



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1324 OF 2015

PETER NJOGU MWANGI.....1ST CLAIMANT

REBECCA BEAUTTAH.....2ND CLAIMANT

JOSEPH KITHINJI MUKINDIA3RD CLAIMANT

JANET WOKI NJAU.....4TH CLAIMANT

ON THEIR OWN BEHALF AND ON BEHALF OF OTHERS CLAIMANTS

VERSUS

GENERAL MOTORS E. A. LIMITED.....1ST RESPONDENT

EAGAL AFRICA INSURANCE BROKERS LIMITED...2ND RESPONDENT

THE TRUSTEES OF THE GENERAL MOTORS KENYA LTD

DEPOSIT ADMINISTRATION PENSION

PROGRAMME (DAPP).....THIRD PARTY

VERSUS

NAIROBI INSTITUTE OF BUSINESS STUDIES LTD.....RESPONDENT

RULING

Introduction

1. The respondents objected to the suit herein on grounds that the suit is statute barred by dint of section 90 and 74(2) of the Employment Act, and that this court lacks jurisdiction to entertain the suit by dint of section 46 of the Retirement Benefits Act. The preliminary objection was opposed by the claimants and it was disposed of by written submissions.

1st Respondent's submissions

2. The 1st respondent submitted that the claimants were employed by the first respondent and they retired between 1988 and 2001. That on 30.7.2015 they brought this suit seeking various reliefs against her and the second respondent. That the period between the said retirement dates and the filing of the suit is upto 21 years as opposed to the 3 years limitation period provided by section 90 of the Employment Act read with section 4(1) of the Limitation of Actions Act. She relied on several authorities to urge that a claim founded on employment contract, filed outside the limitation period of 3 years is time barred and the court lacks jurisdiction to entertain the same.

2nd Respondent's submissions

3. The 2nd respondent submitted that the court lacks jurisdiction to hear and determine this claim by dint of section 46(1) of the Retirement

Benefits Act. That under the said section, the jurisdiction to determine disputes arising from decisions of the managers, administrators, custodians or trustees of pension schemes lies with the Chief Executive Officer of the Retirement Benefits Authority (RBA). She also relied on several authorities to urge that this court lacks jurisdiction to determine this matter under said section and also by dint of section 90 and 74(2) of the Employment Act read with section 4(1) of the Limitation of Act because the suit is statute barred.

3rd Partie's submissions

4. The 3rd party supported the preliminary objection by the respondents by basically reiterating their submissions on the statute bar and this court lacks jurisdiction by dint of section 90 and 74(2) of the Employment Act, section 4(1) of the Limitations of Actions Act and section 46(1) of the Retirement Benefits Act.

Claimants Submissions

5. The claimants submitted that they resigned from employment between 1985 and 1994 but they did not receive their pension because they were not yet 60 years. That after attaining the age of 60 years, they embarked the process of getting their pension but the same was not available due to problems that befell the Kenya National Assurance Company which was liquidated and their pension released to the respondents.

6. The claimants further submitted that their claim is in the class of continuing injury or damage within the meaning of section 90 of the Employment Act and maintained that it is not yet statute barred. That the injury or damage to them will only abate upon resolution of the dispute. They further contended that the provision of section 74(2) of the Employment Act, is irrelevant in this case.

7. Concerning the provisions of section 46 of the Retirement Benefits Act, the claimants submitted that it is also irrelevant in this case because there is no pension scheme involved because theirs was liquidated. In addition they submitted that there was no decision by a scheme herein which was capable of being challenged under section 46 of the Retirement Benefits Act. That in 2010 they tried to file a claim under section 46 of the Retirement Benefits Act but the Authority demanded for

- a. A copy of the Claimant's Scheme Rules
- b. Evidence of claimant's membership and
- c. Employment letters stating terms of service

The claimants relied on 2 authorities to support their case that the suit is not statute barred and the court has jurisdiction to entertain it.

Analysis and Determination

8. There is no dispute from the pleadings and submissions that the claimants were employed by the 1st respondent until they retired or left employment between 1985 and 2001. There is further no dispute that as at the time of the said separation, the claimants had not attained the age of 60 required by the Rules of the pension scheme for one to qualify for payment of his pension. There is further no dispute that the KNAC which had assured their pension scheme collapsed and went under and the pension was returned to their scheme's trustees or employer and when they pursued the same under section 46 of the Retirement Benefits Act, they were told to avail certain documents which they are now seeking from the respondents. The issues for determination are:

- a. Whether the preliminary objection by the respondents meets the threshold for a preliminary objection.
- b. Whether the suit is statute barred
- c. Whether the court lacks jurisdiction to determine the dispute herein

Threshold for Preliminary Objection

9. It is now trite law that the question of jurisdiction and limitation can form a valid ground for a preliminary objection. The foregoing view is fortified by the decision in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd [1969] EA 696** which has continued to receive approval from all the courts in Kenya. In the said case Law J.A observed that:-

".....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation...."

10. The preliminary objection raised by the respondents herein is on both jurisdiction of the court and limitation period. The said grounds are pure points of law which have the potential of terminating the suit in *limine* consequently, I find and hold that the preliminary objection herein meets the threshold of a valid preliminary objection.

Statute barred suit

11. The claimants filed this suit between 14 and 20 years after leaving their employment. The first relief they seek is for the 1st respondent to

forward to the 2nd respondent all their employment and pension contribution records. The claimants have not cited the laws upon which they base the said relief. However, the respondents have cited section 74(2) of the current Employment Act to say that the right to such information lapsed 3 years after the separation. In addition the respondents have also cited section 10(6) of the Act to urge that the obligation by the employer to keep employment records of his employee ends after the lapse of 6 years from the date of separation. They therefore contended that the claim for records is statute barred.

12. The second relief sought is for an order to compel the 2nd respondent to compute and pay the claimants their respective pension dues. The claimant contended that the said claim is not time barred until it is settled because it belongs to the class of continuing injury or damage under section 90 of the current Employment Act. The respondent, however contended that the claim is also time barred and it is filed in the wrong forum by dint of section 46(1) of the Retirement Benefits Act.

13. I have carefully considered the submissions by both sides. The claimants left employment before section 10,74(2) and 90 of the current Employment Act were enacted in 2007. The limitation period of their suit was therefore governed by section 4(1) of the Limitation of Actions Act. The said provision limited a claim based on contract to 6 years. It is therefore my view that any claim arising from the contract of service between the claimants and the 1st respondent expired 6 years after their separation. The same position also obtains for any claim for records of the said contract.

14. However, the claim for pension from a pension scheme is not part of the contract of employment and as such, it cannot be subject to the same limitation period as the other claims founded on employee's contract of service. The right to the pension is an investment and it does not lapse. Time to redress cannot start running until a decision has been made under the pension Trust Deed or Rules to the detriment of the pensioners right to his pension. In this case the claimants are not alleging that their pension has been wrongfully computed or denied through a decision made by the pension managers or trustees under the Trust Deed or Rules. They are asking for an order to compel the 2nd respondent and by extension the 3rd party to compute and pay their pension dues. That dispute is not statute barred under the Retirement Benefits Act and it requires evidence to be taken between the claimants on one hand and the 2nd respondent and the 3rd party on the other hand. The said determination can be done based on the records of employment and deposition filed by the 1st respondent and other parties herein.

Jurisdiction

15. Jurisdiction is everything to a court and whenever it is raised, the court ought to deal with the same forthwith. A court's jurisdiction is derived from the constitution or statute or both as it was held by the Supreme Court of Kenya in ***Samuel Kamau Macharia Vs Kenya Commercial Bank Ltd & 2 Others [2012] eKLR***. The jurisdiction can also be lost by operation of the law under the statutory limitation of the cause of action.

16. As already held herein above, the claim for forwarding of employment records for the claimants by the 1st respondent to the 2nd respondent is statute barred by dint of section 4(1) of the Limitation of Actions Act. In that matter, I return that this court's jurisdiction is distinguished by operation of the law of Limitation.

17. As regards the claim to compel the 2nd respondent to compute the pension payable to the claimants, I find the court lacks jurisdiction to determine that matter by dint of section 46(1) of the Retirement Benefits Act. The section provides:

“ 46(1) Any member of a scheme who is dissatisfied with a decision by the manager, administration, custodian or trustees of the scheme may request in writing that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provision of the relevant scheme rules of the Act under which the scheme is established”.

18. The current Retirement Benefits Act may have been enacted after the claimants left employment. However, in terms of procedure for resolving the dispute herein the new Act must apply to the claimants disputes. Consequently this matter is referred to the Chief Executive Officer of the RBA under section 46 of the Retirement Benefits Act to resolve. In doing so, the Chief Executive Officer will refer to the Trust Deeds or Scheme rules applicable to the claimants and the relevant statute and/or constitution of Kenya.

Disposition and conclusion

19. I have found that the claim for employment records is statute barred and the court lacks jurisdiction to entertain it. I have also found that the claim for computation and payment of the claimants pension dues is not statute barred but the court lacks jurisdiction to determine it by dint of section 46 of the Retirement Benefits Act. Consequently, the claim for computation and payment of pension dues to the claimants is referred to the Chief Executive Officer of the Retirement Benefits Authority under section 46 of the Retirement Benefits Act. The dispute is to be determined between the claimants on one hand and the 2nd respondent and the 3rd party on the other hand but the 1st respondent may be called to give assistance if the need arises. No costs ordered.

Dated, Signed and Delivered in Open Court at Nairobi this 9th day of November, 2018

ONESMUS N. MAKAU

JUDGE