



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 55(N) OF 2010

1. LIVINGSTONE MUTSUNE
2. JACKTONE KAMAU.....CLAIMANTS

VS

AFRICAN TOURS & HOTELS LIMITED

(IN RECEIVERSHIP).....1STRESPONDENT

KENYA TOURIST DEVELOPMENT CORPORATION...2ND RESPONDENT

RULING

1. The 2nd Respondent raised a Preliminary Objection to the suit dated 1st August 2013. Mr. Makokha appeared on behalf of Mr. Namada for the Claimant while Mr. Akhulia appeared for the 2nd Respondent.
2. Mr. Akhulia submitted that the suit is statutorily time barred by Section 90 of Employment Act 2007 and that Section 90 is clear on the issue that any claim brought before the Industrial Court should be brought within 3 years. He stated that in the Claim filed on 20th January 2010 it is clear that the acts complained of arose from the month of July 1998 and to be precise 7th July 1998 as seen from para 7 of the Statement of Claim. This, he submitted, is in clear contravention of section 90 of the Employment Act. He also opined that the Claimant in the matter had a further recourse in the old Employment Act Cap 226 which was repealed in 2008 by the Employment Act 2007. The statutory limitation period was 6 years as the contracts were categorized as general contracts. Again on that issue, the same were general contracts and Section 4(1) placed a limitation of 6 years on any claims arising out of contract. In essence, he submitted, this Claim ought to have been filed on or before 6th July 2004. He said that there has been no application under section 27 or 28 of the Limitation of Actions Act where there leave was sought and no order has been exhibited granting the Claimant the leave to file out of time. He further submitted that seeing the time ran out in July 2004 they waited a further 6 years before filing in January 2010. He held that the issue of limitation goes to jurisdiction of any court and submitted this Court has no jurisdiction to entertain this suit as it is or as it was filed. Under both the Employment law regimes it was barred statutorily. On issue of jurisdiction Counsel used the words of Justice of Appeal Nyarangi in the case of **Motor Vessel Lilian 'S'**. He submitted that the issue of jurisdiction must be determined before a matter can be taken for hearing. In this case there is an unexplained inordinate period of 12 years which makes it statutorily barred and the case thus should be dismissed with costs to the Respondent. The Court has dealt with issue of limitation and has stated that any dispute filed out of time is amenable to striking out. This were the words of **Peterson Waweru Thinwa v. JSC Cause 941 of 2012** (unreported). He submitted that in light of all those

facts the suit ought to be dismissed with costs as it is not properly before the Court.

3. Mr. Makokha opposed the preliminary objection. He stated that the first ground why the preliminary objection should be dismissed is the principle of promissory estoppel. He said that it is not in dispute that the Claim was filed in 2010 after the Claimants were terminated on 7th July 1998. The promise was made by the Respondents to the Claimant that upon termination dues would be paid in the long run. It was not specified when the dues would be paid. He referred to Appendices 2, 8 and 10 on Claimant's bundle as evidence their benefits were calculated and promise made they would be paid. He thus submitted the Respondents cannot now go back on their word and plead time limitation and yet they have not paid anything. The Court should look at the case **Benjamin Airo Shiraku v. Fauzia Mohamed HCCC 272 of 2011** where Justice Havelock citing Lord Denning in **Combe v. Combe** held that where one party by his words or conduct made to the other a promise or an assurance which was intended to affect their legal relations 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 the previous legal relations as if no such promise or assurance had been made by him. But he must accept the legal relation subject to the qualification which he himself has so introduced even though it is not supported in point of law by consideration but only his word.
4. He submitted that the Respondents promised to pay the dues in terms of terminal benefits. The two were retired when they were about to retire. Payments were made from 2001 and they continued making payments to other employees till 2010. The payments were made in a discriminatory way hence the recourse to this Court. Court should take judicial notice that retired employees take even a decade pursuing their dues. Some are even paid long after they have passed on. He opined that the Court will be setting a very bad precedent if the Court were to allow the employers to sit on the terminal benefits and then plead limitation. The decision if made in favour of Respondent will affect millions of poor Kenyans and history will judge the Court harshly. He submitted that the principle of promissory estoppel is to be used as a shield but the Respondent is using it as a sword as opposed to shield. The Respondent had withheld the Claimant's terminal benefits for over 12 years and in all fairness they should not be allowed to plead limitation of time. On those grounds he urged the Court to dismiss the objection. Secondly, he submitted the objection cannot stand based on the Respondent's acquiescence. The case came up for hearing several time but has not proceeded for one reason or another. The Respondents have not previously raised the preliminary objection and have always been ready to proceed on merits. In the case cited above **HCCC 272 of 2011** Justice Havelock stated a court can refuse any relief available on ground of acquiescence or otherwise. He submitted the fact the Respondent has always been keen to go on full hearing that amounts to acquiescence and waiver of any plea of limitation. The last point on why preliminary objection should be dismissed is on the duty to pay terminal dues. The Constitution under Article 41 calls for fair labour practice. The provisions of Constitution are superior to an Act of Parliament. How unfair would it be for employer to terminate employees who are about to reach their retirement age, calculate their dues, promise to pay them in future and now turn back to section 90 that time has lapsed. It would amount to unfair labor practice contrary to Article 41 of the Constitution. He urged the Court while arriving at the decision to reflect on what public policy demands. Does public demand those employees whose employers take over 3 years to process their terminal dues run to court before the 3 years lapse to pursue their terminal benefits or be patient and give the employer time to pay them as the Claimants have done in this case? It was his opinion that option will clog the judicial system as there will be a flood of litigation by retired employees and costly for those employers. The best option is for the employees to be patient and allow employer to make payment unless it take inordinately long to pay the dues. He ended his submissions by praying that the Court dismisses the preliminary objection and allow the case proceed.
5. Mr. Akhulia stated that in his understanding even the issue of promissory estoppel should not last for eternity. The same amounts to an agreement and if parties are to rely on any such agreement then the termination still remains as stated in the law – 6 years and as such, it would have been prudent for the Claimants to raise any such issues before 6th July 2004 and not later. The

Claimants seek to rely on various appendices – 2, 8 and 10 which are letters or receipts from the 1st Respondent in the matter. Counsel submitted that it was common knowledge the entity was in receivership and was liquidated a couple of years back and the letters do not in any way refer to the 2nd Respondent which was a shareholder in the entity. Estoppel as submitted by Mr. Makokha does not supercede the law. As such the statutes of limitations should apply within such claim. The second issue is issue of acquiescence. Going back to the case of **Motor Vessel Lilian ‘S’ v. Caltex** Nyarangi JA stated jurisdiction is everything. Without it, the court has no power to take one more step. If the issue is raised at any time from filing to judgment the court should lay its hands down and determine it. Once the issue of jurisdiction has been raised it must be determined and no amount of acquiescence and willingness to proceed with a matter can be raised as an argument against jurisdiction. In conclusion he prayed that the suit be dismissed on grounds stated as it is an affront to section 90.

6. A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a “demurrer”. The Respondent's Preliminary Objection fits the definition of a preliminary objection per the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. In the celebrated case Law J.A. stated a preliminary objection to be thus:- ?

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of 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, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

7. Sir Charles Newbold, President stated in the same judgment as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. The Respondent does not seek the exercise of judicial discretion. No, what the preliminary objection seeks to do is determine the issue of whether there is a cause of action *in limine*. It is well taken because if it succeeds the Court will be saved the cost of a lengthy trial and attendant expenses on either side.
9. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

10. The authority for this holding by the learned Judge of Appeal is to be found in the writings of John Beecroft Saunders in a treatise which is no longer published headed **Words and Phrases Legally defined – Volume 3: I – N** and it states at page 113 the following about jurisdiction:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the

jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

11. The matter is an interesting one as in opposition to the prayers on limitation the Claimants raise promissory estoppel. It is agreed that the suit was filed after a considerably long time.

12. Section 90 of the Employment Act provides:

Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based on or arising out of this Act or a 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.

13. Prior to 2007, the Employment Act cap 226 had no provision on limitation and the fall back was to the Limitation of Actions Act Section 4(1). The Section provides as follows:-

4.(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued -

(a) actions founded on contract;

14. In the case before me, the Claimants admittedly were terminated in 1998. Limitation would have set in under the repealed Employment Act in 2004. The Respondent urges the Court to dismiss the suit as it was filed in 2010 which is 6 years after the limitation set out in the law. The Claimants claim that promissory estoppel applies.

15. Promissory estoppel is defined by **Black’s Law Dictionary Ninth Edition** as **the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.**

16. Promissory estoppel has four necessary elements which the plaintiff must prove:

- i. there was a promise
- ii. that promise was reasonably relied upon
- iii. and it resulted in legal detriment to the promisee
- iv. justice requires enforcement of the promise

In the case before me, there would have to be proof led to show these 4 elements at play in order to determine if there was indeed promissory estoppel.

17. In the case of **Benjamin Airo Shiraku v. Fauzia Mohamed HCCC 272 of 2011** Justice Havelock citing Lord Denning in **Combe v. Combe [1951] 2 KB 215** held that

Where one party by his words or conduct made to the other a promise or an assurance which was intended to affect their legal relations 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 the previous legal relations as if no such promise or assurance

had been made by him. But he must accept the legal relation subject to the qualification which he himself has so introduced even though it is not supported in point of law by consideration but only his word.

18. In other words, if one promises another and the other acts on that promise then the promisor cannot resile. In this case, it is submitted that the Respondents made promises to the Claimants which it is submitted, qualify as promissory estoppel against the raising of limitation as a bar. The nexus between the 1st Respondent and the 2nd Respondent is one of principal owner and company. The 2nd Respondent thus was bound by the actions and agreements of the 1st Respondent. Did the promise lead to the late filing of the suit? How long can one hold on to a promise? The issue of limitation is a matter of law and no promise in the mind of the Court can suffice to extend the limitation period. Unless the promise was express that the limitation would not apply, I find that the law of limitation set in. Article 41 of the Constitution captures the spirit of the labour disputes but does not mean that suits can be filed outside the limits of time without sanction of Court. Public policy would not fly in the face of statute. In the premises the preliminary objection succeeds and the suit is struck out. However, I will not punish the Claimants with costs.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of January 2014

Nzioki wa Makau

JUDGE