



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 67 OF 2012

EASTERN PRODUCE (K) LTD.....APPELLANT

VERSUS

MARGARET MIGARUSHA.....RESPONDENT

(Being an appeal from the Ruling of Honourable E. Muleka (Resident Magistrate

delivered on 5th July, 2012 in the Senior Resident Magistrate's Court

at Hamisi in SRMCC No.59 OF 2011)

JUDGEMENT

1. The Appeal herein arises from the Ruling made by Hon. E. Muleka R.M. in **Hamisi SRMCC No. 59 of 2011** dated 5th July, 2012 wherein the Appellant's Application seeking to have the Respondent's suit struck out for being time barred was dismissed.

2. The Appellant was aggrieved by the said Ruling and filed five grounds of appeal namely:-

(i) That the learned Magistrate erred in law in holding that Sections 90 and 93 of the Employment Act 2007 do not override the provisions of the Limitation OF Actions Act Cap 22 of the Laws of Kenya.

(ii) The learned magistrate misinterpreted the law in holding that a cause of action founded on breach of contract of employment could be filed outside or after 3 years from the date the cause of action accrues, notwithstanding the provisions of the Employment Act 2007.

(iii) The learned magistrate following wrong principles in interpreting the provisions of the Employment Act 2007 vis-a-viz the provisions of the Limitation of Actions Act.

(iv) The learned magistrate erred in law by failing to find that the suit was time barred.

(v) The learned Magistrate's interpretation of both the Limitation of Action Act and the Employment Act 2007 was wrong in principle.

The Appellant therefore sought for the following reliefs namely:-

(a) The Ruling and orders of the Honourable Magistrate be set aside.

(b) The Respondent's suit be struck out with costs.

(c) The costs of the Appeal be granted to the Appellant.

(d) Such order as would be just in the circumstances be made.

3. The appeal was canvassed by way of oral submissions. Mr. Kamau learned Counsel for the Appellant sought to consolidate the five grounds of appeal and argue them as one and proceeded to posit whether the suit before the lower court was time barred and whether the

Appellant's Application dated 30/4/2012 seeking to strike out the suit was merited. Learned Counsel submitted that the issue being one of personal injury of an employee then the Limitation period is three (3) years as provided for under Section 90 of the Employment Act 2007 which overrides Section 4 of the Limitation of Actions Act. Counsel submitted that the issue of jurisdiction goes to the root and cannot be cured by Sections 1A, 1B and 3A of the Civil Procedure Act or Article 159 of the Constitution.

Mr. Misoj, learned Counsel for the Respondent submitted that the Respondent got injured while in the course of employment and hence the aspect of contract must be the case and which should be lodged within 6 years. He submitted that the Employment Act is not superior to the Limitation of Actions Act as per Section 4(2) thereof and in any case the Legislature would have factored it if it had desired so. Counsel finally submitted that Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution shows that the Respondent's claim is merited and the Appeal should be dismissed.

4. I have considered the oral submissions of the learned counsel for the parties herein. I have also considered the cases cited. From the Respondent's Complaint dated 23/11/2011 the claim is primarily in tort as it seeks for general damages for pain, suffering and loss of amenities in respect of injuries sustained while at the employment of the Appellant. The cause of action is indicated as having arisen on the 17/2/2006. The main issue herein for determination is whether or not the Respondent's suit that had been filed before the lower court was time barred.

To begin with, the relevant statutes dealing with the issue of timelines regarding the institution of claims and or causes of actions of this nature are the Limitation of Actions Act Cap 22 Laws of Kenya and the Employment Act No. 11 of 2007. The salient Provisions of the Limitation of Actions Act as regards the Respondent claim are as follows:-

4 (2) An action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action accrued.

The Employment Act No.11 of 2007 provides under Section 90 as follows:-

“Notwithstanding the provision of Section 4(1) of the Limitation of Actions Act, 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 (12) months next after the cessation thereof.”

The Respondent's cause of action is stated to have occurred on the 17/2/2006. The Employment Act came into force in the year 2007. The Respondent filed the suit on 23/11/2011 a period of over three (3) years after the Employment Act had come into force and she was therefore expected to have complied with the said new law which expressly removed contracts of employment from the ambit of Limitation of Actions Act Cap 22 Laws of Kenya. As the suit was lodged after the requisite three years, it is clear that the claim was therefore time barred. There is no evidence that the Respondent had sought to lodge suit out of time pursuant to Section 27 and 28 of the Limitation of Actions Act. None has been shown. The Respondent has clearly described the nature of the claim as one in tort which should ordinarily have been filed latest the 17/2/2009. Hence as at 23/11/2011 the trial court had no jurisdiction to entertain the suit as the same was time barred already. In the circumstances even the Provisions of Section 1A, 1B and 3A of the Civil Procedure Act as well as Article 159 of the Constitution as contended by the Respondent could not come to the aid of the Respondent. Further the Respondent's attempt to cling onto the claim of a breach of contract cannot be sustained in view of the clear provisions of Section 90 of the Employment Act 2007. Hence the Respondent's claim either way on tort and breach of contract could not survive. The Appellant raising the issue that the trial court ought not entertain the claim at the earliest opportunity was quite in order since the trial court could not obtain the requisite jurisdiction to try a matter which was already time barred. The court of Appeal in the case of **OWNERS OF THE MOTOR VESSEL “LILLIAN S =VS= CALTEX OIL (K) LTD [1989] KLR 1** held as follows:-

“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 its tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

The authority cited by the Appellant's counsel **KCC Limited Vs Peter Manthi Mwau – NBI CA No. 21 of 2012** is on all fours with the circumstances at hand when the Court of Appeal dealing with a similar scenario held as follows:-

“.....Section 90 of the Employment Act 2007 expressly removed contracts of Employment from the ambit of the Limitation of Actions Act – Cap 22 Laws of Kenya. That would therefore mean that the claim was time barred by statute and consequently the trial court had no jurisdiction to entertain his claim.”

From the foregoing, it would appear that the learned trial magistrate went into error when he held that Section 90 and 93 of the employment Act 2007 do not override the Provisions of the Limitation of Actions Act Cap 22 laws of Kenya despite the clear fact that the suit was time barred and the application lodged by the Appellant ought to have been granted.

5. In the result it is the finding of this court that this appeal has merit. The same is allowed as follows:-

(a) The Ruling and order of the Honourable Resident Magistrate dated 5th July, 2012 is set aside.

(b) The Respondent's suit is struck out with costs.

(c) Each party to bear their costs of the appeal.

Orders accordingly.

D.K. KEMEI

JUDGE

Dated and Delivered at ELDORET this 22nd day of November, 2018.

STEPHEN GITHINJI

JUDGE