



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 41 OF 2015

BETWEEN

BEN KIPLAGAT TUNDUNY.....APPELLANT

AND

STANDARD CHARTERED BANK LIMITED.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu, (Onyango, J.) dated 27th February, 2015 in **The Original KSM Industrial Case No. 112 OF 2014**)

JUDGMENT OF THE COURT

[1] On 27th February, 2015, the Industrial Court (now Employment and Labour Relations Court) struck out a claim that had been lodged by **Ben Kiplagat Tunduny** (hereinafter referred to as appellant). The appellant who is aggrieved by that ruling is now before us with a memorandum of appeal raising four (4) grounds in which the appellant challenges the ruling of the learned judge and prays for the same to be set aside.

[2] According to the appellant's claim filed in the Industrial Court on 28th May, 2014, he was an employee of the respondent Standard Chartered Bank (K) Limited from 18th January, 1985 until 22nd December, 2008 when his services were unlawfully terminated. He sought reinstatement with all his accrued benefits.

[3] The respondent filed a defence on 16th July, 2014 in which it denied the appellant's claim and maintained that the appellant resigned from his employment without any duress and was therefore not constructively dismissed. The respondent further raised a preliminary objection to the appellant's claim maintaining that it was fatally defective, and an abuse of the court process as the claim was statutorily barred under the provisions of **section 90** of the **Employment Act 2007**. In addition, that the claim was frivolous, vexatious and an abuse of the court process as it had already been adjudicated upon by a competent court. The Industrial Court (M. Onyango J) sustained the preliminary objection and struck out the appellant's claim for being both *res judicata* and statute barred.

[4] In arguing the appeal, learned counsel, Mr. Masake who appeared for the appellant faulted the learned judge for finding that the claim was statute barred. Counsel argued that although there was another suit that had been filed by the Banking Union against the respondent, the court found that the Banking Union had no *locus standi* to bring the suit on behalf of the appellant; that the appellant's suit was not adjudicated on merit; that as a result the respondent was estopped from pleading limitation. This was because under **section 59** of the **Interpretation and General Provisions Act** it could be implied that time stopped running; and that the appellant's claim that he was constructively dismissed was not addressed by the court.

[5] **Mr. Ouma** who appeared for the respondent relied on **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR**, cited in **Theresa Constabir v Alka Rashamlal Harbanslal Sharma & another [2015] eKLR**; and argued that the appellant's claim was *res judicata* as it raised substantially the same claim as was raised in cause No. 1610 of 2010; and that the court had made a conclusive finding regarding the appellant's claim for constructive dismissal.

[6] In regard to the issue of limitation, Mr. Ouma relied on the majority decision in **Attorney General & another v Andrew Maina Githinji & another [2016] eKLR**, for the submission that although the appellant's cause of action arose on 22nd December, 2008 and the earlier suit i.e. cause No. 1610 of 2010 was filed within the statutory period, time did not stop running and therefore the appellant's claim

was statute barred as the court had no powers to extend time.

[7] We have considered this appeal, the submissions made before us and the authorities cited. There are two (2) main issues that arise. First, is whether the appellant's claim was statute barred as to justify the trial court striking out the appellant's claim. The second issue is whether the appellant's suit was *res judicata* as to render his claim frivolous and an abuse of the court process. There is also another issue that may be subsumed in the other two (2) issues, and that is whether the appellant was accorded due process.

[8] In regard to the issue of limitation, **section 90** of the **Employment Act** states as follows:

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three (3) years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve (12) months after the cessation thereof.”

[9] This means that the appellant's claim having arisen from a contract of service, it had a limitation period of three (3) years from the date the cause of action arose. While it is not disputed that the appellant's employment ceased on 22nd December, 2008 and this is the date when the appellant's cause of action arose, the appellant maintains that time stopped running when cause No. 1610 of 2010 was filed because the court held that the Union had no *locus standi* to bring the suit and therefore the proceedings were a nullity. We are unable to agree with this contention nor is the submission anchored on any law. It is evident that the appellant failed to bring his claim within the three (3) year statutory timeline, but relied on a suit that had been filed by an entity that did not have any *locus standi* to file the suit. These proceedings having been found null and void it is as if they never existed. Therefore, there were no proceedings or any action that the appellant could rely upon as suspending the period of limitation.

[10] **Section 59** of the Interpretation and General Provisions Act provides as follows:

“Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.”

[11] The limitation period is specifically provided for under the Employment Act and there is no provision under that Act for extension of that time, nor has the appellant demonstrated that there was any order made by the court for extension of time. We agree with the learned judge that the appellant's claim was statute barred as he brought the suit on 28th May, 2014, long after the three (3) year statutory period had lapsed.

[12] As regards the issue of *res judicata*, in **Theresa Costabir v Alka Roshanlal Harbanslal Sharma & another (supra)**, that was cited by the respondent this Court referring to **section 7** of the **Civil Procedure Act** stated as follows:

“The import of this is that the doctrine of res judicata seeks to ensure conclusiveness in legal proceedings, in that it bars further legal proceedings based on the same issue(s) over the same subject matter between the same parties or their proxies in bringing an end to litigation, the doctrine ensures that a party is not vexed twice or forced to fight the same battle twice over the same cause.”

[13] Accordingly, **section 7** aforesaid raises four (4) pre-requisites to be met for a matter to be deemed *res judicata*. These were defined in the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR**, to mean that there has to be:

- “(1) A previous suit in which the same matter was in issue;**
- (2) The parties are the same or litigating under the same title;**
- (3) A competent court heard the matter in issue and determined;**
- (4) The issue has been raised once again in a fresh suit.”**

[14] It is not disputed that there was cause No. 1610 of 2010 in which the appellant's alleged unlawful dismissal was an issue. That suit was between the respondent and the Union which was litigating the matter on behalf of the appellant.

[15] It was submitted by the appellant that the suit was not determined on merit and therefore the issues were not addressed or conclusively determined. However, this submission does not reflect the correct position. The extract of the judgment in cause No. 1610 of 2010 that was quoted by the learned judge reveals that the claim was dismissed on two grounds. At paragraph 20 of the judgment, it was dismissed because there was no evidence to support the appellant's claim in regard to constructive dismissal. This was a clear finding in regard to the merit of the appellant's claim, and the second reason for the dismissal is indicated at paragraph 23 of the judgment which was the finding by the judge that the claimant Union had no capacity to bring the claim on behalf of the appellant.

[16] In our view, there were findings made that conclusively determined the claim. The appellant's contention that he was not accorded due process has therefore no substance.

[17] The upshot of the above is that we find no merit in this appeal and do therefore dismiss it with costs.

It is so ordered.

DATED and delivered at Kisumu this 24th day of January, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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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.

DEPUTY REGISTRAR.