Kiget v Majani Mingi Group of Companies (Civil Appeal 24 of 2019)
[2023] KECA 1269 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1269 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 24 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

OCTOBER 27, 2023

BETWEEN

CHARLES M. KIGET ..... APPELLANT

AND

MAJANI MINGI GROUP OF COMPANIES ..... RESPONDENT

(An appeal from the portion of the ruling of the High Court at Nakuru (Mbaru. J) delivered on the 7th of March 2019) in ELRC No. 428 of 2017)

JUDGMENT

1. This is a first appeal arising from a ruling delivered by M. Mbaru J. on March 7, 2019, in an application that pitted Charles M. Kiget against Majani Mingi Group of Companies, the appellant and respondent herein respectively, in the Employment and Labour Relations Court at Nakuru. Charles M. Kiget was dissatisfied with a portion of the ruling hence this appeal.

2. The appellant had filed a Memorandum of Claim dated October 19, 2017 and amended on February 19, 2018, in which he averred that he was employed by the respondent from April 9, 1979 to October 21, 2014 when he resigned due to unfavourable working conditions. As a result, he prayed for a declaration that he was entitled to salary arrears particularized as Kshs 1,002,407/- with interest thereon. He also sought exemplary damages for what he claimed to be the respondent's acts of oppression and arbitrariness towards, him by subjecting him to difficulties for all the years he served.

3. In rebuttal, the respondent filed a Reply to the Memorandum of Claim dated January 31, 2018 and amended on May 17, 2018. It denied the allegations in the Amended Memorandum of Claim and averred that the claim was statute barred. It was further averred that the appellant's dues were settled by the discharge voucher, which the appellant executed with full knowledge and acceptance that any money owed to him was settled. Accordingly, the appellant could not expect further payment or bring any claim against the respondent.

4. In response, the appellant filed an Amended Response to the Amended Reply dated July 20, 2018. He asserted that the claim was not statute barred as the violation of his rights was still going on in a case of continuing injury. Further, that the discharge voucher did not include the salary arrears owing to the claimant.

5. Subsequently, the respondent filed a Preliminary Objection dated May 17, 2018 citing the following grounds:

    a. That the instant suit is statute barred for non- compliance with section 4(1) of the *Limitations of Action Act*

    b. That this claim is statute barred pursuant to section 90 of the *Employment Act, 2007*

    c. That failure to comply with the aforesaid provisions of the law makes the entire claim fatally defective.

    d. That the instant claim is a non-starter, devoid of any merit and is a gross abuse of the court process and it ought to be dismissed with costs.

6. The appellant filed a reply dated September 21, 2018 in opposition and stated that the respondent had not raised a proper Preliminary Objection in law, since it required the ascertainment of facts to determine whether the claim was statute barred or not, and was therefore, not based on a pure point of law. Further, that time started running on October 21, 2014, when the claimant resigned from work due to unfavourable work conditions, and he filed the Memorandum of Claim on October 19, 2017. That he was within time and cannot be statute barred since he still had two days remaining before the elapse of the three years limit. He also asserted that the Preliminary Objection must fail since the relationship between the appellant and the respondent had been caught up by provisions of estoppel in terms of section 39 of the *Limitation of Actions Act*.

7. Upon considering the Preliminary Objection before her, the learned judge found that it had merit and allowed it. The appellant being aggrieved with the court's decision, filed the instant appeal advancing the following ten grounds:

    a. "That the learned judge erred in law and in fact by allowing the respondent's preliminary objection, yet it was not grounded on pure points of law as there were some facts to be ascertained and this could only be done during the hearing of the case.

    b. That the learned trial judge erred in law and in fact, by making a determination that time for the claimant to lodge his claim in court started running in 2007 yet it is a fact that there was a continuing employer employee relationship between the claimant and the respondent until October 2014. The said determination was perverse, gratuitous and egregious.

    c. That the learned trial judge erred in law and in fact, by making an assumption that the claimant was not unionisable as at the time the claim accrued, a total misconception, conjecture and a matter that was not on a pure point of law. The whole ruling constituted a grave misdirection.

    d. That the learned trial judge erred in law and in fact in applying the repealed *Employment Act* cap 226 to bar the appellant for the period of 1997 to June 2007.

    e. That put differently that had the learned judge applied the correct law, that is the *Employment Act, 2007* then she would have found out that the appellant claim fell within 3 years, that is the period October 21, 2014 and October 19, 2017 when the claim was filed and therefore properly before the court.

f. That the learned trial judge erred in law and in fact in not finding that all benefits accruing to the appellant should have been paid in full on termination, that is, when the relationship came to an end on resignation on the 19th of October 2017. Had the law been applied correctly then the relevant law was the *Employment Act, 2007*.

g. That the learned trial judge erred in law and in fact by failing to appreciate that the claimant had pleaded promissory estoppel as provided for under section 39 of the *Limitation of Actions Act* against the respondent and this could only be determined at the full hearing of the case. So much so that it was premature, and a grave misapprehension of the law as applied to the facts of the case.

h. That the learned trial judge erred in law and in fact by rigidly interpreting section 90 of the *Employment Act* and section 4 (1) of the *Limitation of Actions Act* and failed to appreciate that the circumstances of this case were different and warranted a full hearing. Had the learned judge been circumspect she would have reached different conclusion.

i. That the learned judge erred in law and in fact by failing to exercise her discretion judiciously as the court has the jurisdiction to only do justice and not an injustice."

j. The learned trial judge erred in law and in fact by failing to appreciate that the claimant was indeed, a party in Cause 76 of 2013 (which was determined in 2015 when the Union and the respondent herein entered into a consent excluding the claimant's claim on the allegation that he was part of the management hence not covered by the collective bargaining agreement that formed the basis of the consent) a fact that could only be determined at the full hearing of the case.

8. The firm of M/S Arusei & Company Advocates filed written submissions dated 15th of December 2022 on behalf of the appellant. They submitted on three issues being: whether the respondent's preliminary objection was competent; when the time started running; and whether the doctrine of estoppel applies in this case, barring the respondent from pleading limitation of time.

9. The appellant's argument is that there are various facts pleaded that require interrogation. That through their amended Memorandum of Claim, they pleaded that the director of the respondent had made a representation and/or promise to pay the appellant his arrears on a future date, subject to the determination of Nakuru Industrial Court Cause No.76 of 2013, a case against the respondent herein lodged by its employees through Kenya Plantation Agricultural Workers Union. There is also dispute as to the time when the cause of the action arose. In the premise it is urged that there being issues to be ascertained, the Preliminary Objection raised by the respondent is incompetent.

10. It is contended that the appellant lodged his claim within three years from the date of termination of his employment, having resigned from work on 21st October 2014 and lodged his claim on October 19, 2017. Further, that it would have been fair to hear the appellant on whether, during the years for which pending salary is claimed he was in the management category or not, before concluding that he was generally not unionized. His contention is that he was not represented and/or considered at the point of settlement and/or consent in Nakuru Industrial Court Cause No. 76 of 2013.

11. The appellant asserts that before he signed the discharge, he had a discussion with the director of the respondent where he was promised that he would be paid the salary arrears after the determination of Nakuru Industrial Cause No. 76 of 2013. That the terminal dues he got did not include the salary arrears. However, the Kenya Plantation and Agricultural Workers Union and the Respondent compromised the said suit vide a settlement agreement. Paragraph 4 of the said settlement agreement

refers to the list of names which includes the appellant and others benefiting from the said judgement. Consequently, it is their submissions that the respondent is estopped from lodging a Preliminary Objection.

12. In opposition, the firm of M/S Sheith & Wathigo Advocate filed written submissions dated February 10, 2023 on behalf of the respondent. It is submitted that there was no material evidence placed before the trial judge, to show that the respondent agreed not to plead to limitation of time and or that by conduct, the respondent induced the appellant into believing that it would not plead limitation of actions. Consequently, the appellant cannot in the circumstances, object to a plea of limitation of time raised by the respondent. The respondent also submits that the appellant's main prayer is for an order that the respondent pays him interest appurtenant to the salary arrears of Kshs1,002,407/=. It was indicated that the stated salary arrears accrued over various months from 1997 to 2007.

13. The respondent urges that in paragraph 10 of the Amended Memorandum of Claim the appellant avers that he was not a member of the union. He cannot then turn around and allege that the trial judge assumed that the appellant was not unionisable. It is the respondent's view that the judge applied the law properly in her judgment when she held that the claims regarding salary arrears accrued for the period of 1997 to June 2007 fall under the provisions of the repealed *Employment Act* 226.

14. We have considered the record of appeal, the rival submissions, and the law. This being the first appeal, the duty of this court as spelt out under Rule 31 (1)(a) of the *Court of Appeal Rules, 2022* states as follows:

> On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact.

15. Also, the duty of this Court was stated in *Selle & another v Associated Motorboat Co. Ltd.& others* (1968) EA 123 in the following terms:

> I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

16. The only issue for determination in the appeal before us is whether the learned judge misdirected herself, in holding that the respondent had raised a proper Preliminary Objection.

17. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) E.A 696, the celebrated case on Preliminary Objection, it was held as follows:

> "……The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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. The improper raising of points by way of preliminary objection does nothing

but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop."

18. In the impugned judgment before us the learned judge held that:

> "The claim with regard to salary arrears and accrued for the period of 1997 to June 2007 where assessed on their merits falls under the provisions of the repealed *Employment Act* Cap 226 as the *Employment Act* 2007 only came in to force on June 2, 2008.
>
> .... In this regard, the claims with regard to the time period and outside the provisions of the *Employment Act, 2007* and based on a period outside 3 years in terms of section 90 were challenged. The claim premised under the repealed *Employment Act* Cap 226 should have been filed with the court on or before June 2013 a period of 6 years, and claims premised on the *Employment Act, 2007* should be filed within 3 years from the date the cause of action arose."

19. The appellant submits that the cause of action arose on 21st October 2014 when he resigned from work due to unfavourable work conditions, and that the respondent is estopped from raising a Preliminary Objection, having promised to pay him his arrears later. The respondent on the other hand agrees with the impugned judgment on when the time started to run and asserts that at no time did they promise that they would not raise a Preliminary Objection.

20. It is not in dispute that the appellant resigned from his employment with the respondent on October 21, 2014, or that this suit was filed on October 19, 2017. Further, in paragraph 7 of the Amended Memorandum of claim, the appellant pleaded that his salary arrears accrued from 1997 to June 2007. It is therefore our finding that the learned judge's holding that the cause of action for the salary arrears accrued arose in June 2007 was correct and we cannot therefore, fault her.

21. What follows is whether the respondent was estopped from filing a Preliminary Objection on the grounds that they promised to settle the arrears on a future date, upon conclusion of Nakuru Industrial Court Cause No. 76 of 2013. Section 39 (1) of the *Limitation of Actions Act* gives leeway for parties to enter into a contract that would bar them from pleading limitation, and estoppel. It provides thus:

    A period of limitation does not run if—

    a. there is a contract not to plead limitation; or

    b. that the person attempting to plead limitation is estopped from so doing.

22. As the appellant had asserted that the Respondent had promised to settle arrears on a future date; and because the respondent has denied that assertion, that is a disputed fact, which could not be resolved without evidence from the parties. Accordingly, we find that the learned Judge erred when she upheld that aspect of the Preliminary Objection.

23. Nonetheless, as the Claims were time barred, we uphold the decision of the trial court. The appeal is dismissed, save on the issue of promissory estoppel, as held above. Each party will meet their respective costs of the appeal.

DATED AND DELIVERED IN NAKURU THIS 27TH DAY OF OCTOBER, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR