



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 740 OF 2014

GEORGE OPPOLO.....CLAIMANT

V

GUARANTY TRUST BANK OF (K) LTD.....RESPONDENT

JUDGMENT

1. George Opollo (Claimant) was offered employment as a Relationship Manager by Fina Bank Ltd (renamed Guaranty Trust Bank of Kenya Ltd (Respondent) through a letter dated 9 February 2007. On 30 June 2009, the Claimant was appointed as Branch Manager.
2. On 13 September 2010, the Claimant was sent on leave to facilitate investigations into the operations of a certain account. The letter was followed with a letter dated 21 September 2010 inviting the Claimant to attend a disciplinary hearing on 24 September 2010.
3. In a response dated 22 September 2010, the Claimant sought to have the disciplinary hearing held in abeyance because he was facing criminal charges based on the same facts.
4. In the same response, the Claimant sought to be allowed to have an advocate in attendance during the disciplinary hearing.
5. The Respondent rejected the requests by the Claimant on 23 September 2010, and informed him that the disciplinary hearing had been rescheduled to 7 October 2010.
6. On 27 September 2010, the Respondent extended the Claimant's leave to the date of the disciplinary hearing of 7 October 2010.
7. The same day, the Claimant wrote to the Respondent expressing his reservations about the hearing, and asking to be furnished with a copy of the Final Internal Audit Report for Thika branch for the relevant period.
8. The next day, 28 September 2010, the Claimant's advocate wrote to the Respondent insisting that he had a right to be represented by an advocate and seeking confirmation that he could be so accompanied.
9. The Respondent replied on 6 October 2010 setting out the particulars of the allegations against the Claimant and reiterating that the disciplinary hearing would proceed as scheduled.
10. The Claimant did not attend the hearing because the Respondent declined to allow his advocate to accompany him, and the hearing was rescheduled to 18 October 2010.
11. The Claimant did not attend the rescheduled hearing and on 26 October 2010, the Respondent wrote to inform him of summary dismissal.
12. On 6 May 2014, the Claimant initiated these proceedings against the Respondent and he stated the Issue in Dispute as Unlawful termination of George Amatieku Opollo.
13. The Respondent filed a *Memorandum of Response and Counter-Claim* on 4 June 2014 prompting the Claimant to file a *Reply to Memorandum of Response and Response to Counter-Claim* on 25 June 2014.
14. On 11 July 2014, the Respondent filed a *Preliminary Objection* contending that the Cause was statute-barred in terms of section 90 of the Employment Act, 2007.

15. In a Ruling delivered on 3 July 2015, the Court found that the cause of action/head of claim advanced by the Claimant constituted *continuous injury*, and therefore because the suit was filed within 3 years and 6 months from date of dismissal, limitation did not arise.
16. The Respondent filed a *Notice of Appeal* against the Ruling on 17 July 2015.
17. When the Cause was mentioned before this Court on 14 October 2019, the Respondent informed the Court that the Appeal had been abandoned.
18. The Cause was therefore heard on 28 October 2019 and on 17 December 2019.
19. The Claimant filed his submissions on 20 January 2020 while the Respondent filed its submissions on 4 March 2020.
20. The Court is however compelled to revisit the question of limitation as it goes to jurisdiction, and where the Court has no jurisdiction or finds it has no jurisdiction, it must down its pen (see *Owners of the Motor Vessel 'Lilian S' v Caltex Oil Kenya Ltd* (1989) KLR 1).
21. Another reason which has prompted the Court to revisit the preliminary objection is the decision of the Court of Appeal in *G4S Security Services Ltd v Joseph Kamau & 468 Ors* (2018) eKLR.
22. Further, the Court which heard the preliminary objection did not have all the facts before it when addressing its mind to the preliminary objection (the facts had not been interrogated).
23. The Court of Appeal rendered itself thus concerning *continuing injury*

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.

24. In terms of section 90 of the Employment Act, 2007, a party alleging a breach of contract which constitutes *continuing injury* must institute legal proceedings within 12 months from the date the injury ceased.
25. The heads of claim advanced by the Claimant were service gratuity, compensation, accrued leave and lost income.
26. With utmost respect to the Court which dealt with the Preliminary Objection, if these heads of claim constituted *continuing injury*, action should have been instituted within 12 months.
27. In the case at hand, the separation was on 26 October 2011 and the Claimant should have moved the Court before 25 October 2012.
28. Compensation is awardable where the Court finds that an unfair termination of employment occurred.
29. The prescribed time within which to commence action for unfair termination of employment is 3 years. The Claimant did not commence the action within 3 years.
30. The head of the claim for *lost income* is contingent on the question that the employer brought an employment relationship to a premature end, unlawfully or otherwise.
31. The unlawfulness occurs at a particular point in time which is the date the wrong or injury is occasioned.
32. In this case, that was on 26 October 2010. Any cause of action should have been commenced within 3 years, and even if it were a *continuing injury*, action should have been commenced within 12 months.
33. To this Court, the binding holding by the Court of Appeal means that the actions advanced herein were caught up by the law of limitation and the Court must down its pen.

Certificate of Service

34. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

Counterclaim

35. The Respondent counterclaimed against the Claimant for a laptop, and loans which had been advanced (Loan Account LN 1274300049 and Loan Account CA 1214000021).
36. In his defence, the Claimant testified that the Respondent confiscated the car he purchased with the loan, and that he was not advised of

the proceeds of the sale if it was sold, and further that he had paid Kshs 485,760/- part of the car loan amount.

37. Statements of the Accounts were produced in Court.

38. The Loan Account showed an outstanding amount of Kshs 887,844/- as of 30 April 2014 and therein are entries suggesting that the car was auctioned.

39. The Current Account showed that the Claimant owed the Respondent Kshs 10,891/- as of 30 April 2014.

40. The Claimant did not in any meaningful way deny the loans and the Court will find for the Respondent in the Counterclaim, subject to reconciliation.

Conclusion and Orders

41. Regrettably, the Court finds that it has no jurisdiction to entertain the *Memorandum of Claim* and strikes it out with no order on costs.

42. Judgment is however entered for the Respondent in terms of the *Counter-Claim*, but subject to reconciliation which should be done and a report filed in Court within 30 days for adoption by the Court.

43. Respondent to have costs of the Counterclaim.

Delivered, dated and signed in Nairobi on this 13th day of March 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Opiyo instructed by Aming'a Opiyo Masese & Co. Advocates

For Respondent Mr. Masinde instructed by Boniface Masinde & Co. Advocates

Court Assistant Lindsey/Judy Maina