



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE 588 OF 2014

JOHN MUGALLA MWADUMACLAIMANT

VERSUS

BRAEBURN SCHOOLS LTD t/a

BRAEBURN INTERNATIONAL SCHOOL MOMBASA.....RESPONDENT

R U L I N G

Introduction

1 The claimant filed this suit on 20.11.2014 claiming Ksh 936,840 being salary arrears for the period between 1.9.2004 and August 201. The said arrears arose from salary underpayment. The respondent has objected to the suit vide a notice of preliminary objection (PO) dated 14.7.2015. The gist of the P.O is that the suit is time barred and should be struck out for contravening section 90 of the Employment Act (EA). The P.O was disposed off by way of written submissions.

Analysis and Determination.

2 The only issue for determination herein is whether the suit is time barred. According to the respondent, the claimant was employed in 5 distinct fixed term contracts. That he was paid all his benefits at the end of each month, during each respective fixed term contract. That for claims under the contract period between 2004 and 2006, the limitation period was 6 years under section 4 of the limitation actions Act. That the limitation period of the claiming under the contract ending between 2008 and 2010 was 3 years within the meaning of section 90 of the EA. Consequently according to the respondent, the claimant for salary arrears for the period before 2008 expired in September 2011 while the claims for arrears accruing from 2008 and 2010 expired between September 2011 and September 2013. Considering that this suit was filed on 20.11.2014, the respondent urges the court to find that the suit is time barred whichever way one look at it. She has relied on several persuasive judicial precedents on point including this court's decision in **ELRCC NO. 614 of 2011 Gerald Ngimbao Kiyama vs Sala Terena Co. Ltd (2015) eKLR.**

3 The claimant has denied that the suit is time barred and contended that time started running on 30.9.2013 when he resigned from the employment after 9 years' service. In his view the claim was to expire on 30.9.2016. He relied on **ELRCC NO. 367 of 2013 Ezekiel Matagaro & 60 others vs Maersk Kenya Ltd,** to urge the court to find that a claim for salary arrears accrues from the time the contract is terminated. Rika J in the said decision stated:

“Once termination of employment has occurred, and the claim is filed within the time given under section 90, disparate claims under the main suit, cannot be severed and subjected to separate dates

of accrual. If house rent has not been paid over the years; or annual leave pay was not paid, or if there were salary arrears in the employee's record, these must be paid at the point of exit. They are accrued benefits, earned over the continuous years of service. The only limitation is on the main claim, not the disparate claims, accrued to the employee over time."

4 With due respect, the above precedent is only of persuasion value and or must be viewed in relation to the express provision of section 90 of the Employment Act and the terms of each contract of service. Section 90, Supra, duplicated below.

"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 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."

5 In this court's view, section 90 Supra contemplates two classes of cause of action. First, is the one time injury and second, is the continuing injury or damage which keeps on being repeated. In the context of the said provision, if the cause of action is not a repeated injury or damage or breach, the cause of action expires after 3 years. However if the cause of action involves an injury or damage or breach which keeps on recurring, the cause of action for continuous injury expires 12 months next after the last breach or injury. This however has to be interpreted with respect to the particular injury or breach because depending on certain cases like leave, accruals may not be allowed except with the consent of the employer.

6 It follows therefore that an employee cannot be shielded from the statutory time bar in respect of all claim just because he files his suit within the 3 years or 12 months' time bar. He must prove either that his cause of action arose 3 years prior to filing the suit or that the cause of action comprises a series or continuous injury or breach that ceased within 12 months prior to the filing of the suit. If the opposite was to be allowed it would lead to claims which are impossible to resolve especially if an employee decides after many years to file suit as an afterthought and in this court's view the legislature barred that by providing in bad faith. Mandatory terms that no civil action shall lie or be instituted outside the limitation period set out under section 90 of the EA.

7 In the present cause, the claim is for salary arrears in respect of distinct fixed terms contracts which expired on diverse dates between 2006 and 2010. The question that arises is whether cause of action constitutes a distinct breach or injury which expires after 3 years or a continuing injury or breach which expires 12 months after the injury or breach ceased. In this court's view, whichever way you look at the pleadings, the suit is time barred. The facts of the claim supports a case of a continuing breach through salary under payment in which case, the claim expired 12 months next after the breach or injury ceased. The breach in respect of the last contract was August 2010. Hence the claim expired in the end of July 2011. On the other hand if cause of action was to be deemed to have accrued on the day when the claimant's contract ended on 30.9.2013, the claim is still time barred because, 12 months next after the last breach lapsed on 30.9.2014 and the suit was filed on 20.11.2014.

Disposition

8 For reasons stated above the suit herein is time barred and it is struck out with no order as costs.

Signed, Dated and Delivered at Mombasa this 13th day of November 2015.

ONESMUS MAKAU

JUDGE

13.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Ruling delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE