REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 641 OF 2013

BANKING INSURANCE AND FINANCE UNION (BIFU) ………..…… CLAIMANT

VERSUS

COMMERCIAL BANK OF AFRICA LIMITED ……………………….RESPONDENT

RULING

1. The Claimant, Banking Insurance and Finance Union (BIFU) filed the claim dated 8th May 2013 for unfair declaration of redundancy and violation of the Collecting Bargaining Agreement (CBA) with the respondent with regard to underpayments of two grievants, Samuel Kimani Muigai and Shadrack Mburu Wambui. The respondent through their amended Defence filed on 6th February 2014 raised a preliminary objection to the claim on the grounds that;

   a. The contracts of employment for the grievants were for fixed periods and came to an end by effluxion of time; and
   b. The claims predicated upon contracts entered into prior to 2nd January 2010 are time barred.

2. Both parties filed their written submissions with regard to the respondent's preliminary objections. The respondent filed on 23rd April 2014 while the claimant filed on 3rd June 2014.

3. The respondent submitted that the preliminary objection relate to the first grievant Samuel Kimani Muigai as the claim by the second grievant Shadrack Mburu Wambui has been settled. From the claim Samuel Kimani Muigai's claim arose on **31st March 2013** when his contract of service came to an end as it had a fixed term. He was on several fixed term contracts dated 8th December 1998 for 2 years, contract dated 21st January 2004 for 3 years, contract dated 23rd February 2010 for 3 years and contract dated 7th January 2013 for 3 months.

4. The respondent submitted that under section 10(3)(c) of the Employment Act, a contract of employment can be for a fixed period of time. The contracts came to an end by effluxion of time and all terminal dues were paid at the end of each contract. No notice was required as this was not a requirement under the expired contracts and the claim thus filed is an abuse of the court process and should be struck off. The respondent relied on **Ingrid Kivumbi versus Deutsche Gesellschaft Fuer Technische Zumammenarbeit (GTZ) GmbH [2008] eKLR** and the decision in **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers versus Merica Hotels Limited [2013] eKLR.**

5. The respondents also submitted that the contracts entered into prior to 2nd January 2010 are time barred. The contracts relied upon dated 8th December 1998 expired on 9th December 2000 and any claim thereof lapsed on 9th December 2006. The contract dated 4th January 2001 expired and any claims

therefrom lapsed on 8th December 2008 while the contract dated 20th December 2002 expired and any claims therefrom lapsed by 31st December 2010. Under section 4(1) of the Limitation of Actions Act and section 90 of the Employment Act, the subject contracts are predicated upon the contracts prior to 2nd January 2010 and have lapsed and no action can be agitated upon them. These contracts were entered into before the enactment of the Employment Act, 2007 and thus governed by the limitation of Actions Act. The claims were not filed within 3 years or 6 years respectively and thus time barred as the provisions of the Employment Act at section 90 are mandatory as held in **Faustino Waigwa Maina versus G$S Security Service (K) Limited, Cause No. 1417 of 2010.** The claim has been filed outside the limitation period and the court has no power to extend time for such claims to be lodged. The suit should therefore be struck out with costs.

6. In reply, the claimant submitted that the grievant Samuel Kimani Muigai was employed by the respondent from 8th December 1998 and worked continuously until 31st March 2013 when he was unproceduraly terminated. The claimant was working in a group of 15 others who were confirmed and only he was terminated which was segregation and a bad labour practice. When the grievant was engaged in 1998 the law did not provide for fixed term contracts and through various letters issued to him, his employment had been confirmed. That there is no rationale for the termination of the grievants' contract while others similarly situated were not terminated and hence he suffered victimisation.

7. The claimant also submitted that the claim is not time barred as the grievant was unionised and in the CBA negotiated between the claimant and the respondent's association the terms therein prohibit discrimination against any member. That the respondent has admitted owing the grievant some money and thus under the Limitation of Actions Act, extension of time in such a case is allowed in a case of mistake, fraud or omission of material facts. The claimant discovered the underpayments only after 31st March 2013 and are still due and owing and not time barred. These **underpayments go back to March 2009 until March 2013.** The claimant relied on **BIFU versus Bank of India, Cause No. 1201 of 2012.** There is no time bar to claims for fundamental rights as the grievant should have been paid his dues owed to him as an employee and the objections raised should be dismissed.

8. The respondent has raised fundamental matters of law that go to the core of the entire claim. The issue that the there was a fixed term contract that came to an end by effluxion of time and that the claim is statute barred. The principles of preliminary objections were set out way back in 1969 and still hold true to date. A preliminary objection must consist of a point of law which is pleaded or arise by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit as was held in **Mukisa Biscuit Manufacturing Company Ltd v Westend Distributors Ltd [1969] E.A 696)**

9. Both parties agree that with regard to Samuel Kimani Muigai as the grievant, he was at all materials times while at the employment of the respondent under a contract of service. The last such contract is dated 7th January 2013. Following the employment, the claimant claim is that there was an unfair redundancy and underpayment going back to 2009 March up to and until March 2013 when the subject grievant contract lapsed. The objections lodged by the respondent therefore with regard to these claims are that the contract came to an end as agreed and that the claims are time barred with regard to contracts that were in existence prior to 2nd January 2010.

10. The fundamental shift now created by the new labour relations regime is to encourage parties to an employment relationship to reduce the same into writing and as much as possible to put all the terms and conditions of work into writing. Sections 9 and 10 of the Employment Act therefore sets out the provisions and conditions that parties can put into perspective and consideration when writing such a contract of employment and or service. Of importance here is section 9;

> ***9.*** *(1) A contract of service—*
>
> *(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or*

(b) Which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months; shall be in writing.

11. In this case, there are written contracts of service, the last dated 7th January 2013 for a fixed period of three (3) months from 1st January 2013 to 31st March 2013. The parties to this contract also agreed that the contract would be terminated by notice of one (1) month or payment in lieu of such notice. There is nothing I find to contradict these terms from the submissions of both parties. These terms and provisions of the grievants contract are in tandem with the provisions of section 10(3)(c) where A written contract of service specified in section 9 shall state particulars of employment which may state;

(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;

12. Noting the above, even in a case of a fixed term contract, which has terms and conditions of service and outlines the conditions for its termination, an employee under such a contract is also a beneficiary of other parts of the Employment Act with regard to rights and benefits that flow from the employment relationship when it subsisted. Upon termination or lapse of a fixed term contract, whichever is applicable, such an affected employee is subject to the provisions of section 35 (2) thus;

(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

13. The grievants' contract provided for 1 months' notice or payment in lieu of such notice. This is the same period allowed under section 35(1) of the Employment Act giving the minimum notice period. However, even where such notice is issued or payment made in lieu of such notice, such termination even where agreed upon in a fixed term contract is still subject to the provisions of section 35(4);

(4) Nothing in this section affects the right—

(a) of an employee whose services have been terminated ***to dispute the lawfulness or fairness of the termination*** *in accordance with the provisions of section 46; or*

*(b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law. [*Emphasis added].

14. The drafters of the law, in crafting and passing the Employment Act, must have foreseen a case like this one where even in the worst case where one is a casual employee the law made provision that the same can be converted into a fixed term contract if such a casual employee continues to perform such work that cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three (3) months or more. The law therefore is stated in a progressive and protective manner to ensure that no employee is unfairly terminated under whatever regime of contract, casual, oral, fixed or service contract of employment. Whichever is applicable, a termination must be open to further scrutiny for its fairness and lawfulness. Nothing affects that right.

15. The grievant can therefore challenge his termination based on the fairness or lawfulness of such termination and in accordance with the provisions of section 46 of the Employment Act which has a myriad of grounds that an employee can rely on. However where a party cites a termination to have been unfair or unlawful, such are matters of evidence and cannot be concluded at a preliminary stage. There is need to call evidence in that regard. Where such evidence will support the claim as outlined, the duty is on the claimant to lead the grievant and call for such evidence.

16. This leads me to the second issue raised by the respondent that the claims predicated upon the contracts entered into prior to 2nd January 2010 are time barred. There are several contracts herein with

regard to each grievant and more particularly to Samuel Kimani Muigai the last which ended on 31st March 2013. The claim was filed on 8th May 2013, a period of 37 days after the last contract and my reading of section 90 of the Employment Act allows a party in an employment contract to file his claims within 3 years from the day the cause of action arose. Part of the claimant's claim is that there was an unlawful redundancy and underpayments from March 2009 to March 2013. Where these claims related to continuing acts of violations of the grievants rights or arose at the time of termination and or at the lapse of fixed term contract, these are matters that can only be well articulated in evidence as at this point it would be impossible to decipher which claims fall outside the statutory periods subject to the provisions of section 90 of the Employment Act and where the provisions of section 4 of the Limitation of Actions Act end. The objections raised by the respondent raise substantive issues that require the call of evidence and cannot be dealt with at this preliminary stage.

17. I also hasten to quote the dicta of Sir Charles Newbold *in* ***Mukisa Biscuits Manufacturing Co. Ltd versus Westend Distributors Ltd at page 710;***

> *...The second matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objections. 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 as 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.*
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> *The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and on occasion, confuses issues. This improper practice should be estopped….*

18. For the fair, just and proper administration of justice in this case, to strike out the suit at this stage would be the injustice.

The preliminary objection raised by the respondent is rejected. Costs will be in the cause.

Delivered in open Court at Nairobi and dated this 7th Day of July 2014

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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