



IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: D. MUSINGA, F. SICHALE & S. ole KANTAL, J.J.A.)

CIVIL APPEAL NO. 301 OF 2014

BETWEEN

HARRISON NDUNG'U MWAI & 500 OTHERS.....APPELLANTS

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(An appeal from the judgment of Industrial Court of Kenya at Nakuru (Ongaya, J.) dated 30th May, 2014

in

H. C. C. C. No. 88 of 2013 (formerly H.C.C.C. No. 326 of 2004)

JUDGMENT OF THE COURT

1. **Section 3(1)** of the **Public Authorities Limitations Act** Cap 39 Laws of Kenya provides as follows:

“No proceedings founded on tort shall be brought against the Government or Local Authority after the end of twelve months from the date on which the cause of action accrued.

Section 3(2) of the same Act states that:

“No proceedings founded on contract shall be brought against the Government or Local Authority after the end of three years from the date on which the cause of action accrued.”

2. By way of a plaint filed in the High Court of Kenya at Nakuru on 9th December, 2004, the appellants stated that there existed a contract of employment between each one of them and the Government of the Republic of Kenya (the Government); that between 1994 and 2000 the Government colluded with representatives of the World Bank, the International Monetary Fund and the Donor Community in general to deceive and/or mislead them into accepting voluntary retirement, thereby inducing breach of respective contracts of employment, hence occasioning them economic harm.

3. The appellants sought, *inter alia*, a declaration that they are entitled to be paid a total of **Kshs 124,250,000/=** as compensation for loss of employment due to the induced voluntary early retirement.

4. The respondent denied the appellants' claims and stated that each of the appellants voluntarily retired from his or her employment under the Voluntary Early Retirement Scheme initiated by the Government between 1993 and 2000, without any force, misrepresentation or deception as alleged; and each of the appellants was paid their rightful dues and benefits under the said scheme.

5. The respondent further averred that the appellants' suit did not lie for non-compliance with **Section 13A** of the **Government Proceedings Act** and for being time barred under **Section 3** of the **Public Authorities Limitations Act**.

6. The suit was eventually transferred from the High Court to the Employment and Labour Relations Court. Upon completion of a full hearing, **Ongaya, J.** dismissed the appellants' suit, holding, *inter alia*, that each of the appellants had voluntarily retired from their respective employment; and in any event, the suit was time barred.

7. The appellants, being aggrieved by the trial court's decision, preferred an appeal to this Court. Although the memorandum of appeal consists of eight (8) grounds, in their written submissions, the appellants raised three (3) issues for determination as follows:

“1. Whether the failure to enjoin the World Bank and the International Monetary fund (IMF) as Defendants in the suit was fatal to the Plaintiffs' case.

2. Whether the Learned Judge erred in fact in holding that the Appellants voluntarily opted for early retirement when there was glaring evidence to the contrary.

3. Whether the Learned Judge erred in law in failing to hold that the Appellants were denied the chance to canvass the issue of limitation.”

8. It is trite law that limitation goes to the jurisdiction of a court. This Court so held in **THURANIRA KARAUURI VS. AGNES NCHECHE [1997] eKLR**. It follows therefore that whenever the question of jurisdiction arises, it ought to be resolved at the earliest opportunity because without jurisdiction a court has no authority to decide a matter before it.

9. In the celebrated case of **OWNERS OF THE MOTOR VESSEL “LILIAN S” VS. CALTEX OIL (KENYA) LTD [1989] KLR 1**, Nyarangi, JA held:

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. In **THURANIRA KARAUURI VS. AGNES NCHECHE** (supra), this Court held that a suit that is time barred is incompetent and fit for striking out as limitation goes to jurisdiction. And in **SAMUEL KAMAU MACHARIA & ANOTHER VS. KCB LTD & 2 OTHERS [2011] eKLR**, the Supreme Court of Kenya held that:

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law.”

11. In light of the foregoing, the first issue that we must consider and determine is whether the trial court had jurisdiction to hear and determine the dispute that was before it in view of the issue of limitation. It was not disputed that the appellants' suit was based on contracts of employment between the appellants and the Government; and that by virtue of **Section 3(2)** of the **Public Authorities Limitations Act** such a suit ought to have been instituted within three years from the date on which the cause of action accrued.

12. The cause of action, according to the appellants, was the voluntary early retirement of the appellants, whether induced or otherwise, which took place between 1994 and 2000. It follows, therefore, that any suit founded on the said cause of action had to be filed within three years from the latest date, which was 31st December, 2003. That was conceded by **Mr. Biko**, learned counsel holding brief for **Mr. Kiplenge** for the appellants. The appellants filed their suit on **9th December, 2004**. The suit was clearly time barred and the trial court had no jurisdiction to hear and determine it.

13. The issue of limitation was at the core of the dispute and it was expressly raised by the respondent in its statement of defence. The appellants did not file any reply to the respondent's statement of defence. The trial court heard evidence from both sides. The respondent's evidence, as per DW1, was that the voluntary early retirement scheme ran from 1993 to 1998, not from 1994 to 2000 as alleged by the appellants. Either way, the suit was time barred.

14. That conclusion is sufficient to dispose of this appeal in its entirety since it establishes the fact that the trial court had no jurisdiction to hear the matter.

15. Having said that, we only wish to add that a perusal of the record of appeal, in particular the evidence tendered by **PW1, PW2** and **PW3** for and on behalf of the appellants, shows that there was clear admission that each of the appellants voluntarily filled and signed the application forms for voluntary early retirement, were paid their dues and effectively retired from civil service. It is instructive that none of the appellants refunded the terminal benefits they received from the Government but opted to institute the claim long after they had spent their respective dues. Their claim did not lie at all.

16. This appeal is without any merit. Each party shall bear their own costs.

Dated and delivered at Nakuru this 23rd day of May, 2018

D. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR