IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & GATEMBU, JJA)

CIVIL APPEAL NO. 204 OF 2013

BETWEEN

KENYA AIRWAYS LIMITED.....APPELLANT

VERSUS

TRANSPORT & ALLIED WORKERS UNION.....RESPONDENT

(An appeal from the Award and Order of the Industrial Court of Kenya at Nairobi (Chemuttut, J.) dated 15th June, 2011

in

Industrial Court Cause No. 1559 of 2010)

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JUDGMENT OF THE COURT

1. This appeal arises from a ruling of the then Industrial Court (Chemmuttut, J.) delivered on 15th June 2011 declining to uphold the respondent's preliminary objection that the respondent's claim is barred by Section 4 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

2. The background in brief is that Tadayo L. Omoke, a member of the respondent's Union, was employed by the appellant airline as a baggage handling agent in 1978. He was subsequently promoted to the position of senior customer service clerk. He remained in that position until 22nd February 1999 when he was summarily dismissed from employment on grounds that he carelessly and improperly performed his duties. He was aggrieved. He instructed K. H. Osmond advocate, who by a letter dated 26th June 2000, made demand, under threat of action, upon the appellant to admit liability within 10 days for illegal termination of Omoke's services.

3. In its response to that demand dated 24th November 2000, the appellant denied liability, maintaining that the dismissal was justified and that due process was followed in accordance with its staff rules. The threat to institute action was not carried out until approximately 11 years later when, on 15th December 2010, the respondent instituted a suit before the Industrial Court on behalf of Omoke seeking remedies for wrongful summary dismissal. In its memorandum of claim, the respondent alluded to attempts that had been made in the intervening period to have the matter resolved, including meetings held, involvement of a conciliator drawn from the Ministry of Labour and Human Resource Development that culminated in recommendations by the Minister which the respondent declined to accept, necessitating the institution of the claim before the Industrial Court.

4. As a response to that suit, the appellant promptly filed a notice of preliminary objection on 22nd December 2010 in which it asserted that as the cause of action accrued in 1999, the "*claim is time barred under the provisions of both the Employment Act of 2007 and of the Limitation of Actions Act Cap 22*" and that the respondent's "*rights to sue for alleged breach of contract having lapsed, he lacks capacity to agitate any cause against the* [appellant]" and that "*the claim is therefore an abuse of the court process*."

5. In its reply to the preliminary objection, the respondent asserted, among other things, that the case was "*not a new case which ordinarily elapsed if it is not processed within the so called time frame of three (3) years*"; that the dispute had gone through various levels including through the parties "*grievance procedures*"; had been investigated by the Ministry of Labour and Human Resource Development and a report made; that the Minister's report and recommendations had failed to meet the respondent's expectations and it had rejected it; and that the Minister was then called upon to refer the dispute to the Industrial Court to no avail; that the respondent should therefore not be "*blamed*

for the time the dispute is brought to court"; and that the court has jurisdiction and should therefore not abdicate its powers by refusing to hear and determine the dispute.

6. In rejecting the preliminary objection, the Judge stated that the respondent had sufficiently explained the delay in filing the claim and the same was therefore not barred by limitation.

7. In its memorandum of appeal, the appellant complains, and Mr. E. Owiti, learned counsel for the appellant, submitted in his written submissions which he orally highlighted before us that the decision of the Industrial Court is wrong in that the court had no jurisdiction to entertain a claim founded on contract after the limitation period; that the court did not have a discretion to waive limitation; that notwithstanding that there was no application for extension of time before the Judge, there is no provision under the Limitation of Actions Act for extension of time for claims in contract.

8. In support, counsel referred us to decisions of this Court in ***E. Torgbor vs Ladislaus Odongo Ojuok [2015]eKLR*** for the proposition that there is no jurisdiction to extend time on claims founded on contract; ***Langat vs Kenya Posts and Telecommunications Corporation [2001] 1 EA 143*** for the proposition that Section 4(1) of the Limitation of Actions Act requires actions in contract to be brought within 6 years; and ***G4S Security Services (K) Limited vs Joseph Kamau & 468 others [2018]eKLR*** for the proposition that time does not stop running on account of reconciliation or other alternative dispute resolutions mechanisms being pursued.3

9. On his part, Mr. N. Makuwa, the Industrial Relations Officer of the respondent, also relied on his written submissions which he briefly highlighted. He submitted that the Industrial Court is vested with jurisdiction to hear and determine the dispute; that under Article 48 of the Constitution, access to justice is guaranteed; and that under the repealed Trade Disputes Act, there was a prescribed mandatory five tier procedure for processing trade disputes "*before reaching the Industrial Court for hearing and determination*".

10. Mr. Makuwa made reference to the decision of the Industrial Court in ***Kenya Plantation & Agricultural Workers Union vs Mununga Leaf Base [2013] eKLR*** where that court declined to dismiss an action on grounds of limitation on the basis that the cause of action accrued when it became clear that the conciliator's recommendations would not be honoured. He also referred to the decision of the Industrial Court in ***Kenya Hotels & Allied Workers Union vs Southern Palm Beach Resort [2014]eKLR*** where it was held that parties did not have direct access to the Industrial Court and the matter could not be determined "*simply on the basis of the Limitation of Actions Act*."; and the decision of the Industrial Court in ***Kenya Scientific Research International Technical and Allied Institutions Workers Union vs Rainald Schumer's and another [2012] eKLR*** where it was held that "*in view of the fact that conciliation process was on going, the limitation period could not run until the same had been exhausted*."

11. Having considered the appeal and the submissions, the issue for our consideration is whether the respondent's claim is barred under Section 4(1) of the Limitation of Actions Act and whether the Judge erred in dismissing the preliminary objection in that regard.

12. In dismissing the preliminary objection, the Judge stated:

> "***whether a claim has become too stale or not will depend on the facts of each case. In the present case the Union had been waiting for the countersignature of the management of the Company on Form 'A', through the Minister, but this was not forthcoming. The delay was also caused by the Minister for his laxity in expending this matter by forwarding the form to the management of the Company for their counter-signature to enable the Court to handle the matter. In my considered view, therefore, the Union have been able to make out sufficient cause for condonation of the delay and it cannot be said that the claim was belated or time-barred. The authorities cited by the learned counsel for the Company, Ms. Ochieng do not apply in this case. The preliminary objection is, therefore, dismissed, with costs to the Union."***

13. It is apparent from that underpinning passage of the impugned ruling that the Judge proceeded on the basis that to uphold or reject the defence of limitation of actions involved exercise of discretion. That was a wrong premise. The respondent's claim was founded on a contract of employment. Section 4(1) of the Limitation of Actions Act provides in relevant part that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

14. It is not in dispute that Omoke was dismissed from employment on 22nd February 1999. That is when his cause of action accrued. He was alive to that fact. He instructed his advocate, K. H. Osmond, to pursue his claim. A demand letter dated 26th June 2000 was sent by that advocate to the appellant with a threat of action. Suit was however not filed until 15th December 2010. That was approximately 11 years after the cause of action accrued and approximately 5 years after the limitation period had run out. In the Judge's view the delay was excusable.5

15. As Waki, JA stated in ***Attorney General & another v Andrew Maina Githinji & another [2016] eKLR***, if a matter is statutorily time-barred, there is no room for exercise of judicial discretion. In ***Divecon v Samani (1995-1998) 1 EA 48*** at p.54 this Court held that:

> "***...no one shall have the right or power to bring an action 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. In the light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that 'the wording of section 4 (1) of the limitation of Action Act (Chapter 22) suggests a discretion that can be invoked.***" [Emphasis]

16. In ***Rift Valley Railways (Kenya) Ltd v Hawkins Wagunza Musonye & another [2016] eKLR*** although a decision rendered post the

repeal of the Trade Disputes Act, it was held that 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.***"

17. We accordingly hold that the Judge erred in taking the view that he had a discretion not to apply the provisions of Section 4(1) of the Limitation of Actions Act to a claim that was clearly instituted outside the prescribed limitation period.

18. The proposition advanced by the respondent that limitation does not run until the conciliation process or other settlement processes are exhausted is not in our view a correct representation of the legal position. See ***G4S Security Services (K) Limited vs Joseph Kamau & 468 others***. (above)

19. In conclusion therefore, we allow the appeal. The ruling of the Industrial Court given on 15th June 2011 is hereby set aside. We substitute therefor an order upholding the appellant's preliminary objection dated 21st December 2010 with the result that the respondent's claim filed on 15th December 2010 is hereby struck out with costs to the appellant. The appellant shall also have the costs of the Industrial Court.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of March, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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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.

DEPUTY REGISTRAR