REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

Cause Number 118 Of 2015

Between

1. BILTON ETOBO BARASA OKHONJO

2. SAMSON K. NYELILEY AND 32 OTHERS……CLAIMANTS

VERSUS

KENYA PORTS AUTHORITY…… RESPONDENT

RULING

1. This is a Ruling on a point of Preliminary Objection raised by the Respondent. The Notice of Preliminary Objection was filed on the 25th March 2015. It is based on Section 90 of the Employment Act 2007, which places a limit of 3 years, on the filing of Claims arising under the Act.

2. In their Statement of Claim filed on 11th March 2011, the Claimants state they were appointed by the Respondent in September 2007 as Trainee Assistant Operations Officers [Gantries]. They were taken through training for 18 months. They were to be confirmed in their positions with effect from September 2007, on completion of training. They did the training, advancing to the next job group. The Respondent however did not enhance the Claimants' salaries, to reflect their new job group. Their salaries remained unchanged from 2007 to December 2010. On 2nd February 2011, they were confirmed as Assistant Operations Officers [Gantries] Grade HM4, with the effective date given as 1st December 2010. They claim they were discriminated against as other Trainees joining before and after the Claimants, were automatically paid salaries commensurate with their training and Job Groups. They Claim:-

a. A declaration that they were discriminated upon and treated unfairly by the Respondent
b. A declaration that the Respondent's failure to pay the Claimants salary of Job Grade HG1 from 27th September 2007 to the date of confirmation in Job Group HM4 is unfair
c. An order of specific performance compelling the Respondent to confirm the Claimants to the post of Assistant Operations Officer [Gantries] with effect from 27th September 2007
d. An order of specific performance compelling the Respondent to pay the Claimants salary of Job Grade HG1 for the period 27th September 2007 to January 2010 amounting to Kshs. 64,780,770
e. Costs and Interest

3. The Respondent submits the issue in dispute arose between 2005 and 2007 when the Claimants were appointed. They were issued terms in 2007. They slept on their grievance until this year when they presented this Claim. The Employment Act sets a time limit of 3 years, while the Limitation of Actions

Act Cap 22 the Laws of Kenya has a ceiling of 6 years on contractual claims.

4. The Respondent holds therefore that the Claim is time barred. Section 90 of the Employment Act goes to the jurisdiction of the Court. Training took place in 2007. They should have raised their grievance then, or declined appointment. The Respondent submits that the decisions cited by the Claimants in responding to the objection are distinguishable. In the ***Industrial Court Cause Number 91 of 2012 between Kenya Plantations & Agricultural Workers Union [2013] e-KLR*** and ***Industrial Court Cause Number 2331 of 2012 between Francis Muthini Mue v. Rakesh [2013] e-KLR***, the Court held that time ceases to run while an employment dispute is undergoing other dispute resolution mechanisms, before it is forwarded to the Court for adjudication. The Respondent submits that is so when the dispute has been referred to the conciliation of the Minister for Labour, which was not the case with the Claimants herein. No statutory alternative dispute resolution mechanisms were engaged before the filing of the Claim.

5. The Respondent concludes its submissions with the argument that the letters of appointment were specific when the cause of action arose. The Claim should have been filed then. There is no evidence from the Claimants showing they were engaged in alternative dispute resolution. There was nothing to stop time from running. The Ministry of Labour was not involved.

6. The Claimants reply that the Respondent advertised for training positions in the year 2005. The 34 Claimants applied for training and were appointed. They were to undergo training for 18 months. On confirmation they were told their salaries would be back-dated to 2010. They realized this had not been done. They invoked the internal dispute resolution mechanism, writing to the Management seeking equalization of salaries. The Respondent engaged the Claimants writing various letters to them, in attempting internal and voluntary resolution. They were in the end told their claims could not be sustained. This was in the year 2012.

7. The Respondent's Human Resource Manual recognizes that before the Court is approached, Parties should invoke the internal dispute resolution mechanisms. Clause H.6 prescribes this procedure and is rooted in Article 159 of the Constitution of Kenya. Time started to run on 6th December 2012 when the Claimants were told there was no voluntary settlement. Labour disputes cannot be treated as civil disputes. The Claimants rely on the decisions cited at paragraph 4 of this Ruling. They urge the Court to reject the Preliminary Objection.

The Court Finds:-

8. The Claim is based on salary discrimination. The first observation made by the Court is that the Claimants have not expressly invoked the Employment Act 2007. It cannot be presumed that they have come to Court pursuant to the Employment Act 2007, while they have not pleaded any provision of that law. It is not therefore entirely correct to rely on a temporal provision of the law, which is contained in a law which has not been invoked in filing of the Claim. The Claimants have not stated that their contracts were made pursuant to the Employment Act 2007.

9. Salary discrimination, particularly the kind that is historical in nature, is a kin to historical injustices, which are corrected principally through constitutional principles, and cannot be wished away through statutes of limitation.

10. Even without this resort to constitutional thinking, the Court found in the case of ***David Muhoro Wanjau v. Ol Pejeta Ranching Limite***d that it was wrong to apply the 3 year or 6 year time limit, in Claims for salary discrimination. Relying on comparative jurisprudence, the Court held that salary discrimination frequently occurs in small increments, over a large period of time. The Employer knowingly carries forward past pay discrimination. Time-limit, if any resets with each new pay cheque affected by the discriminatory act. The Court would therefore not apply Section 90 of the Employment Act 2007, even were it to be demonstrated that this law, is the law pursuant to which this Claim is made.

11. The second view of the Court is that if the Employment Act 2007 is applicable, the submission by the Claimants on the role and effect of alternative dispute resolution must prevail. The Court has held in the

decisions cited at paragraph 4 above, that time does not run while Parties are engaged in attempts at voluntary settlement. Such mechanisms need not be statutory mechanisms such as those under the Labour Relations Act; it includes other forms of voluntary settlement mechanisms such as negotiations involving Parties' Advocates [see the cases of ***Desidery Tyson Otieno v. Rift Valley Railways Limited*** and ***Hawkins Wagunza Musonye v. Rift Valley Railways Limited- both [2015] e-KLR].*** If it can be shown Parties were engaged in formal negotiations, the Court must take into account the time involved in such negotiations.

12. Importantly, there are Human Resources Manuals at workplaces, which ordinarily contain elaborate internal grievance and dispute settlement mechanisms. The Claimants and their Employer engaged in attempts at voluntary settlement between 2007 and 2012. Clause H.6 of the Human Resource Manual provides for internal grievance procedures involving audience with the Supervisor, Section Heads, all the way up to the Managing Director. These internal grievance and dispute resolution mechanisms are as important as other alternative and statutory dispute resolution mechanisms. Article 159 [2] [c] has recognized other dispute resolution mechanisms. It requires the Court to promote those mechanisms. This cannot be done if other dispute mechanisms are not allowed to run their full cycles.

13. It has been shown the Claimants complained through the Head of Container Operations, on 15th May 2012, about the salary discrimination and selective application of rules. They had prior to this lodged grievances individually. The Head of Human Resources wrote on 6th December 2012 stating that '' *management has considered your appeal against the decision made and communicated to you in the letter dated 8th June 2012… but has declined to rescind its decision…..in that regard, your request for your appointment to be pegged at Grade HG.1 / HM.4 has been declined.''*

14. This, in the view of the Court signaled the end of the internal grievance and dispute resolution procedure. It paved the way for the Claimants to approach the Bench. Time would, if the Employment Act 2007 is applicable, run from that date. But as suggested elsewhere, salary discrimination is in the nature of a continuing economic injury, where time-limit, if any resets, with each new pay cheque.

IT IS ORDERED: -

a. ***The Preliminary Objection is rejected.***
b. ***Parties shall take a date for the hearing of the main dispute.***
c. ***Costs in the cause.***

Dated and delivered at Mombasa this 25th day of September 2015

James Rika

Judge