



**Kimondo v Attorney General (Civil Appeal 168 of 2018)
[2022] KECA 1008 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KECA 1008 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 168 OF 2018
W KARANJA, MSA MAKHANDIA & K M'INOTI, JJA
SEPTEMBER 23, 2022**

BETWEEN

LABAN KIMONDO APPELLANT

AND

ATTORNEY GENERAL RESPONDENT

(Being an Appeal from the Judgment and Decree of the Employment & Labour Relations Court at Nairobi (Nzioki wa Makau, J.) dated 13th September, 2015 in ELRC Cause No. 941 of 2014)

JUDGMENT

1. Laban Kimondo (the appellant) was the claimant before the Employment and Labour Relations Court (ELRC) in ELRC Case No. 941 of 2014, where the Hon. Attorney General was named as the respondent. The appellant's claim was that he was employed by the Government at the Industrial and Commercial Development Corporation (ICDC), a State Corporation on September 13, 1971. He worked there for some time before he was transferred to Yuken Textile Industries Limited "Yuken" where he worked for a short while before he was dismissed or sacked through the 1.00 pm radio news announcement, a very prevalent mode of dismissal of Government appointees then. He tried to follow up the matter with the Ministry of Commerce & Industry without success, ultimately deciding to seek legal recourse by way of filing the aforementioned suit in 2002.
2. It was his position that in February 1986 he was appointed as General Manager of Yuken by the Ministry of Commerce and Industry on a 3 year contract of employment and there was an express term in the contract that he would work on such terms as he had enjoyed as a personnel manager at ICDC until new terms were determined under Yuken.
3. He sought payment of salary Kshs. 2,934,972, house allowance Kshs. 1,908,000, other allowances Kshs. 1,028,400, leave pay Kshs. 286,599, pension, interest on the sums due and any other relief the court may deem just to grant. He amended and further re-amended his claim on November 30, 2009



pursuant to leave of the court and the claim then stood at Kshs. 36,415,008. plus interest on the sums claimed at commercial rates.

4. Meanwhile, the respondent denied that any contract existed between the appellant and the respondent and averred in the alternative that if any contract existed between them, then the same was lawfully terminated and all owed dues paid. The respondent filed a notice of preliminary objection to the suit on grounds that the suit offended the mandatory provisions of the [Public Authorities Limitation Act](#), [Government Proceedings Act](#) and Order VII of the *Civil Procedure Rules*.
5. The respondent submitted that the issues for determination were whether there existed an employment contract between the appellant and the Government of Kenya during his tenure at Yuken; whether liability could attach to the Government in the circumstances of this case and whether the appellant had proved his claim.
6. The respondent further submitted that back then, Yuken was a state corporation under the then Ministry of Trade and Industry and that save for a letter of appointment, the appellant never produced any document to demonstrate that he actually accepted the job at Yuken Textiles and also failed to produce any evidence by way of pay slip to prove that he actually received a salary from Yuken for the 17 months he alleged he was at Yuken.
7. The respondent also stated that the appellant never called any witness to confirm that he actually worked at Yuken; never exhibited a termination letter by Yuken and that the proper defendant should have been Yuken which would have had the opportunity to rebut the existence of the said contract. The respondent submitted that if there was a contract of service then it was between the appellant and Yuken and not between him and the Government of Kenya. The respondent maintained that the appellant never filed a claim against Yuken as a creditor once Yuken was placed under receivership. The respondent asserted that the appellant chose to sit on his rights and having failed to pursue the receiver manager of the company under liquidation could not blame the respondent for anything arising out of the contract.
8. The respondent submitted that in an employment contract one could not seek special damages based on anticipation or claims that his livelihood was curtailed by the termination. The respondent asserted that the evidence of the actuarial scientist was insufficient to meet an award of special damages. The respondent stated that the appellant merely engaged the actuary to make calculations on anticipated earnings and that the claim could not be sustained.
9. When the matter came up for directions before Khaminwa, J, she directed that the preliminary objection taken by the respondent regarding the statutory limitation of the suit be disposed of during the substantive hearing. The Court therefore had to determine whether the suit was time barred and whether the proper party had been sued.
10. The Court distilled the issues to be whether the respondent was non-suited and whether the suit was statute barred as the issues that needed to be determined in limine before considering the merits of the appellant's claim.
11. The Court noted that Yuken was a State Corporation and thus a body corporate that had perpetual succession. In such character, it had the capacity to sue and be sued. The appellant on the other hand averred that the defendant was sued on behalf of the Ministry of Industrial Development in accordance with the [Government Proceedings Act](#). The Court held that the claim should have been mounted against Yuken and on liquidation, upon the Liquidator. The Court found that the appellant was non-suited against the respondent.



12. The Court held that in regard to limitation, the suit ought to have been mounted within 6 years of the cause of action and the claim was, therefore, statute barred. Those two findings could have disposed of the suit, but the court went further and considered the merits of the claim. On the issue of Special and general damages, the court found that the appellant had a burden to discharge and the actuary was not the source of the proof, but rather, the evidence the appellant had. The court noted that no pay slips, bank statements or cheques were produced in support of the income and allowances claimed. The court ultimately found that the appellant failed to discharge the evidentiary burden and the case was dismissed with costs.
13. Being aggrieved by the said decision, the appellant filed the appeal before us in which he has proffered grounds, *inter alia*; that the learned Judge erred both in law and fact by taking up a preliminary objection on his own motion; by holding that the respondent was non suited while the preliminary objection had not been raised at any stage of the proceedings, by dismissing the entire suit on those grounds; by denying the appellant an opportunity to respond to the preliminary objection; and by ignoring the fact that the appellant had been given leave to file the suit out of time and that on the evidence, the appellant had proved his case on a balance of probability and his claim ought not to have been dismissed.
14. The appellant filed submissions but the respondent filed none and opted to rely on the documents it filed before the ELRC.
15. The appellant submitted that when the preliminary objection was raised, the issue as to filing the suit out of time had long been resolved by issuance of an order granting leave to file the suit out of time by the High Court Kuloba, J. on October 11, 2002; that the order was granted on October 11, 2002 but issued on May 13, 2005.
16. He submits that instead of raising a preliminary objection on June 25, 2003 the respondent ought to have appealed against the order issued on October 11, 2002 which to date stood unchallenged; that the trial Judge could not therefore come up with the issue as to the suit having been statute barred at all; that the issue could not be raised since it was already resolved.
17. As regards the respondent having been non-suited, he submits that the issue was raised by the respondent in the preliminary objection but withdrawn on March 15, 2005 when the matter was before the Hon. Justice Ojwang; that the preliminary objection having been withdrawn – the same issues could not be raised as issues for determination either by the court or the respondent who attempted to raise the same in their submissions; that there was no appeal by the respondent against withdrawal of their preliminary objection hence the issue could not be raised afresh.
18. He submits that on July 28, 2014 after the matter was transferred to the ELRC, it was before Justice Onyango when the respondent confirmed that he could not afford to bring back the actuarial scientist as an expert witness for cross-examination and they agreed to cross-examine the appellant only; that on November 10, 2015 the appellant was cross-examined before Justice Nzioki wa Makau; that even after the transfer of the matter to the ELRC the evidence of the actuarial scientist remained intact particularly his affidavit which evidence to date stood unchallenged. He thus prays for judgment in the sum of Kshs. 144, 833, 110 together with costs of the appeal and costs before the ELRC.
19. When the matter came up for virtual plenary hearing on March 21, 2022 learned counsel Mr. Wambugu and Mr. Marwa appeared for the appellant and the respondent respectively. Highlighting his submissions, Mr. Wambugu reiterated his written submissions and emphasised that the parties had abandoned that preliminary objection by consent. He submitted that it could thus not be an issue for consideration by the trial Judge during the trial; that the other issue of being non-suited could also



not arise because the preliminary objection was withdrawn by consent. He submitted that jurisdiction is an issue of law and that the court itself cannot take matters that have not been put forth by the parties because the court is impartial; that the crux of the matter was about the respondent being nonsuited and the suit having been caught up by laches. Counsel also lamented that the matter was never considered on merit.

20. We have considered the record before us in its entirety along with the submissions and the authorities cited to us pursuant to Rule 29 1(a) of this *Court's Rules*. Having done so, we discern the legal issues arising for determination to be: Whether the trial court erred in considering the preliminary objection which parties had withdrawn and/or abandoned by consent and whether there was non joinder of the parties.
21. A cursory reading of the record reveals that indeed there was a preliminary objection dated June 24, 2003 that stated that the suit was time barred and leave obtained to bring the suit out of time was defective and ineffective to cure the time defect; that the suit had been instituted against the wrong party and that the suit had been instituted without the mandatory leave. It is common ground that the said preliminary objection was withdrawn on March 15, 2005 before Ojwang, J. (as he then was). The germane question is whether the said withdrawal acted as a bar against the court raising and determining the issue thereafter. Simply put, can parties withdraw jurisdiction from or confer the same on the court where none exists, and could the court raise the issue suo motu?
22. In *Anacleth Kalia Musau v Attorney General & 2 Others* [2020] eKLR, Civil Appeal 111 of 2017, the Court of Appeal in determining a jurisdictional issue which was never raised by the parties to the suit stated as follows: -

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

‘A jurisdictional issue is fundamental and can even be raised by the court *suo motu* as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:

“What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)

We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of *Iga V. Makerere University* [1972] E.A 62, where it was stated that;

“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected.” (Our emphasis).



The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction.

23. The foregoing confirms the truism that parties cannot confer jurisdiction on the court, where none exists, even by consent and the court can deal with the issue *suo motu* even where the same has not been raised. From the foregoing, it is clear that despite parties consenting to abandon the preliminary objection, the matter was still live before the court and the learned Judge was in order to consider and make a determination on the issue. These two issues pertained to law and could not be rebutted by way adducing evidence. Whether or not the suit was time-barred was a mere exercise in computation of time based on the pleadings on record and therefore we are not persuaded that any of the parties was prejudiced in the circumstances of this appeal.

24. The concept of having statutory limits on various causes of action is in place for good reasons and parties cannot wish it away by consent, withdrawal or any other way. In the case [Rawal v Rawal](#) (1990) KLR 275 the court stated:-

“The object of any Limitation enactment is to prevent a Plaintiff from prosecuting stale claims on one hand and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after long lapse of time.”

In any event, as noted by the learned Judge, the court had no discretion to extend time after expiry of the 6 years statutory limitation as Section 4(1) of the [Limitation of Actions Act](#) was not applicable in the circumstances of this case. The decision of this Court in [Divecon Ltd v Samani](#) (1995-1998) 1 E.A 48, cited by the learned Judge was on point and is still good law. The learned Judge applied the law correctly when he raised the issue and determined it *suo motu*. We have no basis to interfere with his findings in that regard.

25. On the issue of misjoinder or nonjoinder of the respondent, as observed by the learned Judge, Yuken was a statutory corporation with capacity to sue and be sued and was the correct respondent. Even if the appellant found safety in including the Attorney General, the corporation itself ought to have been the first and primary respondent. Still on this issue, the appellant did not deny that Yuken was placed under receivership before the appellant filed his claim. The right party to be sued was the official receiver and not Yuken.

26. Having found that the court lacked jurisdiction to entertain the suit, we need not delve into the merits of the case but from what we have seen on record, we entertain some serious doubt whether even on merit, our conclusion would have been any different from that of the learned Judge as there was serious paucity of evidence placed before the court.

27. This appeal is in our considered view devoid of merit and the same is hereby dismissed with orders that each party bears its own costs of the appeal.

Dated and delivered at Nairobi this 23rd day of September, 2022.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL



K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

