



REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL NO.150 OF 2016

ALFRED MUTINDA MUTUA.....APPELLANT

-VERSUS-

C.F.C STANBIC BANK (K) LTD.....RESPONDENT

RULING

1. This Appeal is against the trial Magistrate's ruling dated the 14th October 2016 upon a Preliminary Objection (P.O) dated 24th July 2015 was raised by the defendant.
2. The P.O. was on grounds that the suit was statute barred as limitation period is 3 years under the law of limitations, since this is a suit founded on the tort of negligence and no cause of action is disclosed since the Amended Plaintiff dated 6th December 2013 is vague and does not contain material facts.
3. By a ruling dated the 14th October 2016 the suit was found to have been based on tort and therefore time barred having been filed more than five years after the cause of action arose. The suit was therefore struck out with costs.
4. The cause of action arose on the 29th July 2004 while the Appellant was in the course of employment of the Respondent where he sustained very severe injuries which in facts the Appellant attributed to the Respondent's breach of duty of care as an employer. Particulars of breach of duty of care by the Respondent are also stated.
5. Upon hearing of the preliminary objection (P.O), the trial magistrate found the suit to have been filed out of time as it was based on tort, and not contract, and proceeded to strike it out.
6. The Appellant's gravamen of the Appeal is that the trial Magistrate erred in holding that the suit arose under tort and not under contract.

ANALYSIS AND DETERMINATION

Issues for Determination

- i. Whether the primary suit was time barred.***
- ii. Whether the course of action is a tort or contract.***

7. This Court has had occasion in the past, to consider the nature of a preliminary objection. The Court endorsed the long-standing jurisprudence set in the *Mukisa Biscuit case*, on the nature of a preliminary objection. 8. In *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Sup. Ct. Application No. 23 of 2014, the Court cited its earlier decision in the *Joho case* thus [paragraph 51]:

“The principles in the *Mukisa Biscuit* case were restated by this Court in the *Joho* case [as follows...]

‘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 ... 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. Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

9. What point of law is being raised in this preliminary objection? The preliminary objection raised by the defendant in my view is a pure point of law based on **Limitation of Actions Act** under **Cap 22 Laws of Kenya**.

Whether the cause of action was based on tort or contract

10. The Appellant in his further Amended plaint further Amended on the 15th December 2010 pleaded at paragraph 4 that there was an express contract between the plaintiff and the defendant. It was the duty of the defendant to take all reasonable precautions for the safety of the plaintiff while engaged in employment.

11. At Paragraph 6 of the further amended plaint the plaintiff states that the injuries suffered were caused by the negligence and/or breach of duty and /or breach of contract of employment by the defendant. The particulars listed under paragraph 6 of the further amended plaint are purely particulars for breach of duty of care and/or negligence.

12. The plaintiff did not particularize any particulars in relation to breach of the employment contract as required under **Order 2 Rule 4** of the Civil Procedure Rules which provides:

Order 2 Rule 4 of the Civil Procedure Rules

(4) A statement that a thing has been done or that an event has occurred, being a thing or an event the doing or occurrence of which constitutes a condition precedent necessary for the case of a party shall be implied in his pleading.

13. This court is also in consonance with the reasoning in **Kenya Power & Lighting Company Limited v Collins Agumba Aboge [2016] eKLR where Majanja J stated as follows...**

“Whether a claim in founded on tort or contract is based on the substance of the claim as set out in the pleadings. The respondent, at paragraph 5 of the plaint pleaded that the, “accident was caused by the breach of the defendant statutory duty and or common law duty of employment.” This leaves no doubt that the respondents claim was not founded on contract.

I agree with the decision in **Kiamokama Tea Factory Company Ltd v Joshua Nyakoni KSI HCCA No. 169 of 2009 [2015] eKLR** that a breach of statutory duty, as pleaded by the respondent, is a tort (*see also Kenya Cargo Handling Services Ltd v David Uggwang NRB CA Civil Appeal No. 64 of 1984 [1985] eKLR*). My view is further fortified by *Black’s Law Dictionary (8th Ed.)* which defines tort as, “a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons on an employer to his employee is clearly a tort.”

14. In **James Omukhala Otieno & another (Suing as the personal representatives estate of Wilson Okate Omukhala (Deceased) v Lomolo 1962 Limited [2019] eKLR Mulwa J** in an appeal where both breach of contract and breach of statutory duty were pleaded in a plaint stated as follows;

“A claim such as the one in this matter cannot be two faceted. It is either a contract or a tort, but not both.”

15. In the case **Kiamokama Tea Factory Co. Ltd –vs. - Joshua Nyakoni (supra)**, faced with a similar issue the court rendered that where no terms of contract of employment are pleaded in the plaint there is no duty of care as stipulated in the statute in employment matters.

16. The court further stated that;

“Breach of the statutory duty of care is not a breach of the contract but breach of duty of care in tort and therefore subject of the limitation period prescribed for actions based on tort...”

17. Based on the above this Court finds that the cause of action was a tort and therefore time barred under Limitation of Actions Act having been filed one year after the three years Limitation Period.

18. It is also noteworthy, that the Respondent herein did not file an application seeking for leave to have its suit admitted out of time hence the suit was dead on arrival.

19. This court is also persuaded by the Respondents submission that the facts in the **Kiamokama case** are similar to this instant case (injury at work) and the court held that the limitation period being a tort is three years.

20. This Court was urged to overlook the limitation of time to file suit as a procedural technicality as envisaged in Article 159(2) (d) of the Constitution and Section 1A and 1B of the civil procedure Act.

As held in **Rawal vs. Rawal [1990] KLR 275,**

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other

hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims”

21. The Supreme Court in **Zacharia Okoth Obado -vs.- Edward Akong’o Oyugi & 2 others [2014] eKLR Civil Application No. 7 of 2014** was persuaded by the dictum of Kiage, JA in **Nicholas Kiptoo Arap Korir Salat -vs.- IEBC & 6 others [2013] eKLR** where he stated;

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.

I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

22. Limitation of actions is not a procedural technicality and failure to file suit on time cannot be remedied by Article 159(2) (d) of the Constitution.

23. I agree with the trial magistrate’s findings that the pleadings and evidence pointed to an action in tort and not contract and therefore the suit was subject to limitation period of three years as stipulated under the Limitations of Actions Act, Section 4(2).

24. For the above reasons I find no merit in the Appeal. Accordingly it is dismissed with costs to the Respondent.

25. It is so ordered.

DATED, SIGNED and DELIVERED at this 28th DAY of March, 2019.

D. CHEPKWONY

JUDGE.