					Kshs.266,352
The total amount of claim for workers who had worked for 12 years is Kshs.266,352 x 2 = Kshs.532,704					

(b) Cost of the suit.

(c) Interest on (a) and (b) above

4. CAUSE 316 OF 2013

Felix Kyalo..... 1st Claimant

Fredrick Owino..... 2nd Claimant

Agrey Odhiambo..... 3rd Claimant

Ambrose Makenzi..... 4th Claimant

Peter Mwangangi..... 5th Claimant

(a) Unpaid wages, the extra one hour worked for nine (9) years, due to the Claimants under the contract or under the provisions of the Regulation of Wages and Conditions of Employment Act as tabulated below –

Period	Amount paid	Statutory amount	Difference	Calculation of underpayment	Total
January 2001 – December 2010	Kshs.0 for the overtime	Kshs.303	Kshs.303	1 hour x 5 days x 12 months x Kshs.303 x 9 years	Kshs.163,620
January – – December 2009	Kshs.0 for the overtime	Kshs.327	Kshs.327	1 hour x 5 days x 12 months x Kshs.327 x 1 year	Kshs.19,620

(b) Cost of the suit.

(c) Interest on (a) and (b) above

5. CAUSE 317 OF 2013

Javan Mutebi..... 1st Claimant

Michael Otieno..... 2nd Claimant

(a) Unpaid wages, the extra one hour worked for eight (8) years, due to the Claimants under the contract or under the provisions of the Regulation of Wages and Conditions of Employment Act as tabulated below –

Period	Amount paid	Statutory amount	Difference	Calculation of underpayment	Total
January 2002 – – December 2010	Kshs.0	Kshs.303	Kshs.303	1 hour x 5 days x	Kshs.145,440

	for the overtime			12 months x Kshs.303 x 8 years	
January – – December 2009	Kshs.0 for the overtime	Kshs.327	Kshs.327	1 hour x 5 days x 12 months x Kshs.327 x 1 year	Kshs.19,620
January – – December 2010	Kshs.0 for the overtime	Kshs.350	Kshs.350	1 hour x 5 days x 12 months x Kshs.350 x 1 year	Kshs.21,000
January 2002 – – December 2010	Kshs.260	Kshs.303	Kshs.43	Kshs.43 x 12 months x 8 years	Kshs.4,128
January – – December 2009	Kshs.281	Kshs.327	Kshs.46	Kshs.46 x 12 months x 1 year	Kshs.552
January – – December 2010	Kshs.281	Kshs.350	Kshs.69	Kshs.69 x 12 months x 1 year	Kshs.828
Total amount per worker who had worked for 8 years					Kshs.191,568
The total amount of claim for workers who had worked for 8 years is Kshs.191,568 x 2 = Kshs.383,136					

(b) Cost of the suit.

(c) Interest on (a) and (b) above

6. CAUSE 318 OF 2013

Jeremiah Mwenda..... 1st Claimant

Benson Mutuku..... 2nd Claimant

Robin Ochieng..... 3rd Claimant

Lazarus Kiilu..... 4th Claimant

Mwanzia Masila..... 5th Claimant

(a) Unpaid wages, the extra one hour worked for seven (7) years, due to the Claimants under the contract or under the provisions of the Regulation of Wages and Conditions of Employment Act as tabulated below –

Period	Amount paid	Statutory amount	Difference	Calculation of underpayment	Total
January 2003 – – December 2010	Kshs.0 for the overtime	Kshs.303	Kshs.303	1 hour x 5 days x 12 months x Kshs.303 x 7 years	Kshs.109,080
January – – December 2009	Kshs.0 for the overtime	Kshs.327	Kshs.327	1 hour x 5 days x 12 months x Kshs.327 x 1 year	Kshs.19,620
January – – December 2010	Kshs.0 for the overtime	Kshs.350	Kshs.350	1 hour x 5 days x 12 months x Kshs.350 x 1 year	Kshs.21,000
January 2003 – – December 2010	Kshs.260	Kshs.303	Kshs.43	Kshs.43 x 12 months x 7 years	Kshs.3,612
January – – December 2009	Kshs.281	Kshs.327	Kshs.46	Kshs.46 x 12 months x 1 year	Kshs.552

January – – December 2010	Kshs.281	Kshs.350	Kshs.69	Kshs.69 x 12 months x 1 year	Kshs.828
Total amount per claimant who had worked for 7 years					Kshs.172,872
The total amount of claim for the claimants who had worked for 7 years is Kshs.172,872 x 5 workers = Kshs.864,360					

(b) Cost of the suit.

(c) Interest on (a) and (b) above

7. CAUSE 319 OF 2013

Thomas Mulwa

(a) Unpaid wages, the extra one hour worked for six (6) years, due to the Claimant under the contract or under the provisions of the Regulation of Wages and Conditions of Employment Act as tabulated below –

Period	Amount paid	Statutory amount	Difference	Calculation of underpayment	Total
January 2004 – – December 2010	Kshs.0 for the overtime	Kshs.303	Kshs.303	1 hour x 5 days x 12 months x Kshs.303 x 6 years	Kshs.109,080
January – – December 2009	Kshs.0 for the overtime	Kshs.327	Kshs.327	1 hour x 5 days x 12 months x Kshs.327 x 1 year	Kshs.19,620
January – – December 2010	Kshs.0 for the overtime	Kshs.350	Kshs.350	1 hour x 5 days x 12 months x Kshs.350 x 1 year	Kshs.21,000
January 2004 – – December 2010	Kshs.260	Kshs.303	Kshs.43	Kshs.43 x 12 months x	Kshs.3,096

				6 years	
January – – December 2009	Kshs.281	Kshs.327	Kshs.46	Kshs.46 x 12 months x 1 year	Kshs.552
January – – December 2010	Kshs.281	Kshs.350	Kshs.69	Kshs.69 x 12 months x 1 year	Kshs.828
Total amount of the claimant who had worked for 6 years					Kshs.154,176

(b) Cost of the suit.

(c) Interest on (a) and (b) above

The respondent filed a memorandum of reply in Cause No. 568 of 2012, 314/2013, 317/2013, 318 of 2013, 319/2013. There is no defence in the other files.

In all the replies, the respondent avers that the claimants were employed intermittently and only reported to work when there was work to be done. The respondent attached copies of attendance records which reflect that between 2007 and 2010 the claimants did not work full time.

The respondent further avers that it is not a Member of Kenya Association of Building and Civil Engineering Contractors (KABCEC) and is not a signatory to the Collective Bargaining Agreement between KABCEC and Kenya Building, Construction, Timber Furniture and Allied Industries Employees Union (BBCTF and AIE Union) which the claimants pegged their claims on. The respondent avers the terms of employment of its employees including the claimants were based on the labour laws and the General Order.

The respondent avers that the Union wrote to the District Labour Officer, Nyayo House on 15th September 2010 alleging that the respondent was in the process of termination employment of 120 causal employees, among them the claimants; In the letter the Union was seeking underpayments and severance pay. That several meetings were held between the respondent and workers' representatives and an agreement was reached on 15th July 2011. According to the agreement employees who had worked for the respondent in 2008, 2009 and 2010 were to be paid 6 months accrued leave at the rate of 1.75 days per month for each year. It was further agreed that in appreciation of the years of service the employees would be paid an ex gratia payment as follows –

20 years and over service - 5 months' salary at 26 days per month

15 years – 19 years' service - 4 months' salary at 26 days per month

10 years –14 years' service - 2 months' salary at 26 days per month

3 years – 9 years' service - 1 months' salary at 26 days per month

2 years –1 year's service - 15 days per month

In addition, the workers were to be paid 6 days, wages as termination notice. That it was agreed the payments would be in full and final settlement of terminal benefits of the employees and the workers would have no further claims against the employer thereafter.

The respondent avers that all the claimants were paid as per agreement and payment was witnessed by the Labour Officer.

On the prayer for overtime the respondent avers that the Employment Act gives the employer the right to regulate working hours and that according to Regulation of Wages and Conditions of Employment (General) Order the maximum hours per week is 52 hours spread over 6

days a week, which translates to an hour per day. It is the respondent's positon that no employee worked more than 9 hours per day and thus no claimant is entitled to overtime. Further, that there is no legal basis for the claim of overtime for between 14 and 24 hours is an afterthought. That arrears if any are only payable for 12 months.

It is further the respondent's averment that the issues of overtime and underpayments were raised during conciliation at the Labour Office and found to have no merit.

It is further the respondent's averment that the claimants received terminal benefits as agreed at the Labour Office and signed discharge certificates absolving the respondent of any further liability in respect of their employment.

The respondent prays that the claims be dismissed.

By consent of parties Cause Numbers 312, 313, 314, 315, 316, 317, 318, 319, 320 and 321 all of 2013 were consolidated and heard under Cause No. 586 of 2012. Parties thereafter agreed to dispose of the suit by way of written submissions. The claimants filed submissions on 6th August 2019. The respondent filed theirs on 3rd September 2019. The claimants thereafter filed final submissions on 23rd October 2019.

The crux of the submissions by the claimant is that the termination of the claimants' employment was unfair. That the claimants worked extra hours which were not compensated and they should be paid as per tabulation in each of the claims.

In the submissions for the respondent, it is stated that the claims for overtime and underpayment are time barred, having been continuing wrongs for which a claim must be made within 12 months of cessation thereof as provided in Section 90 of the Employment Act. That the claimants having left employment in January 2011 and the claims having been filed on 10th April 2012 for Cause 586 of 2012 and on 12th March 2013 for all the others, the same are statute barred.

The respondent relies on the case of *Samuel Otiende Lukoko –V- Shiners Girls High School (2015) eKLR* where Radido J. held thus –

> *"13. In the Memorandum of Claim, the Claimant sought for underpayments on the prescribed minimum wages and overtime running from the year 2000 to 2014.*
>
> *14. Determination of the preliminary objection in real sense requires a discussion of a narrow legal issue and that is whether underpayments (below the minimum wage) is a continuing injury for purposes of section 90 of the Employment Act, 2007.*
>
> *15. I had occasion to discuss the question of continuing injury in Stephen Kamau Karanja v Family Bank Ltd (2014) eKLR. In that decision I stated that*
>
> > *"23. It would be appropriate for me therefore to make reference to other reputable sources. Black's Law Dictionary, ninth edition defines continuing injury as an injury that is still in the process of being committed - An example is the constant smoke or noise of a factory.*
> >
> > *24. To the examples given, I would add payment of wages below the prescribed minimum rates would be a continuing injury."*
>
> *16. The parties herein did not present before me any precedent which would make me reach a different conclusion from that I expressed in the case mentioned above that underpayment of wages constitutes a continuing injury.*
>
> *19. And where the underpayments continue, the cause of action in respect of all the underpayments would be statute barred 12 months after the cessation of the injury."*

The respondent further relied on the decision by the Court of Appeal in *G4S Security Services (K) Limited -V- Joseph Kamau and 468 Others (2018) eKLR* where the Court decided thus –

> *"20. In the circumstances of this case we find that such 'unpaid terminal dues' do not constitute a continuing injury as contemplated under the proviso to Section 90 of the Employment Act. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month. Regarding 'a continuing injury', the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred."*

It is further the respondent's submissions that the claimants are estopped from filing the claims herein first, because the matter was conciliated and a binding agreement reached, the terms of which agreement the respondent settled. The respondent relies on Appendix 6 of its bundle of documents where the claimants and/or their representatives confirmed receiving their terminal dues as per the conciliation agreement. To buttress this point the respondent relies on the case of *Janet Mwacha Mwaboli -V- Modern Soap Factory Limited (2018) eKLR* where Rika J. held thus –

> *"14. Conciliation outcome, under the Labour Relations Act 2007, ought, like a complaint under Section 47 of the Employment Act, to be binding on the Parties, unless compelling reasons can be shown before the Court, justifying interference with the findings and*

recommendations of the Conciliator.

15. The Labour Relations Act attempts to make conciliation binding on the Parties, by establishing strict procedural standards with respect to moving from the Conciliator to the Court.

16. Section 69 of the Labour Relations Act requires the Conciliator to issue a certificate if the dispute is unresolved. Rule 5 of the Employment and Labour Relations Court [Procedure] Rules 2016, states that where the dispute has been the subject of conciliation, the Statement of Claim shall be accompanied by a report of the Conciliator on the conciliation process, supported by minutes of the conciliation meeting. It is mandatory also, to have the certificate of conciliation issued under Section 69, accompanying the Statement of Claim. Where there is no certificate of conciliation, the Claimant or his Representative shall swear and file an Affidavit, attesting to the reasons why the Conciliator has not issued the certificate. Where report has been made and conciliation has not taken place, the Claimant shall swear and file an Affidavit, attesting to reason why conciliation has not taken place.

17. Conciliation is therefore meant to be a binding and effective dispute resolution mechanism, with the Court's intervention sought, only when there are compelling reasons to do. Parties can only move to the Court under Rule 5 above. The Court needs to have the Conciliator's certificate, report and minutes of the conciliation meetings, to satisfy itself that conciliation has taken place; that the dispute is unresolved; that procedural requirements have been met; to assess if there are errors of law arising from conciliation process that require correction; and to satisfy itself that there are compelling reasons to hear the Parties afresh, and depart from, or affirm, the findings and recommendations of the Conciliator. Non-adjudicatory mechanisms are anchored on Article 159[2][c] of the Constitution of Kenya. They must be taken as binding and effective dispute resolution mechanisms, not merely as stepping stones to the judicial forum."

The respondent further relies on the decision of Makau J. In *George Okoth -V- Hui Yi Company Limited (2018)* where the court held that the dispute having been voluntarily solved before the Labour Officer by a written agreement signed between the parties and witnessed by the Labour Officer, and in the absence of vitiating factors, such as duress, mistake, misrepresentation or undue influence "*the agreement cannot be swept under the carpet after the respondent acted upon it to the detriment and after the claimant drew benefits there from*". The court further observed that "*Consequently, in order to encourage Alternative Dispute Resolution, I decline to allow a resolved dispute from being recycled before this Court*."

The respondent submitted that it had demonstrated in its appendix 6 that the claimants were paid and made undertakings to the effect that they had no further claims against the respondent after conciliation agreement.

The respondent further relied on the decision of the Court of Appeal in *Katiwa Kanguli -V- Bamburi Cement Limited (2015) eKLR* where the court held thus –

"Lastly, it is not lost on us that on 11th March, 2011, the appellant signed a document entitled "Acceptance of transfer of gratuity for period served as unionisable employee" and that it was in line with this that he received the sum of Kshs.2,372,722/- aforesaid. It is also not in dispute that subsequent to this, the appellant also signed a discharge voucher dated 4th June, 2011, in which he acknowledged receipt of the aforesaid sum duly taxed off. Of utmost importance to this case however is that, in signing the discharge voucher, the appellant admitted that the received sum was "was in full and final settlement and discharge of all sums due to me and acknowledge that I have no further claims against the company including claims for reinstatement." This constituted an unequivocal representation by the appellant that all his dues had been settled. Short of proving that this representation was secured through fraud, duress, mistake, undue influence or misrepresentation, the appellant cannot be allowed to disown it. According to Halbury's Laws of England 3rd Edition Vol. 15 at paragraph 344,

"When one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

It is in situations such as these that the doctrine of promissory estoppel applies. Estoppel is a set of doctrines in which a court prevents a litigant from taking an action the litigant normally would have the right to take, in order to prevent an inequitable result.

In such a case, it is presumed that both parties understood the full implications of the undertaking and promise so given, and the promisor cannot thereafter be allowed to renege on his promise or undertaking. See Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 and Silas Njiru & The Catholic Diocese of Meru v Andrew Kiruja [2010] eKLR.

In signing the discharge voucher on the terms aforesaid, the appellant in essence gave an undertaking not to lodge a claim for any further gratuity dues. Unless he could show that that undertaking was vitiated by fraud, duress, mistake, undue influence or misrepresentation which was not the case here he remains so bound by the undertaking."

On the issue whether the suit is competent, the respondent submits that the Claimants did not comply with Rule 6 of the Industrial Court (Procedure) Rules 2010 which were in force at the time of filing of this suit. This Rule required that any suit brought in court after conciliation ought to have had a report by the conciliator on the conciliation process supported by minutes of the conciliation meeting. That these are important to enable the court establish whether or not to interfere with the conciliator's findings. This Claim is not supported with any of these documents and the Respondent submits that the suit is incompetent and should be struck out. In *Janet Mwacha Mwaboli v Modern Soap Factory Limited [2018] eKLR*, (supra) Rika J. held thus;

"Parties can only move to the Court under Rule 5 above. The

Court needs to have the Conciliator's certificate, report and minutes of the conciliation meetings, to satisfy itself that conciliation has taken place; that the dispute is unresolved; that procedural requirements have been met; to assess if there are errors of law arising from conciliation process that require correction; and to satisfy itself that there are compelling reasons to hear the Parties afresh, and depart from, or affirm, the findings and recommendations of the Conciliator."

On the reliefs sought, the respondent submits that the claimants did not submit any evidence to support the claim for overtime. That they have not demonstrated the days when overtime was worked and this being special damages must be specially proved. The respondent relies on the decision of Rika J. in the case *Fred Makori Ondari v The Management Committee of The Ministry Of Works Sports Club [2013] eKLR* where the court held –

"The prayer for overtime pay dating back from 2001, of 4,166 hours is not backed by evidence. The Claimant prepared for himself a document indicating the number of hours allegedly worked in excess from 2001 to April 2009. He does not give details of the overtime work done, whether it was authorized by his employer; whether he ever demanded for payment while on duty; and why he would wait until termination to claim overtime pay that accrued from as early as 10 years prior to termination. He did not even explain to the Court why the amount claimed as overtime pay, is different from the overtime pay contained in his letter of demand before filing of the Claim. The prayer for overtime pay is rejected."

The respondent also relied on the case of *Kenya Union of Commercial, Food and Allied Workers [KUCFAW] v Daylite Drycleaners [2013] eKLR* where the court held –

The Court agrees with, and upholds the recommendations of the Investigator except with regard to overtime. There was no evidence presented before this Court to show that from the date she was employed, Emily worked overtime for 15 hours per week. The submission of the Claimant before the Investigator was that the Grievant reported to work at 7.30 a.m. to 6.00 p.m. The Respondent's submission on the reporting time was not captured by the Investigator. The Grievant told the Court in her evidence that she reported at 7.00 a.m., not 7.30 as submitted by the Claimant before the Investigator. Where did the Investigator get the information that the Grievant reported at 7.00 a.m. if this was not in the submissions of the Claimant or the Respondent? The Court did not find the position of the Claimant on hours of work consistent. The testimony of the Grievant that she worked from 7.00 a.m. to 6.00 p.m. from Monday to Saturday, right from her first day of employment, was unconvincing."

The respondent submits that the repair for underpayments was likewise not proved by the claimants. That they did not attach any payslip or state their job categories or a CBA from where this could be ascertained. The respondent further submitted that this issue was raised before the Conciliator who found the demand wanting and did not recommend payment of the same.

The respondent prays that the claim be dismissed with costs to the respondent.

In response to the respondent's submissions, the claimants filed final written submissions in which they set out the actual amount claimed as follows –

i. Kshs.855,144/= for the 3 claimants in Cause No.312/2013 representing underpayment over 13 years.

ii.Kshs.l ,892,640/= for the 5 claimants in Cause No.314/2013 representing underpayment over 18 years.

iii.Kshs.532,704/= for the 2 claimants in Cause No.315/2013 representing underpayment over 12 years.

iv. Kshs.1,051,320/= for the 5 claimants in Cause No.316/2013 representing underpayment over 9 years.

v. Kshs.383,136/= for the 2 claimants in Cause No.317/2013

representing underpayment over 8 years.

vi. Kshs.864,360/= for the 5 claimants in Cause No.318/2013 representing underpayment over 7 years.

vii.Kshs.l 54,176/= for the 1 claimant in Cause No.319/2013 representing underpayment over 6 years.

viii.Kshs.467,136/= for the 4 claimants in Cause No.320/2013 representing underpayment over 4 years.

ix.Kshs.79,592/= for the 3 claimants in Cause No.321/2013 representing underpayment over 2 years.

On whether the claims are time barred, the claimants submit that the issue was not pleaded in the memorandum of response. That parties are bound by their pleadings and cannot litigate through submissions as this would be prejudicial to the claimants. That this was the position adopted by the Court of Appeal in *Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR* where the court held:-

"The respondent in his submission before us also pointed out that the defence by the appellant that the discrimination claim was a continuing injury that was barred by time limitation was a new defence that was never pleaded or raised in the trial court; and that parties are not allowed to switch defences at the appeal stage. Indeed, the record shows that the defence that the discriminatory acts

complained of were continuing injuries or damages so that any claim based on them should be instituted within 12 months of cessation was never raised in the trial court. There is no such defence raised in the appellant's response to the claim nor was such defence led in evidence or in submissions. Further, Rule 14(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 allows a party, through pleadings to raise any point of law. Order 2 rule 4 requires in mandatory terms that any relevant statute of limitation must be specifically pleaded."

On whether they are estopped from filing the present suit, the claimants submit that what took place in what the respondent refers to as conciliation do not fall under conciliation as contemplated under the Labour Relations Act and the authorities cited by the respondent are not applicable. The claimants further submit that the persons who signed appendix 5 referred to by the respondent are not the claimants herein. That as such the claimants are not bound by the agreements.

The claimants further submit that appendix 7 of the respondent's bundle of documents which the respondent relied on cannot assist as the heads of claims listed therein are totally different from what is claimed in the suits under consideration. It is further submitted that under the Employment Act parties cannot contract out of the minimum terms of employment.

On competence of the claims, the claimants submit that the submissions by the respondent are misplaced. On the reliefs sought the claimants submit that they pleaded the amounts due specifically. That they worked 9 hours for 5 days every week for the entire period they were in employment instead of the permitted 8 hours. That appendix 6 of the respondent's bundle of documents corroborates the averments of the claimants.

The claimants pray that judgment be entered in their favour as prayed.

Determination

It is not in dispute that the claimants were employees of the respondent or that there were conciliation meetings at which a settlement was reached and payments made to the claimants. This is confirmed by appendix CO1 of the memorandum of claim in Cause No. 586 of 2012 which is reproduced below –

"12th January 2010

Managing Director

Mason Hart Kenya Ltd

P.O. Box 14300 – 00800

NAIROBI

Attention: Evans Kiragu

TERMINATION OF CHARLES OGOLA AND 120 OTHERS

I refer to my letter dated 17th September 2010 on the notification of acquisition of Business of Manson Hart Ltd by the Kenya Day Works Products.

I make reference to the records already produced at this office of your former employees.

In view of the fact that his case has taken a long time to be resolved and in order to amicably settle the matter, I am by this letter calling both parties for a joint meeting on 20.01.2011 at this office room 16-7 at 10.00 am.

The management of Manson Hart Ltd are required to produce all the employees original records for the duration of employment at the time of the meeting. The names of the complainants are attached for ease of reference.

Be guided accordingly.

SIGNED

L. K. Bil District Labour Officer

NAIROBI"

There is further a letter dated 15th August 2011 from the respondent addressed to District Labour Officer in which the respondent was seeking confirmation of tabulation of payments of terminal dues of 121 employees including all the claimants. The letter is reproduced below –

"Our Ref: A/9

August 15, 2011

District Labour Office

Nairobi Central

Ministry of Labour

P.O. Box 42988 – 00100

NAIROBI.

For the attention of Mr. Robert Ngugi

Dear Sir,

RE: TERMINATION OF CHARLES OGOLA AND 120 OTHERS

following our meeting on 15th July 2011 on the above, attended by the Management representatives and the casuals workers representatives, an agreement was signed and witnessed by you as the chairman.

We have worked out the figures as agreed but have noted that during the reconciliation exercise, some names that appeared on the original list produced to the labour officer in September 2010 were removed and other names introduced, including those of loaders (who were always paid at a rate based on the number of tiles that were loaded on each vehicle) in a new list forwarded to your office on 14th March 2011 with calculations showing the casuals representatives demands. This was long after we had worked out summary of schedules for the casuals as per the original list from your office and records of the same sent to your office which took a long time to compile. The number of years worked for those whose names have been omitted are not provided.

We are ready to proceed with payment for those whose names and figures that are without dispute.

Attached please find 3 No. schedules of the list of names as explained above.

Schedule 'A' – No. 1-95 - names appearing in original list.

No. 96 - 118 - names omitted in the new list.

Schedule 'C – Nos 1 - 17 - Names newly introduced in the new list of March 2011.

Nos. 18-28 - Names of loaders (Paid per unit loaded).

We would appreciate your guidance as regards the concerns we have raised on schedule B mid C.

Yours Faithfully

SIGNED

EVANS M. KIRATU

FOR: MANSON HART (K) LIMITED"

Payments voucher filed by the claimants in Claimants' Further List of Documents dated 26th November 2012 and filed on 13th December 2012 confirm that the claimants worked for 5 days and were paid by the day.

The respondent attached a copy of the agreement that was signed by the parties (appendix 5 of the respondent's bundle). The agreement is reproduced below –

"15 July 2011

AGREEMENT BETWEEN CHARLES OGOLA AND 117 OTHERS AND MANSON HART KENYA LIMITED

In a meeting held today on 15 July 2011 it was agreed as follows

That all employee who were working during the year starting from January to September 2010 be paid 6 months prorate leave for each year of service at the rate of 1.75 days per month for 3 years i.e. 2008, 2009 and 2010.

That all the affected workers be paid ex-gratia payment as follows:-

20 years and over – 5 months' salary at 26 days per months.

15 years to 19 years – 4 months

10 years to 14 years – 2 months

3 years to 9 years – 1 month 2 years to layers - 15 days.

That all the affected workers will be paid 6 days' notice in full and final payment. After the above payment there will be no other claims against the company in future. The money will be paid on or before 19 August 2011.

Management Representative

Patrick K Mugambi – Director SIGNED

Evans M Kiragu – General Manager SIGNED

Robert Muthanga – FKE SIGNED

15-7- 2011"

It is clear from records filed by the parties that the claimants were all paid and acknowledged payment of terminal dues which included pay in lieu of notice, pay in lieu of leave and terminal dues. They all signed clearances which stated that the payments were in full and final settlement.

From the prayers in the memorandum of claim, the claimants only seek underpayments and overtime.

The issues arising for determination are whether the claims are statute barred, whether the claimants are estopped from filing suit, whether the suits are competent and whether the claimants are entitled to the reliefs sought.

On the first issue, overtime is a continuing wrong while underpayments is a right. It is therefore only overtime that would statute barred after 12 months as provided under Section 90 of the Employment Act. Underpayments would however accrue like all other terminal benefits so long as the claim is filed within 3 years from the date of accrual of cause of action.

The respondent further raised the issue of estoppel. It is clear from the settlement by the parties that the two items claimed in the suits under consideration, that is overtime and underpayments, were not discussed and were not included in the tabulation of terminal dues by the parties under the conciliation agreement.

Section 48(1) of the Labour Institutions Act provides that –

48. Wages Order to constitute minimum terms of conditions of employment.

(1) Notwithstanding anything contained in this Act or any other written law?

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

The claimants would thus not be estopped from claiming that which was their right. This is further reinforced by Section 3(6) of the Employment Act which provides that –

(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.

I thus find that the claimants are not estopped from claiming the items that have been claimed in their suits herein.

On the competency of the suits, the issues raised by the respondent would fail in the face of the provisions of Article 159 of the Constitution and Section 20(1) of the Employment and Labour Relations Court Act which espouse the courts to decide on the merits of the case without undue regard to technicalities.

On whether the claimants are entitled to the prayers sought I would agree with the respondent. On the claim for overtime, the only argument by the claimants is that they worked for 9 hours a day for 5 days a week. In the first place, they have not demonstrated that they worked every week for 5 days in the 3 years claimed. Secondly, they have not demonstrated that even if they did so, they worked for overtime.

Rule 5 of the Regulations of Wages (Building and Construction Industry) Order provides for 45 hours per week while the General Order provides for 52 hours per week. The claimants worked for 9 hours a day for 5 days which is 45 hours per week. They thus did not work any overtime. The claim for overtime is thus not proved and is dismissed.

On the claim for underpayment, they did not submit any proof of what the statutory wage they were entitled to was. They further did into submit proof of what they were earning during the period claimed. They also did to state which job category each claimant was engaged in as this would determine the statutory minimum wage applicable.Without the particulars the claims by the claimants that they were underpaid are incapable of ascertainment. The claims thus fail.

The result is that the entire claim fails and is accordingly dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE