



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 149 OF 2019

CHRISTINE KAINYU KIRAITHE.....APPELLANT

-VERSUS-

KENYA FORESTRY RESEARCH INSTITUTE.....1ST RESPONDENT

ROBERT MWANGI WANJAMA.....2ND RESPONDENT

(Being an appeal against the ruling and order of Honourable D.M. Kivuti (Mr.) (Senior Resident Magistrate) delivered on 15th February, 2019 in MILIMANI CMCC NO. 6428 of 2018)

RULING

1. At the onset, the 1st and 2nd respondents herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated 10th July, 2018 and sought for reliefs against the appellant in the nature of the sum of Kshs.1,311,400/ together with costs of the suit and interest thereon on the basis of salaries irregularly paid to the appellant and which salaries had not been refunded.
2. The respondents averred in their plaint that the appellant was at all material times an employee of the 1st respondent, working as an Assistant Research Officer on permanent and pensionable terms in its centre station at Gede, whereas the 2nd respondent was at all material times an employee of the 1st respondent, serving as a Human Resource Assistant.
3. The respondents pleaded in their plaint that on 29th October, 2007 the 1st respondent received an application by the appellant for a PhD scholarship opportunity tenable in the United Kingdom and that the appellant's course was subsequently approved, at which point the 1st respondent permitted her to pursue her PhD between 15th February, 2009 and 5th February, 2012 when she was expected to report back to work.
4. It was pleaded by the respondents that on said 5th day of February, 2012 and thereafter, the appellant failed to report back to work and further failed to comply with the 1st respondent's directive that she completes a training bond and return it by 31st August, 2012.
5. The respondents stated that between March, 2012 and 1st November, 2013 the appellant received irregular salaries totaling a sum of Kshs.1,311,400/ given on the expectation that she would report back to work upon completion of her studies, which sum the appellant has refused and/or neglected to refund to date.
6. The respondents pleaded that the appellant's employment was terminated by the 1st respondent with effect from 5th July, 2016.
7. Upon service of summons, the appellant entered appearance and filed her statement of defence on 14th November, 2018 to deny the respondents' claim.

8. The appellant also filed a notice of preliminary objection dated 12th November, 2018 in which she raised the following grounds of objection:

i. THAT the entire suit as brought out and filed offends the provisions of Section 90 of the Employment Act Cap. 226 Laws of Kenya in that the claim herein relates to an employment relationship.

ii. THAT the suit relates to a claim for irregularly paid salaries during the period between March, 2012 and 1st November, 2013 clearly offending the mandatory provisions of Section 90 of the Employment Act Cap. 226 Laws of Kenya.

9. For the foregoing reasons, the appellant sought to have the respondents' suit struck out with costs.

10. Upon considering the preliminary objection, the trial court dismissed it vide its ruling delivered on 15th February, 2019.

11. Being aggrieved by the above decision, the appellant sought to challenge the same by way of an appeal. Through her memorandum of appeal dated 19th March, 2019 the appellant put in the following grounds:

i. THAT the learned trial magistrate erred in law and in fact by holding that the appellant's preliminary objection was not raised purely on a point of law.

ii. THAT the learned trial magistrate erred in law and in fact by failing to acknowledge that the preliminary objection was raised purely on a point of law being the application of Section 90 of the Employment Act.

iii. THAT the learned trial magistrate erred in law and in fact by taking into account irrelevant considerations.

iv. THAT the learned trial magistrate erred in law and in fact by holding that the principles of unjust enrichment overrode the mandatory provisions of Section 90 of the Employment Act.

12. This court issued directions to the parties to file written submissions on the appeal. In her submissions dated 3rd December, 2019 the appellant argues that the preliminary objection raised pure points of law; namely the issue on limitations; yet the trial court found otherwise, and erroneously so.

13. The appellant argues that the matters in issue relate to an employer-employee relationship between the 1st respondent and herself, specifically the issue of payment of irregular salaries which according to her arose between March, 2012 and 1st November, 2013 thereby making the respondents' suit time barred.

14. It is the averment of the appellant that from the foregoing, it is clear that the relationship between the parties herein is governed by the provisions of the Employment Act. To buttress her argument, the appellant cited the case of **Francis Atonya Ayeka v Kenya Police Service & another [2017] eKLR** where the Employment and Labour Relations Court (ELRC) held thus:

“The objections by the respondent being premised on the application of section 90 of the Employment Act, 2007 and the same being mandatory, noting the time running from January, 2011 to 2017 when the petition was filed, the claims made being premised on employment and labour relations, the petitioner cannot benefit from listing the matter herein as a Petition and not a Claim. The matters between the parties are with regard to employment and labour relations. The provisions of section 90 of the Employment Act, 2007 are mandatory. There is no claim that there is a continuing injury.”

15. The appellant is of the view that the trial court ought to have appreciated that the provisions of Section 90 of the Employment Act are capped in mandatory terms and that the issue of unjust enrichment had not been raised by any of the parties.

16. On their part, the respondents who filed written submissions on 7th June, 2020 contend that the appellant has not satisfied any of the following ingredients associated with a preliminary objection laid out by the court in the renowned case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696**:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

17. The respondents further contend that the appellant has failed to show the manner in which the trial considered

irrelevant factors in making a determination on the preliminary objection.

18. It is the submission of the respondents that they have in place a prima facie case with high chances of success hence the trial court was correct in dismissing the preliminary objection.

19. The respondents are of the view that the issues advanced by the appellant touch on the provisions of Section 90 of the Employment Act yet the claim arises out of the law on contract.

20. The respondents are also of the view that their claim has been filed within the statutory 3-year timeline from the date on which the cause of action arose, and urged this court to consider the case of **David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] eKLR** where the Industrial Court upheld the following decision arrived at in the case of **Justus Atulo Ashioya v Akshar Team Security Limited-Industrial Cause No. 849 of 2011:**

“The period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching, over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of termination, the Employee should be accorded all benefits arising under the contract of employment. The event that triggered this Claim happened on or about 26th January 2011, and the Claim to enforce the full range of benefits was filed on 11th August 2011, well within the period created under Section 90 [of the Employment Act 2007].”

21. In the end, the respondents have urged this court to dismiss the appeal with costs.

22. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal lies principally against the trial court’s decision to dismiss the appellant’s notice of preliminary objection. I will therefore deal with the grounds of appeal contemporaneously.

23. As earlier noted, the learned trial magistrate upon considering the preliminary objection dismissed the same on the reasoning that the respondents’ claim against the appellant is not limited to the rights of an employer against that of an employee or vice versa; rather, it is a money claim for which the respondents are convinced that the appellant unjustly enriched herself.

24. The learned trial magistrate went on to reason that whereas the claim relates to an employer-employee relationship, it does not touch on the provisions of Section 90 of the Employment Act hence the preliminary objection does not raise pure points of law.

25. Reference is made to the prominent case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** which defined the term ‘preliminary objection’ in the manner set out hereinabove.

26. The above definition was further advanced in the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

27. The question therefore is whether the preliminary objection in the present instance raised pure points of law. From my study of the same, I note that the appellant is essentially challenging the respondents’ suit on the premise of limitations pursuant to the provisions of Section 90 of the Employment Act which in turn touches on jurisdiction. In my view, the subject of limitation is a pure point of law since the law is well settled that any suit filed out of the statutory timelines and without leave of the court is deemed time barred and therefore incompetent before any court of law.

28. To this extent, I find that the learned trial magistrate fell into error in not appreciating the validity of the appellant’s preliminary objection in tandem with the definitions above.

29. The provisions of **Section 90** of the **Employment Act No. 11 of 2007** (“the Act”) stipulate as follows:

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based 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.”

30. It is clear from the above that a mandatory timeline of 3 years is given for the commencement of claims arising out of the Act or out of a contract of service, with a separate timeline of 12 months in the instance of continuous injury or damage.

31. I will first address the primary issue touching on whether the provisions of the Act would govern the present claim. From my study of the pleadings and material which was placed before the trial court, I established that it is not in dispute that the 1st respondent and the appellant enjoyed an employer-employee relationship at all material times. It is also not in dispute that the claim relates to the refund of salaries which, according to the respondents, were irregularly paid to the appellant. It therefore follows that the provisions of the Act would become applicable to the parties herein since the claim arose out of the employment relationship subsisting among the parties. On this note, I similarly disagree with the reasoning of the learned trial magistrate that this is merely a money claim on grounds of unjust enrichment. In my view, the learned trial magistrate’s analysis on this issue was misguided.

32. Having determined so, I will now consider the issue to do with whether the respondents’ suit was time barred. In order for me to address this, I must establish when the cause of action accrued for the time to begin to run.

33. The court in the case of **South Nyanza Sugar Co. Ltd v Dickson Aoro Owuor [2017] eKLR** sought to answer the above question in the following manner:

“It is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”

34. The appellant on the one part argues that the respondents ought to have brought their claim within 3 years of the period between March, 2012 and 1st of November, 2013 when the salaries were irregularly paid. On the other part, the respondents are of the view that their claim was timeously filed within 3 years of the termination of the appellant’s employment and claim for a refund made on 5th July, 2016.

35. From the pleadings and material placed before the trial court, it is apparent that the respondents’ claim is founded on the salaries paid to the appellant on the aforementioned dates. It therefore follows that time would begin to run on March, 2012 when the appellant was first expected to report back to work upon completion of her studies and received the first of her salaries whose refund is now being sought; and not at the point of termination of her employment.

36. Upon taking into account the fact that the respondents filed their suit on 12th July, 2018 outside of the timelines stipulated under Section 90 of the Act requiring them to bring the claim within 3 years of March, 2012 I find the suit to be time barred.

37. From the foregoing, I find the preliminary objection raised by the appellant to be valid, thereby departing from the finding arrived at by the learned trial magistrate.

38. In the end, I find the appeal to be meritorious. It is allowed. The ruling delivered on 15th February, 2019 is hereby set aside and is substituted with an order allowing the preliminary objection dated 12th November, 2018. The suit is consequently struck out with costs to the appellant. The appellant shall also have costs of the appeal.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 30th day of July, 2020.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st and 2nd Respondents