



IN THE COURT OF APPEAL

NAIROBI

(CORAM: OUKO (P), MUSINGA & J. MOHAMMED, J.J.A.)

NAKURU CIVIL APPEAL NO.125 OF 2017

BETWEEN

ABUBAKAR ABDI ALI.....APPELLANT

AND

EGERTON UNIVERSITY.....RESPONDENT

(Being an appeal from the Ruling and Order of the Employment and

Labour Relations Court of Kenya at Nakuru (Radido, J.) delivered on

24th March 2017 in E.L.R.C Cause No. 354 of 2016.)

JUDGMENT OF THE COURT

1. On 15th September 2016, the appellant filed a memorandum of claim in the Employment and Labour Relations Court at Nakuru against the respondent, his former employer, seeking various remedies following his dismissal from employment way back on 20th August 2016, which he contended was unfair.
2. The respondent raised a preliminary objection to the claim, stating that it was statute barred pursuant to the provisions of **section 4(1)** of the **Limitation of Actions Act**, hence fatally defective.
3. **Radido, J.** in his ruling that upheld the preliminary objection, held that the cause of action advanced by the appellant was contractual in nature, and in terms of **section 4(1)** of the **Limitation of Actions Act** it should have been commenced within 6 years, but was filed 20 years after the cause of action accrued.
4. The learned judge further held that leave cannot be granted to commence such a suit out of time, even if the appellant had sought leave to do so, which he had not. He cited this Court's decision in **Divecon v Samani [1995-1998] 1E.A. 48**. Consequently, the appellant's claim was struck out.
5. Being dissatisfied with that ruling, the appellant preferred this appeal, faulting the learned judge for: failing to consider his inability to file the claim within the prescribed period of time; applying **section 4(1)** of the **Limitation of Actions Act** narrowly to deprive him of his right to enforce and enjoy the right to access justice and fair labour practices; overlooking his rights under **Article 43(1)** of the **Constitution**; granting prayers in the preliminary objection without due consideration of his deposition, and for entertaining a preliminary objection that was fatally defective. We were urged to allow the appeal, set aside the impugned ruling, and remit the matter to the trial court for hearing.
6. The appeal was canvassed by way of written submissions that were briefly highlighted by the parties' respective advocates. **Mr. Okubasu**, learned counsel for the appellant, stressed that the appellant had provided material that showed exceptional circumstances under **section 22** of the **Limitation of Actions Act** which ought to have entitled him leave to file the suit out of time, but the trial court failed to consider the material.
7. Counsel told the Court that there was evidence that the appellant was a patient at Mathari Hospital since 1983 when he was first treated for a condition which qualifies as insanity, and therefore such disability ought to have been considered in terms of the provisions of **section 22** of the **Limitation of Actions Act**. Counsel cited the case of **AAA v Teachers Service Commission [2018] eKLR** to buttress that line of submission.

8. **Mr. Muriithi**, learned counsel who held brief for **Mr. Kisila** for the respondent, submitted that the appeal is fatally defective as it does not contain the order appealed from as required under **rule 87(1) (3)** of this Court’s Rules and urged us to strike it out.

9. Regarding the alleged inability of the appellant to file his claim within the prescribed period of time, the respondent’s counsel submitted that the trial court had no jurisdiction to extend time in such a claim, and in any event, no such application had been filed or any suit brought on his behalf as a person of unsound mind under **order 32 rule 15** of the **Civil Procedure Rules**.

10. It was further submitted that the trial court did not overlook the provisions of **Article 43(1)** of the **Constitution**; and lastly, that the trial court could not consider the appellant’s depositions in its determination of a preliminary objection as that was contrary to the well laid principle in **Mukisa Biscuit Manufacturers Ltd v West End Distributors Ltd [1969] E.A. 696** that requires that the court considers only the pleadings and not evidence.

11. Having perused the record of appeal and considered the submissions on record, the only substantive issue that arises for our determination is whether the appellant’s claim was statute barred.

12. **Section 4(1)** of the **Limitation of Actions Act** provides that:

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrues-

(a) actions founded on contract;”

There was no dispute that the appellant’s action was founded on contract. The appellant was dismissed from his employment by the respondent on 30th August 1996 and the claim was filed about 20 years thereafter. Although in his claim before the trial court the appellant alleged that he had “**just recently stabilized**” mentally, and alluded to a medical report dated 5th May 2016 from Mathari Hospital, no suit had been filed on the appellant’s behalf in accordance with **order 32 rule 15**, which permits a next friend to file suit (with leave of the court) on behalf of a person of unsound mind. Similarly, no application had been made under **section 22** of the **Limitation of Actions Act** for extension of the limitation period due to the alleged disability. The learned judge’s determination of the preliminary objection was limited to the pleadings filed by the parties.

13. The learned judge was right in following this Court’s holding in **Divecon Ltd v Samani** (supra), to the effect that the court had no power to extend time or grant leave to commence legal action in contractual claims outside the statutory time frames in the aforesaid circumstances.

14. Consequently, we are satisfied that the learned judge did not err in upholding the preliminary objection which resulted in the striking out of the appellant’s memorandum of claim.

15. Having arrived at that conclusion, we need not consider the other grounds raised by the appellant, that would be a vain academic exercise.

16. This appeal is without merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY APRIL, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR