REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Appeal 188 of 2003

JOSEPH MURAI KAMAU ……..…….. APPELLANT

VERSUS

MAWARA INVESTMENT LIMITED …….....…….…….. RESPONDENT

JUDGMENT

The issue in this appeal is straightforward. Was the action filed in the lower court based on tort (in which case it was time-barred) or was it based on contract, in which case the suit was not time-barred and should have proceeded to its logical conclusion. The lower court was persuaded that the Plaint disclosed an action in tort, and the suit having been filed three years after the cause of action arose, it was time-barrred and accordingly it was struck out. This is how the court expressed itself:

> **"…this court notes that although the plaintiff was an employee of the defendant and his employment may have been contractual the cause of action giving note (sic) to this case is basically that of a tort. He was supervising the uprooting of a tree within the farm when the tree fell on him, occasioning him injuries. I cannot read any contractual (sic) here. I can only read a fact (sic)".**

It is against that Ruling that this appeal has been preferred. The Appellant's Counsel, Mr Gitau, submitted before this court that the Plaint, as drawn, showed clearly that the Appellant was suing his employer in contract under his contract of employment and the fact that the word "contract" was not used in the Plaint did not mean that the action was not founded in contract.

Mr Waweru, Counsel for the Respondent, argued that the Plaint showed that the Appellant sought damages for a wrong stipulated in paragraph 4 of the Plaint, and that paragraph 9 showed that by invoking the doctrine of *"res ipsa loquitor"*, he was relying on tort. He relied on *Bullen and Leake,* Page 345 to argue that the Plaint did not fulfill the conditions set out for a claim in contract.

Having reviewed the Plaint filed herein, I have much difficulty agreeing with the submissions made by Mr Gitau before this court. Paragraph 3 of the Plaint shows clearly the capacity within which the Appellant brought this action – as an "employee" of the Respondent at its Maakiou Farm. Paragraph 4 states that he was instructed to supervise the uprooting of a tree when it fell and injured him. Paragraph 5 outlines the particulars of his employer's negligence, one of which particulars state as follows:

"Failing to provide its employees, and the Plaintiff in particular with protective gear."

This is clearly an action by an employee against an employer for breach of duty of care at common law. It is an action in tort, not contract. No agreement or terms of any contract relied upon are shown to have been breached. Indeed the Plaint does not plead the existence of any agreement. The fact that the parties have a contractual relationship, of an employer/employee as in this case, does not automatically follow that a law suit between them is founded on "contract". If the Plaintiff relies upon a contract, it is incumbent upon him to plead specifically the substance and effect of the agreement so far as is material, and he must show whether his claim is founded under or by virtue of any of the terms of his agreement, or whether it is founded upon a breach of the agreement.

Nothing of the sort is shown here. His claim is founded on the employer's breach of duty at common law,

and that is a claim in tort, and ought to have been brought within the three year limitation stipulated in law.

I find, therefore, that there is no merit to this appeal and the same is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 21st day of September, 2005.

ALNASHIR VISRAM

JUDGE