



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 104 OF 2012**

**ELDORET STEEL MILLS LTD.....APPELLANT**

**Versus**

**EVANS MAKORI MICHAEL.....RESPONDENT**

**JUDGMENT**

1. The instant case is before the court for a decision on the appeal lodged on 15<sup>th</sup> October 2012, following the ruling of Mr. F.N Kyambia, Principal Magistrate in Eldoret CMCC No. 353 of 2012.

**Summary of Proceedings**

2. In the argument before the magistrate's court, counsel for the plaintiff who had filed a suit against his former employer following an industrial accident stated that the claim against the defendant was filed out of time, having been filed 4 years after the cause of action arose. According to **Section 90** of the **Employment Act**, the time within which claims for contract are filed is 3 years. On the other hand, the Limitation of Actions Act sets the time bar at 6 years.

3. Mr. Z. K. Yego counsel for the Plaintiff cited **Section 92(2)** of the **Employment Act** which prescribes that the provisions of the Employment Act as regards time limitation are to be taken in view of other legislation. In this regard, the plaintiff sought:

- 1) An extension of time within which the suit ought to have been filed.
- 2) That the suit be validated and deemed to have been properly filed.

4. Mr. Yego told the court that the fact that there are two conflicting pieces of legislation in view of limitation of time was a material fact unknown to him. Because of this, he sought the court's discretion according to **Articles 148 & 149** of the **Constitution** and **Section 27** of the **Limitation of Actions Act** which provides for extension of time.

5. The defendant opposed the plaintiff's application calling it defective and incompetent. Mr. Andati counsel for the defendant told the court that material facts ought to have been demonstrated at the time the cause of action arose. Additionally, he stated that by virtue of **section 90** of the **Employment Act**, the court's hands are tied and the matter is not discretionary.

6. Mr. Andati also raised concerns that the application was defective having been brought by way of Originating Summons which ought to have been brought before the suit was filed. He stated that by bringing the application, the plaintiff was being unfair to the defendant and urged the court to dismiss it.

7. In rebuttal, Mr. Yego insisted that the determination of the material fact in regard to time was a matter to be decided by the court. That, the application had been brought properly according to the law in **Section 29** of the **Limitation of Actions Act** and the suit was rightfully brought by way of Originating Summons (O.37 – Civil Procedure Rules). Counsel maintained that **Article 159** of the **Constitution of Kenya 2010** applied and it could not be used to aid the defendant who failed to demonstrate how he stood to suffer.

8. In his ruling, the learned trial magistrate observed that **Section 90** of the **Employment Act** read as follows;

**“Notwithstanding the provisions 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 be instituted unless it is commenced within 3 years next after the act...”**

He noted that the Act is clear on the limitation of time but silent on the redress available in the event that the suit has not been instituted

within the required time frame.

9. The learned trial magistrate relied on the provisions of **Section 4(1)** of the **Limitation of Actions Act** and stated that the limited time is not an absolute bar to bringing an action. He decided that notwithstanding the provisions of Section 90, the applicant in this matter is entitled to invoke the provisions of Limitation of Actions Act and upon satisfying the court as to the requirements of Section 27, 28 and 30 he can be granted leave to file out of time.

10. The learned trial magistrate held that the materials relating to the cause of action are of decisive character, which were at all times outside the knowledge (actual or instructive) of the plaintiff until after the expiry of the limitation period. He stated that the plaintiff knew all along that he was within time according to the limitation of Actions Act and only later came to learn of the provisions of the Employment Act

11. The learned magistrate cited **section 30** of the **Limitation of Actions Act** which outlines the instances when a matter shall be taken to be outside the knowledge of a person as follows;

a) If he had not known that fact;

b) In so far as that fact was capable of being explained by him, he had taken all such step (if any as it was reasonable for him to have taken before that time for purposes of ascertaining it);

c) In so far as there existed and were known to him circumstances from which, with appropriate advise that fact ought to have been ascertained or informed, he had taken all such steps as it was reasonable to have taken before that time, for the purpose of attaining appropriate advise with respect to those circumstances.

The learned trial magistrate allowed the application on grounds that the claim was genuine and there were good reasons to sustain it.

12. The appellant thereafter lodged his appeal based on the following grounds:

i. That the learned trial magistrate erred in law and in fact in holding that the Respondent's Application to validate the suit filed out of time and without leave of court was meritorious.

ii. That the learned trial magistrate erred in law and in fact in granting the Respondent the prayers for extension of time, validation of the suit and other prayers in question.

iii. That the learned trial magistrate erred in law and fact in failing to consider the authorities cited by the appellant at the hearing of the application by the Respondent.

iv. That the learned trial magistrate erred in law and in fact in failing to consider the provisions of Section 90 of the Employment Act hence an erroneous ruling and/ or decision.

v. That the learned trial magistrate erred in law and in fact in failing to consider the Appellants submission as to the requirements of the provision of the Limitation of Actions Act CAP 22.

vi. That the learned trial magistrate erred in law and fact in failing to find that the Respondent had not satisfied the requirements for grant of leave and/ or extension and/ or validation of the suit hence an erroneous decision was arrived at in the circumstances.

vii. That the learned trial magistrate erred in law and fact in considering extraneous issues which were not raised at the hearing of the application by the Respondent.

### **Appellant's Submissions**

13. The Appellants filed their submissions based on the grounds of appeal stated above. Echoing their submissions in the lower court, Counsel illustrated the error in bringing the application before the court by way of Originating Summons citing **Order 37 rule 15** of the **Civil Procedure Rules, 2010**. He stated that an Originating Summons is a suit by itself and it would be improper to file a suit within a suit. Additionally, counsel submitted that the Employment Act was in force since 2007 and the appellants raised the issue of Limitations when they filed the defense on 21<sup>st</sup> January 2012.

14. A look at the defense confirms that the appellant did raise the issue of limitation but stated that the plaintiff was barred by the Limitation of Actions Act. This is erroneous because the time threshold prescribed by the Limitation of Actions Act as discussed earlier is 6 years. The defense should have pointed out that the claim was time barred under **Section 90** of the **Employment Act**.

15. The Appellant also stated that the law does not have provision for extension of time when it comes to contracts citing **Section 90** of the **Employment Act**. He relied on the case of **Silferius Obel Odera Vs. Telkom Kenya Limited Civil Suit 2381 of 1990 (Nairobi)**, where the court stated that the powers afforded by the Limitation of Actions Act Section 26, 27 and 28 only apply in instances of fraud, mistake and ignorance of material facts. The learned judge in this case stated that the power does not apply in instances of contract. Additionally, the appellant asserted that the respondent's application must fail on the basis that the suit was defective from the start and the conditions prescribed in Section 27 (2) were not satisfied (as highlighted above).

16. The Appellant argued that the subordinate court did not put the authorities cited to back the case into consideration and also failed to

consider **Section 90** of the **Employment Act**.

17. The Appellant contended that the Respondent's engagement with the Appellant was on contractual basis and was therefore subject to **Section 90** of the **Employment Act**. The Appellant maintained that if leave to file out of time is to be granted under the Limitation of Actions Act, then leave must be sought before the suit is filed which the respondent did not do. The Respondent sought an extension of time in the suit.

18. Because of this, the Appellant asserted that the proceedings before the court are improper, irregular and not premised in law. The Appellant added that from the Respondent's supporting affidavit there was no plea or allegation of fraud and there was no allegation of ignorance of material facts. As a result, the Appellant terms the court's decision as erroneous because the entire case was based on an improper application of the law.

19. The Appellant stated that the learned trial magistrate considered extraneous issues and ignored matters that had been raised by the counsel for the Appellant in his affidavit. The Appellant prayed that the appeal be allowed and the order and ruling of the subordinate court be set aside.

### **Respondent's Submissions**

20. The Respondent's submissions summed up the contention in the Appellant's suit as being a question of whether the Respondent had satisfied the requirements for grant of leave and/ or extension of time and/or validation of the suit. As highlighted in the subordinate court, the Respondent submitted that **section 90** of the **Employment Act** is not an absolute provision and should not be taken in isolation.

21. The Respondent cited **Section 27(3)** of the **Limitation of Actions Act** and **Section 92(2)** of the **Employment Act** to be the basis of validating his application. **Section 27(3)** of the **Limitation of Actions Act** provides that:

**"This section does not exclude or otherwise affect-**

**a) any defense which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or**

**b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued."**

22. As far as **Section 92(2)** of the **Employment Act** is concerned, except where otherwise provided, the provisions of this Act shall be in addition to, and not in substitution for or in derogation of, the provisions of any other Act.

23. The Respondent cited the case of **Kenya Cargo Handling Services Limited & David Ugwang (1982- 1988) 1 KAR 672** where the court held that:

**"...Any action founded on any contract may still be brought in Kenya before the end of 6 years from the date which the cause of action accrued."**

On this premise, the Respondent submitted that their suit was filed within time.

24. In sum, the Respondent submitted that: the conflict between the Employment Act and the Limitation of Actions Act is a material fact; that he was not ignorant of the aspect of the time limitation because he actually filed his suit within time; that limitation of Action is a preliminary issue that must be pleaded according to **Order 2 rule 4** of the **Civil Procedure Act** and the Appellant raised the issue of limitation on appeal; that the question of extension of time is a matter within the discretion of the trial court and the court was not unreasonable or unjust in granting favor to the Respondent/ Applicant.

25. He contended that the Plaintiff's claim was a claim for damages under common law and breach of statutory law and was not an employment issue per se. Hence the Appeal lacks merit and ought to be dismissed.

### **Disposition**

26. The crux of the instant appeal is the apparent 'conflict' between the Employment Act and the Limitation of Actions Act and whether as a result, the learned trial magistrate was right or at fault in allowing the Respondent's application for extension of time.

27. The Court of Appeal in Nyeri in **Attorney General & Another V Andrew Maina Githinji & Another, Civil Appeal No. 21 of 2015 decided on a matter touching on issues similar to what has been raised in the instant case. Waki J.A stated in view of Section 90 of the Employment Act as follows;**

**"By expressly inserting Section 90, the intention of Parliament , in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section preemptorily limits actions by the use of the word 'shall'."**

28. **Section 90 of the Employment Act** as it is, is the substantive law that ought to govern resolution of disputes arising from an employer and employee relationship. It should be noted that **Section 4 of the Limitation of Actions Act** does not enjoy primacy over **section 90 of the Employment Act**.

29. It is worthy of note however, that **section 90 of the Employment Act** relates exclusively to matters of breach of contract. The relation between the employer (Appellant) and the employee (Respondent) is governed by the Employment Act but this provision cited by the Appellants only relates to suits arising out of contractual obligations owed to the employee by the employer.

30. The plaintiff in his plaint pleaded breach of both contractual and tortious nature. The plaintiff stated that it was a breach of the employer's contract of employment not to take all reasonable measures for the safety of the plaintiff while he was engaged in his work. However, the plaintiff has not annexed the contract of employment. It seems that the plaintiff was grasping at any supposed vivifier for his case. The omission by the employer remains an omission of a statutory duty which is a tort.

31. Persuasively, the learned judges Muriithi and Wakiaga JJ when faced with a similar conflict in **Kiamokama Tea Factory Co. Limited Vs Joshua Nyakoni, Civil Appeal No. 169 of 2009** stated as follows:

**“There is no magic in mentioning in a plaint the term breach of contract as a basis of the suit so to give it the 6 year protection against the Limitation of Actions Act. It is the substance of the claim that must be examined not the nomenclature!”**

32. From the proceedings, the nature of the claim was purely tortious based on negligence and not one of contractual nature. By virtue of this, section 90 becomes inapplicable in this particular matter. The plaintiff filed the suit 4 years after the cause of action. While time had lapsed if the matter fell under the ambit of the Employment Act, the plaintiff/applicant was still well within the time given in the Limitation of Actions Act which prescribes 6 years.

33. The Appellant raised an issue in the filing of the application stating that it is improper to file an Originating Summons to apply for extension of suit after a suit has been filed. **Order 37 rule 6 subrule (2)** of the **Civil Procedure Rules** states that if one seeks to extend time after filing suit, the application is made within that suit and not by way of Originating Summons but through an ordinary application. This however does not disqualify the entire case and should be classified as a mere procedural technicality.

34. As was found in **Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 6 Others Civil Appeal No. (Application) 228 of 2013 (Nairobi)**, the learned judges at appeal stated that;

**“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.**

35. The court invokes **Article 159(2)(d) of the Constitution of Kenya** which states that:

**“justice shall be administered without undue regard to procedural technicalities...”**

In the premise, the court finds that the application was duly allowed by the learned trial magistrate under the Limitation of Actions Act and is hereby upheld. The Appeal is found to be lacking in merit and is accordingly dismissed with costs to the Respondent.

**DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JUNE 2018**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT ELDORET THIS 5<sup>TH</sup> DAY OF JULY 2018**

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**HELLEN OMONDI**

**HIGH COURT JUDGE**