Otieno v National Cereals and Produce Board (Civil Appeal 143 of 2017) [2021] KECA 23 (KLR) (23 September 2021) (Judgment)

Neutral citation: [2021] KECA 23 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 143 OF 2017

W KARANJA, HM OKWENGU & SG KAIRU, JJA

SEPTEMBER 23, 2021

BETWEEN

MICHAEL BENHARDT OTIENO OTIENO ..... APPELLANT

AND

NATIONAL CEREALS AND PRODUCE BOARD ..... RESPONDENT

(An Appeal from the Ruling of the Employment and Labour Relations Court at Nakuru (S. Radido, J.) delivered on 14th July, 2017 in Misc. Application No. 2 of 2017)

JUDGMENT

1. Michael Benhardt Otieno Otieno, (the appellant) was employed by National Cereals and Produce Board (the respondent) as an Assistant Pest Control Officer in the respondent's premises in Kisumu where he worked until 3rd April, 2003 when he was terminated, by a letter dated 20th June 2003, on allegations of loss of pest control chemicals, irregular sale of dunnage, insubordination and absence from duty. Before the dismissal, the appellant had served the respondent with a letter dated 27th March, 2003 in which he purported to give the employer a notice of resignation from employment. The notice had been declined and he was terminated instead.Following the dismissal, the respondent computed what was supposed to be the appellant's benefits and the same were paid to him. The employer must have thought that the matter had been resolved but that was not to be.

2. Fourteen years later, vide a motion on notice dated 25th January, 2017 the appellant moved the Employment and Labour Relations Court (ELRC) seeking leave to file his claim out of time, against the respondent following his termination on grounds, *inter alia,* that: the Limitation of Actions Act did not apply to the respondent by dint of section 42(1)(k) of the said Act as read with Article 22(1) of the Constitution as the same involved loss of public property owned by a public entity; that section 90 of the *Employment Act*, 2007 is subject to Part III of the Limitation of Actions Act

3. The appellant claimed that he only became aware of the material facts pertaining to his claim sometime in May 2016 when he obtained the respondent's Human Resources Policies and Procedures Manual; that the failure by the respondent to pay his dues was contrary to the provisions of the Manual and this amounted to fraud and that the claim was for equitable relief. The application was supported by the appellant's affidavit of even date.

4. Upon service of the application the respondent, through its legal officer swore a replying affidavit on 17th March, 2017 in opposition which affidavit prompted the applicant to file a further affidavit on 21st March 2017, when oral arguments were taken.

5. The respondent opposed the application on both technical and substantive grounds. In sum, it was its argument that the supporting affidavit was attested to by an advocate who was not qualified to practice; the application was brought through a notice of motion instead of an originating summons; that application for leave to file suit out of time could only be allowed in claims arising out of tort and not contract; that the delay of 14 years would infringe its right to a fair trial and that allegations of fraud in concealing the Human Resources Manual are not substantiated among other reasons.

6. Having considered the application the learned Judge in his Ruling dated 14th July, 2017, now impugned, found that: since the applicant's claim was based on his contractual entitlements and not enforcement of Bill of rights, his contention that **section 42(2)** of the Limitation of Actions Act as read with **section41(1)(k)** of the said Act excluded his claim from the law on limitation, and that in any event the argument that such delay could be cured under **Article 159** of the Constitution did not hold water as the said provision applied to actions relating to claims for recovery or compensation in respect of the loss of or damage to public property.

7. The Court further held that the appellant's claim for purposes of statutory limitation of time was subject to **Section 4** of the Limitation of Action's Act and not the *Employment Act*; that the appellant's claim was filed out of time; being that the intended claim was anchored on contract, the court had no jurisdiction to extend time or grant leave as sought by dint of section 4(1) of the Limitation of Actions Act; and that the appellant failed to prove that his reason for delay was due to the fact that the respondent had through fraud concealed from him facts which were material to his claim in respect of his entitlement to certain dues or benefits such as staff savings refund, gratuity, accrued leave, which were contingent on the employment contract.

8. Ultimately, after considering the substantive issues raised, the court held that the application lacked merit and dismissed it with no order as to costs.

9. The appellant has proffered this appeal vide a Memorandum of appeal dated 27th September, 2017 raising 5 grounds which include grounds that the learned Judge erred by: misinterpreting the term "Public Property" and actions claiming equitable relief"; by delineating Employment and Labour Rights from Fundamental Rights; by finding that the appellant's right of action accrued with the effective date of injury i.e dismissal (3rd April 2003),while decisions of both Civil and Industrial Courts are consistent that such accrues from the date a party is notified of the action, basing his ruling on section 4(1) of the Limitation of Actions Act which was not pleaded by the appellant, but ignored the glaring evidence of fraud by the respondent's letters exhibited by the appellant's on record and lastly, by making a ruling based on his constructive knowledge of contents of a letter dated 14th November 2004, which was not produced or examined in pleadings.

10. Both parties filed submissions in support of their rival positions. At the plenary hearing of the appeal which was conducted virtually, the appellant appeared in person while the respondent was represented by learned Counsel, Mr. Njenga. They both adopted their submissions and highlighted the salient

points. According to the appellant, in his dismissal letter, he was informed he would be paid his terminal dues less any liabilities he may be owing according to the terms and conditions of service which terms were not in his knowledge since they were not given to him; that the respondent went quiet on the appellant for 3 years prompting him to write a letter dated 14th November, 2005 demanding his dues; that the respondent in a letter dated 13th December, 2005 responded and stated that under the terms and conditions of service for management staff, he was only entitled to his own provident fund contribution upon dismissal; that this letter extinguished any expectations of the appellant.

11. He submitted that 13 years after dismissal, on 16th May, 2016 by an act of Divine Providence he came across a document called National Cereals and Produce Board Human Resources Policies and Procedures, dated April 2000; that he had never heard of such a document when he was in employment and on reading the manual, he got startling revelations on the terms and conditions of service which seemed to be the ones under which he was employed in January 2001.

12. He further submits that from the manual, it was a mandatory duty of the respondent to give the appellant his terms and conditions and that a copy signed by the appellant be kept in his personnel records as stated in Clause 2.22, 2.3 on page 24 of the manual; that the manual had provision for monetary benefits and allowances which the appellant was entitled to irrespective of the circumstances of leaving employment which he was not aware of when he demanded his dues in November 2005; that it was after these revelations the appellant moved to court on concealment of facts through fraud whereby the learned Judge dismissed his suit.

13. In response to the appellant's submissions, the respondent condensed the issues to be whether leave to file a suit out of time should be granted to the appellant and whether sections 42 (1)(k) and 42(2) of the Limitation of Actions Act applies to the instant case. According to the respondent, section 27 of the Limitation of Actions Act provides for instances where time can be extended and that the instant case is not one of them; that the length of delay cannot be excused as the primary purpose of Limitation of Actions Act is a double - edged sword meant to ensure the aggrieved party files suit within the set timelines and to protect the "antagonist" should the suit be filed after a lengthy lapse of time.

14. The respondent further submits that the extension of time under the Limitations of Actions Act only applies where the claim is based on tort,more particularly the tort of negligence, nuisance and breach of duty and damages claimed for any injuries must be personal injury to the appellant and that the appellant has demonstrated none of the above.

15. On whether the provisions of section 42 (1)(k) and 42 (c)of the Limitations of Actions Act applies in the instant case, the respondent submits that the above sections apply to suits where the loss of or damage to any public property is involved and the appellant's case has nothing to do with loss or damage to public property.

16. In opposition to ground 1 of the memorandum of appeal that stated the Judge erred in his interpretation of the term public property and actions claiming equitable relief, the respondent submits that the claim by the appellant as sought at the ELRC did not seek equitable relief and it is thus clear that sections 42(1)(k) and 42 (2) do not apply and in the circumstances, the Judge did not need to define public property nor equitable reliefs as argued by the appellant as those were not in contention before the court.

17. We have considered the record, the grounds of appeal and the rival written parties' submissions. This being a first appeal, this Court's duty as set out in *Selle vs Associated Motor Boat Company Ltd*} is to re-consider the evidence, re-evaluate it and draw its own conclusions. In so doing, we must however bear in mind that we neither heard nor saw the witnesses and should therefore make due allowance for

that. From a careful perusal of the record of appeal, parties' submissions and the authorities the legal issues arising for determination can be discerned to be:-

i. Whether the learned Judge properly exercised his discretion in denying the appellant leave to file his suit out of time; and

ii. Whether the learned Judge misinterpreted and misapplied the provisions of section 42(1)(k) and 42(2) of the Limitation of Actions Act.

18. It is not disputed that the appellant was dismissed vide a letter dated 20th June, 2003 and that the respondents wrote him a letter dated 14th November, 2005 informing him that under the terms and conditions of service, he was only entitled to his own provident fund contribution upon dismissal. In his submissions, he stated that through his pay slip, he contributed monthly to the provident fund, a staff savings fund and a gold save scheme.

19. He further submitted that 13 years after dismissal, by an act of Divine providence he came across a document called National Cereals and Produce Board Human Resources Policies and Procedures dated April 2000 which gave him startling revelations on the terms and conditions of service. In this regard, the appellant made heavy weather of the argument that the respondent was obligated to inform him of his terms and conditions and of any benefits therein and that they did not discharge that burden which was then tantamount to fraud.

20. It is clear to us, however, that the said manual was in existence for the time the appellant worked for the respondent. While appreciating that the employer had the statutory responsibility to avail the manual to the appellant, it was also prudent and in his interest for the appellant to enquire about and obtain the manual form the respondent. This was even more important during the disciplinary process and after receiving the letter of suspension. In any event, this is a person who had penned a resignation letter, prior to his termination. Did he do so without knowing what he owed or what he was owed? Did he have to wait for 13 years to discover the manual? We are not convinced that "Divine providence" was sufficient explanation for the delay of 14 years.

21. Faced with almost similar circumstances, this Court in *Civil Appeal Number 209 of 2015, Maersk Kenya Limited vs Murabu Chaka Tsuma [2017] eKLR* expressed itself as follows: -

> "Following his dismissal, nothing precluded him from filing a claim for compensation and loss of earnings within the stipulated period. In our view, the respondent slept on his rights, and equity does not come to the aid of the indolent.

22. The appellant's claim before the trial court was as follows:-

1. Surcharge and recovery of Sh. 350,943/45.
2. Wrongful dismissal and/or unfair termination.
3. Staff savings refund.
4. Nafaka Sacco Gold Savings refund.
5. 90 days leave earned.
6. Acting allowance for 14 months.
7. Gratuity.
8. Pension.

9. Travel and subsistence allowance

10. Duty allowance.

23. From the above, there is no nexus between the claims sought and public property to bring the appellant under the protection afforded by section 42(1)(k) of the Limitation of Actions Act . We also agree with the learned Judge that the claim had nothing to do with violation of the appellant's constitutional rights. or could the provisions of the *Employment Act* 2007 apply to the appellant's case. We are in concurrence with the learned Judge's finding that the appellant's cause of action was contractual and his decision not to extend time was not made in error.

24. The learned Judge actually lacked discretion in the circumstances to extend time. See *Rift Valley Railways (Kenya) Ltd vs Hawkins Wagunza Musonye & another* where this Court held as follows:-

> "By craft and innovation the learned Judge, in grave error extended time by relying on negotiations by the parties and suspending time for this period. Where a statute limits time for bringing an action,no court has the power to extend that time, unless the statute itself allows extension of time.That is what the court stated in *Divecon vs Samani*
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> " No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract."(Emphasis applied)

25. From the foregoing analysis it is clear that this appeal lacks merit. We dismiss it with no order as to costs.

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

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR