



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 283 OF 2016

(An appeal from the ruling of Hon. M. Chesang in Milimani CMCC No. 5377 of 2015 delivered on 29/4/2016)

(CORAM: F. GIKONYO J.)

INSIGHT MANAGEMENT CONSULTANTS LIMITED.....APPELLANT

Versus

BENARD KEANGO BASWETI..... RESPONDENT

JUDGMENT

1. This is an appeal from the ruling of Hon. M. Chesang in Milimani CMCC No. 5377 of 2015 delivered on 29/4/2016 in which the magistrate dismissed the appellant's preliminary objection seeking to have the claim struck out for being time barred
2. The cause of action as per plaint as that the respondent was employed by the appellant when on 2/12/2011 while in the course of his employment, he inhaled sulphuric gas which leaked from the plant due to the negligence of the appellant in failing to keep the plant in sound working condition. The chemical inhalation caused chest pains and difficulty in breathing. Therefore the respondent sought General and Special Damages.
3. The appellant filed a notice of preliminary objection on 3/12/ 2015 on the ground that the claim was time barred for the cause of action accrued on 2/12/2011 and the suit was filed on 10/9/2015. They relied on Section 90 of the Employment Act 2007 which sets limitation at 3 years for all injury claims arising out of employment.
4. The respondent in reply contended that he decided to pursue his case under the law of contract of employment, thus, his claim is governed by the Limitations of Actions Act Cap 22 Laws of Kenya and so they were within the time limitation.
5. The learned magistrate upon hearing the parties delivered his ruling and dismissed the appellants preliminary objection expressing himself as follows;

“It is clear from the averment contained at Paragraph 4 of the plaint that the plaintiff elected to sue based on a contract on employment and the period provided therein is six years (Limitation of Action Act) The plaintiff filed this suit in this time.

The notice of preliminary objection is frivolous, vexatious and an abuse of the process of court.”

6. Aggrieved by the decision the appellant filed this appeal which is predicated on the grounds that the learned magistrate erred both in law and in fact by failing to find that section 90 of the Employment Act 2007 expressly sets limitation at 3 years for injury claims arising out of employment and is seeking the following orders;
 - a. That the appeal be allowed
 - b. That the whole ruling and order delivered on 29/4/2016 be set aside
 - c. That the appellants preliminary objection be upheld
 - d. Costs of the appeal

Submissions

7. This appeal was canvassed by way of written submissions. The appellants argued that there is no provision under the Employment Act, the Limitation of Actions Act or any written law for extension of time as it was held in **Civil Appeal No. 28 of 2014 Beatrice Kahai Adagala v. The Postal Corporation of Kenya**. Furthermore, section 90 of the Employment Act expressly sets limitation at 3 years for all alleged injury claims arising out of employment without exception, regardless of whether alleged to have arisen out of contract or tort.

8. On the other hand, the respondents in their submission maintained their position and argued that the respondents sought to file a civil suit against the appellant under the law of contract to enforce his rights under the contract of employment so long as he is able to prove negligence on the part of the appellant.

ANALYSIS AND DETERMINATION

9. Much judicial ink has been spilt on the subject on whether a suit based on breach of statutory duty imposed by statute law upon parties in a contractual relationship is an action in tort or contract, I do not wish to multiply those authorities but I am content to cite some few. In **Kiamokama Tea Factory Co. Limited v Joshua Nyakoni [2015] eKLR** Muriithi J opined as follows;

“As I understand the matter, the duty of care stipulated by the statute in employment cases is a civil obligation which arises where a relationship of employment exists, hence the need to plead the contract of employment. [The contract of employment is a condition precedent for the crystallization of the statutory duty of care.] This duty remains a tort which only arises in the context of a contract of service. Breach of the statutory duty is not a breach of the contract but breach of duty of care in tort and therefore the subject of the limitation period prescribed for actions based on tort in the Limitation of Action of Actions Act.

To hold otherwise would elevate duties imposed by statute without choice of the parties to the same status as contractual stipulations entered into by parties to a contract who transact at arm’s length, with full knowledge of consequences of breach and independence to contract. The statutory provisions are a legal imposition on parties in a particular contractual relationship must, for lack of the elements of freedom of contract, occupy a lower position relative to contractual conditions and warranties.

Accordingly, I find that the plaintiff’s suit herein is an action in tort.”

10. With a binding force, the Court of Appeal in the case of **Kenya Airways Corporation Ltd V Tobias Oganya Auma & 5 Others [2007] eKLR** cited **Robin Cahill & 9 Others v. T.S. Nandhra & 3 Others – Civil Appeal No. 57 of 2002 (unreported)** where Ringera J. (as he then was) stated that:

“The claim in the present suit sounds in tort contrary to the opinion of the plaintiffs’ counsel. Breach of statutory duty of care is to my mind a claim in tort essentially, so is the claim in negligence and fraud. Of the cases cited, the one which in this context is most pertinent is PRUDENTIAL ASSURANCE CO. LTD. VS. NEWMAN INDUSTRIES LTD & OTHERS [1979] 3 ALL ER 507. As seen earlier the same case is authority for the proposition that a representative action could lie in tort even though the members of the class have separate causes of action provided care was taken to ensure that the action did not confer on any member of the class a right he could not have claimed in a separate action or bar a defence which the defendant could have raised in such separate action. The case also held that because of that reason a plaintiff in his representative capacity would normally be able to obtain only declaratory relief.

11. So I take the view that a suit based on breach of statutory duty albeit imposed upon parties in a contractual relationship is an action in tort and not in contract. The factual basis of the plaintiff’s suit as set out in paragraph 4 & 5 of the Plaint is an action in tort.

12. Being of that persuasion, the trial magistrate erred in holding that the cause of action was in contract and not in tort.

13. However, the trial court committed even a more fundamental error; dealing with the question of limitation as a preliminary objection; something that makes me to consider a more intriguing request; that I uphold the preliminary objection herein and dismiss the suit for being time barred. These two matters force that I repay a scholarly debt on the subject of whether limitation of action should be tried as a preliminary point or at the trial.

Limitation as an issue for trial

14. Limitation of actions was taken up by the Appellant as a preliminary point and the intention of the objection was to have the suit struck out or dismissed for being time barred. I have been treated to the same invitation before. The law as I understand it is that limitation of actions is a matter for determination at the trial; it cannot be dealt with in a summary manner or as a preliminary objection. The court should therefore formulate limitation as one of the issues for determination and decide it on evidence adduced thereto. On this see the case of **Oruta & Another vs. Nyamato [1998] KLR 590**, where the court held that limitation of action:-

”... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”

15. See also the case of **Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 of 1997**, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (ibid) that:

“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary

point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act...’

16. The case of **El-Busaidy vs. Commissioner of Lands [2002] KLR 508**, buttressed the above position when it held that the issue of limitation under Government Lands Act could only be decided at the trial on evidence.

17. Accordingly, the intention of the law is that the issue of limitation of actions should be undertaken and determined at the trial.

18. I should also think that the requirement in Order 2 rule 4 (1) of the Civil Procedure Rules that the relevant statute of limitation should be specifically pleaded in the defence underscores the legal necessity that limitation is a matter for determination at the trial. The reason here is because a successful defence of limitation makes the claim not maintainable. The effect is that the plaintiff is divested of remedy in law; something that is quite substantial for it affects rights; and the Constitution will not permit such divestiture of remedy through a summary procedure when the law requires the issue to be determined after hearing evidence of the parties. See the rule below:

4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

19. Thus, as the issue of limitation is a matter of law and fact, it must be determined at the trial. The cases of **El-Busaidy ibid, Lulu Drycleaners Ltd & Another vs Kenya Industrial Estates & Another [2005] 2 KLR 97** and **Achola & Anr vs. Hongo & Anr [2004] 1 KLR 462** have so held.

20. In light of what I have stated, I do not think that limitation of actions is a mere technicality as it has been argued by many commentators. It is a substantial question of law and fact which should be determined in a substantive manner at the trial. Therefore, article 159(2) (d) of the Constitution does not diminish this issue or procedure of hearing limitation at the trial.

21. Be that as it may, I am alive to the fact that Section 27, 28 of the Limitations of Actions Act and Order 37 rule 6 of the Civil Procedure Rules provide for extension of time *before or after* commencement of suit. This makes it absolutely necessary that limitation is determined after hearing evidence at the trial. See rule 6 below:

6. (1) An application under section 27 of the Limitation of Actions Act made before filing a suit shall be made ex parte by originating summons supported by affidavit. (2) Any such application made after the filing of a suit shall be made ex parte in that suit.

22. Therefore, I decline to strike out or dismiss this suit on account of limitation as that issue shall be determined at the trial of the suit. I have simply restated the law on suits based on breach of statutory duty. I also hold that the trial court ought to have declined to deal with the question as a preliminary point and reserve it as one of the issues for determination at the trial. The ruling dated 29th April 2016 is set aside. Therefore, I direct that the suit be remitted back to the trial court for hearing and disposal by a magistrate of competent jurisdiction other than the trial magistrate herein. If any other proceedings were held in the suit, they are also set aside. Each party will bear own costs of the appeal. It is so ordered.

Dated and signed at Meru this 14th day of November 2019

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F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 19th day of November 2019

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L. NJUGUNA

JUDGE