IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KARANJA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 261 OF 2016

BETWEEN

KILIMANJARO COMPANY LIMITED.....APPELLANT

VERSUS

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Industrial Court of Kenya at Nairobi (Maureen Onyango, J) made on the 19th *day of August 2015* **in Industrial Court Cause No. 938 of 2010**

****

JUDGMENT OF THE COURT

1. Kenya Union of Commercial Food And Allied Workers (the respondent), a Trade Union registered under the Trade Unions Act (now repealed) instituted proceedings against **Kilimanjaro Company Limited, (the appellant)** on behalf of two of its members, Fima Abdi Famau and Rachel Njeri herein after referred to as the grievants. The two grievants were both employed by the appellant on 1st May, 2001 in the position of Sales/Accountant Group 6, each on a consolidated monthly salary of Kshs. 10,059.00.

2. On 14th June, 2004, they were both served with dismissal letters ostensibly on account of poor performance. From the record, it would appear there was in place a recognition agreement between the appellant and the respondent. According to the respondent it was on that basis that it stepped in to handle the dismissal of the two grievants. The respondent calculated the dues owed by the appellant to the grievants and on 29th June, 2004 the respondent sent the tabulation to the appellant. The total dues after tabulation of all claims amounted to Ksh. 53,852.90. It is not disputed that these amounts were paid to each grievant subsequently, after the filing of the claim, on a without prejudice basis. The parties however appear not to have agreed after the appellant was served with the tabulated claim and consequently, the respondent engaged the alternative dispute resolution mechanisms provided for under **Section 4 of the Trade Disputes Act, Cap 234** (now repealed) by referring the matter to the Minister for Labour.

3. By a report dated 30th December, 2005 the Minister of Labour and Human Resource Development through one M. M. Muli recommended that the dismissal of the grievants be reduced to normal termination to enable them collect their terminal dues. Apparently, the dispute was not resolved and the respondent referred the dispute to the Industrial Court vide the Notification of Dispute Form dated 29th September, 2009. The court took cognizance of the case and invited the parties for mention but only the respondent appeared. The court gave directions as to the filing of the pleadings as was the procedure then.

4. Pursuant to the directions given by the court, the respondent filed the claim in which it faulted the appellant for dismissing the grievants without proving the allegations leveled against them. Further, it was contended that the said grievants were terminated without being accorded a fair hearing. They sought orders of reinstatement of the two grievants without loss of benefits, seniority and any increments that may have taken place from the date of the 'purported dismissal'. In the alternative they prayed for award of terminal benefits as per the Collective Bargaining Agreement in force as at the time of the said termination and compensation of 12 months salary/wages for the wrongful dismissal. The Appellant did not file a defence against the said claim and judgment was entered against it without the benefit of being heard.

5. Subsequently however, following a successful application by the appellant, the initial Award made in favour of the grievants dated 3rd December, 2012 and all consequential orders were set aside on 22nd March, 2013 and the appellant was granted leave to file a defence, which it did by way of a Memorandum of Reply dated 2nd April, 2013.

6. The appellant's case was that the grievants were not members of the claimant during their time of employment. According to the claimant

the claim was a non-suit, null and void and called for the same to be struck out *in limine*. It further contended that the grievants' services were terminated on the 14th of June, 2004 for poor performance and misappropriation of funds. They averred that the grievants carried out sales and did not remit the monies to the appellant and according to them this amounted to misappropriation of funds. The appellant further challenged the claim on the ground of limitation on a double pronged approach. On one hand, the appellant contended that as the cause of action accrued on the 14th of June, 2004, the claim was time barred under **Section 90 of the Employment Act, 2007**. On the other hand, if the court were to find Section 90 of the Employment Act, 2007 inapplicable, the claim would still be extinguished by virtue of the provisions of the Limitation of Actions Act as the claim was filed in January 2011, six years after the cause of action arose.

7. In addition to the question of limitation, the appellants urged that the respondent had no *locus standi* to file the claim on behalf of the grievants who were not its members and that the suit should be struck out. It was also the appellant's case that an amount Kshs. 53,852.90 paid to each of the grievants following an out of court settlement was what was legally owed to them in full and final settlement of the terminal dues and the demand of Kshs. 110,190.10. had no basis. It further averred that the balance claimed by the respondent appeared to be a component of compensation equivalent to 12 months' salary yet the same was no payable under the Employment Act (1976) (now repealed), which was the applicable law at the time the cause of action arose. That under the said law an employer was at liberty to terminate an employee with notice without giving reasons and that such an employee incase no notice was issued was only entitled to the value of the notice of termination and any outstanding dues accrued but not paid.

8. The court considered the dispute before it and rendered the judgment dated 19th August, 2015 in favour of the respondent where it held that; the summary dismissal of the grievants was unfair and that the appellant should pay each of the grievants compensation equivalent to 12 months' gross salary at Kshs. 120,708.00., which amount according to the court the appellant had not objected to.

9. That is the judgment that provoked this appeal which is premised on grounds that the learned Judge erred in law and in fact in finding that the respondent had *locus standi* to institute proceedings on behalf of the grievants; the grievants' termination was unfair and that the grievants were entitled to the damages sought.

10. The appeal was canvassed by way of written submissions with brief oral highlights. The appellant's submissions were filed on 19th July, 2017 while those by the respondent were filed on 16th August, 2017. When the appeal came up for plenary hearing on the 25th March, 2019 learned counsel Mr. Makori appeared for the appellant while Mr. Nyumba appeared for the respondent.

11. In a bid to demonstrate why this appeal should be allowed counsel for the appellant submitted on three main issues i.e. *locus standi*, statutory limitation and assessment of damages. On the issue of *locus standi*, counsel posited that the grievants were not members of the respondent and that the respondent did not rebut the same with evidence contrary to **section 112** of the Evidence Act which places the onus on a party to prove or disapprove a fact which is particularly within his/her knowledge. He further submitted that such membership was even denied by the grievants in a data engagement form that they had signed during the period of engagement where they specifically denied being union members. According to learned counsel, the claim having been filed by a stranger, the suit ought to have been struck out. In support of this position he relied on among others the cases of **Kenya Shipping Clearing and Warehouses Workers Union v Bobmil Industries Ltd 2013 eKLR** and **Kenya National Private Security Workers Security Limited (2013) eKLR** and **Transport and Allied Workers Union v DHL Global Forwarding (K) Limited (Industrial Cause No. 745 of 2010)** where the courts found that a union can only sue in its own name or on behalf of its members who are aggrieved by the actions of their employer.

12. On the issue of limitation of time, he urged that the fact that the learned Judge found that the dispute arose in 2004 and went through the alternative dispute resolution stage before being filed in the Industrial Court in 2001 did not mean that the dispute was filed within time; and that the alternative dispute resolution deliberations did not amount to a stay of the statutory limitation time as imposed by law.

13. On the issue of damages payable, he urged that the amount remitted to the grievants was done on a without prejudice basis and without admission of liability on the part of the appellant. He faulted the learned Judge for finding that the appellant had not objected to the amount claimed as compensation when indeed the appellant had maintained the only amount payable was the salary in lieu of notice. He further faulted the court for not making a finding on the alleged non-performance of the grievants as well as the allegations of misappropriation of funds on the part of the grievants despite the appellant having produced evidence such as receipts and invoices in support of the same. Further, that the grievants did not deny the said allegations. He urged the court to allow the appeal.

14. Opposing the appeal on behalf of the respondent, Mr. Nyumba started off by relying on his submissions filed on the 16th August, 2017 and the grounds affirming the decision of the court filed on 5th June, 2017. On the issue of statutory limitation, he submitted that the matter had been reported to the minister in 2004. It was the duty of the minister to refer the matter to court and if there was any delay, it was by the minister and not the union. He further submitted that the provision of the Employment Act relied upon on limitation is not relevant because the cause of action arose in 2004 and the Act referred to was effective from 2011.

15. On locus standi, the respondent seemed to invoke the doctrine of estoppel saying that as the appellant participated throughout in the proceedings and agreed to settle the matter with the union at some stage, they cannot therefore turn back and deny that the union lacked the requisite *locus standi.* On the award of compensation, it was submitted that section 16 of the Trade Disputes Act, allowed the court to award compensation as one of the remedies and such did not find any fault on the part of the trial Judge.

16. The respondent has raised what it refers to as a preliminary point in its submissions which has a bearing on the jurisdiction of this Court to entertain the appeal. We restate the truism that jurisdiction is everything and without it the court cannot move any step and further that the same being a point of law, it can be raised at any point. We note however that the point was not raised in the respondent's Notice of Grounds for affirming the decision. Further, it was not one of the points Mr. Nyumba addressed us on. It has just been raised as an amorphous point in the submissions.

17. We appreciate however that a challenge on jurisdiction can be raised at any point of the proceedings. Addressing the question of jurisdiction this Court in the case of **National Union of Water and Sewerage Employees & 3 others –Versus- Nairobi Water & Sewerage Company Limited (2018) eKLR**, pronounced itself as follows;-

> **"It is now trite that an issue of jurisdiction is a fundamental issue and should be disposed off whenever raised; that being a legal issue it may be taken at any stage of the proceedings, that where a court is convinced that there is want of jurisdiction to entertain any matter before it to finality, that court has no other option but to down its tools. See Owners of Motor Vessel 'Lillian" versus Caltex Oil (Kenya) Limited (1989) KLR 1…"**

18. Be that as it may, the question of jurisdiction in this case is double faceted. Before we get into the jurisdiction of this Court to entertain this appeal, we must address the question as to whether the claim was statutorily time barred, because that too is jurisdictional. If we find the respondent's claim was time barred then the appeal will have been determined at that point and the question as to whether an appeal lies before this Court not will not arise.

19. It is common ground that the grievants' employment was terminated in June, 2004. Attempts to settle the dispute out of court were not successful. As indicated earlier, pursuant to section 4 of the Trade Disputes Act the matter was referred to the Minister for labour whose representative filed the report with his findings and recommendations in December, 2005. These recommendations appear not to have been acceptable to the parties and the respondent on 30th September, 2009 sent the notification of a trade dispute to the minister who in turn referred the dispute to the then Industrial Court. Interestingly the minister's Notification of Dispute to the Industrial court is dated 29th September, 2009, a day before the respondent's transmission of the form requesting the minister to refer the dispute to court.

20. The Notification of the dispute was received by the court on 24th June, 2010 and the Memorandum of Claim was not filed in court until 21st January, 2011. According to the appellant, the claim was time barred both under section 90 of the Employment Act 2007, which sets the time limitation as 3 years and the Limitations of Actions Act which sets time limitation as 6 years. Irrespective of the applicable Act the claim was time barred.

21. The respondent however maintains that the time limitation applicable was not the 3 years under the Employment Act but the 6 years under the Limitation of Actions Act based on the law of contract. Maintaining that the claim was not time barred, the respondent posited that time stopped running once the dispute was referred to the minister for arbitration. This proposition had found favour with the learned trial Judge. We are now called upon to determine whether the learned Judge was correct on that issue. What is the correct position in law?

23. This Court has had occasion to determine this issue on various occasions. In **G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR**, the Court held that:-

> **"Time does not stop running on the commencement of reconciliation or other alternative dispute resolution mechanisms provided for under the Constitution or any other law.** This is fortified by the decision of this court in the case of **Rift Valley Railways (Kenya) Ltd V Hawkins Wagunza Musonye and another [2016] eKLR** which held as follows:
>
> **"While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of Section 90 of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service."**

See also **Times Newspapers Ltd v O'Regan [1977] I.R.L.R 101** where the Court sitting on appeal held that an employment tribunal had erred in law in finding that it was not reasonably practicable for an employee to make her complaint for unfair dismissal within the requisite period on grounds of her belief that the period to file her claim ran from the end of negotiations between her union and the employer.

Going by the above decisions of this Court, it is evident that the learned Judge fell into error when she made the impugned finding that:-

> **"Under the Trade Disputes Act once a dispute was reported to the Minister it was deemed to have commenced and would thus not be caught up by the limitation of Actions Act."**

24. There being no doubt that the cause of action herein arose in June 2004, the claim having been filed in court on 21st January, 2011, was clearly time barred even from the Limitation of Actions Act perspective and the entire proceedings before the trial court were essentially a nullity. Having so found, we do not need to go into the other grounds of appeal as this ground disposes off the entire appeal.

25. Consequently, we allow the appeal with orders that each party bears its own costs in view of the fact that the grievants lost their jobs over 15 years ago and it would be unconscionable to burden them with costs in favour of their former employer.

Dated and delivered at Nairobi this 5th day of July, 2019.

W. OUKO, (P)

…….

JUDGE OF APPEAL

W. KARANJA

……...…….

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

…….……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR