IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)

CIVIL APPEAL NO. 247 OF 2014

BETWEEN

DONALD OSEWE OLUOCH ……..... APPELLANT

VERSUS

KENYA AIRWAYS LIMITED ……...…. RESPONDENT

(An Appeal from the Ruling and Order of the Industrial Court at Nairobi by (N. Nderi, J.) dated the 11th day of July, 2014

in

INDUSTRIAL CAUSE NO. 1362 OF 2013

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JUDGMENT OF THE COURT

1. The issue in this appeal is whether time for purposes of limitation of actions stops running against a party during the pendency of an action commenced in the wrong court.

Background

2. The respondent employed the appellant as a pilot in terms of a letter of appointment dated 23rd November 2006. Employment commenced on 2nd January 2007. In consideration of the respondent paying for the appellant's training, the appellant bound himself, under a training or sponsorship bond, to work for the respondent for a period of three years or to refund the cost of training in the event of working for a lesser period. Before the expiry of the three years, the appellant tendered his resignation from employment to the respondent by a letter dated 25th June 2007.

3. On 8th October 2009, the respondent filed suit in the High Court of Kenya at Milimani (HCCC No. 754 of 2009) seeking to recover the sum of the secured bond from the appellant on the grounds that the appellant was in breach of the employment contract. The appellant contested the jurisdiction of that court, asserting that it was not the proper forum for an employment dispute. To that end, he filed an application to have the suit dismissed. The High Court declined to dismiss the suit. On appeal in Civil Appeal No. 5 of 2013, the Court of Appeal overruled the High Court and struck out the respondent's suit in a judgment delivered on 14th February 2013.

4. That was not the end of the matter. On 23rd August 2013, the respondent filed suit against appellant based on the same cause of action in the Employment and Labour Relations Court (the ELC) being Industrial Cause No. 136 of 2013. The appellant objected to that suit. In his preliminary objection dated 2nd October 2013, the appellant contended:

> *"1. That the claim herein is statute barred by virtue of the provisions of Section 90 of the Employment Act, Act No. 11 of 2007 and Section 4 of Limitations of Actions Act. The cause of action arose on 25th June 2007 as pleaded in paragraph 8 of the Memorandum of Claim. The Claimant should have filed the Memorandum of Claim on or before 25th June 2010.*
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> *2. That the Claimant is estopped from filing the instant suit before the Industrial Court as it had earlier opposed an application to have Milimani HCCC No. 754 of 2009 Kenya Airways vs. Donald Osewe filed at the Commercial and Admiralty Division from being transferred to the Industrial Court. The suit was subsequently dismissed by the Court of Appeal for want of jurisdiction."*

5. After hearing the parties, the court delivered a ruling on 11th February 2014 that is the subject of this appeal, holding that Section 90 of the Employment Act, 2007 was not applicable; and that when the cause of action arose on 25th June 2007, that Act had not commenced operation as it became operational in August 2008.

6. According to the Judge, the law applicable on the question of limitation in this case is Section 4(1) of the Limitation of Actions Act that stipulated a limitation period of 6 years for causes of action founded on contract. However, although "*more than six years had lapsed*" at the time the respondent filed suit in the ELC on 23rd August 2013, in the Judge's view, the period between 8th October 2009 when the respondent initiated the suit in the High Court over the alleged breach of employment contract to 14th February 2013 when that suit was struck out by the Court of appeal, time for purposes of limitation stood still and did not run. Consequently, the Judge held, the suit in the ELC "*was filed within time and* [that] *court has jurisdiction to entertain the same*." With that, the court dismissed the preliminary objection precipitating this appeal.

The appeal and submissions by counsel

7. Referring to the memorandum of appeal and to written submissions, Mr. Mansur Issa appearing with Ms Muthoni Mugo, learned counsel for the appellant, submitted that the Judge erred in holding that to apply Section 90 of the Employment Act in this matter would result in a retroactive application of the statute; that in any event to the extent that the legislation affects procedure only and not substantive rights, it can operate retrospectively.

8. In that regard, counsel referred to a Privy Council decision in **Municipality of Mombasa vs. Nyali Limited [1963] EA 371**. Counsel went on to say that the limitation provisions are mandatory and the intent in enactment of Section 90 of the Employment Act is to restrict commencement of proceedings arising out of employment contracts to 3 years. Counsel cited **IGA vs. Makerere University [1972] E A 65**; **A. G and another vs. Andrew Maina Githinji and another [2016] eKLR**.

9. It is also the appellant's case that the conclusion by the Judge that time did not run during the pendency of the litigation over the same matter that was struck out by the Court of Appeal is wrong. The reliance by the Judge on Indian law that has no application in this country to support that conclusion, counsel argued, was erroneous and a misdirection.

10. Counsel maintained that under our legal system, the law circumscribes the circumstances when limitation period may be extended and the pendency of litigation is certainly not one of the grounds for extending time. In any case, there can be no extension of time for causes of action arising out of breach of contract. Counsel cited **Mary Osundwa v Sugar Company Ltd [2002] eKLR**; **Thuranira Karauri vs Agnes Ncheche [1997] eKLR** and **A. G and another vs. Andrew Maina Githinji and another**

(above) in support.

11. On his part, Mr. Walter Amoko, appearing with Mr. John Mbaluto, learned counsel for the respondent, submitted that the Judge was right that Section 90 of the Employment Act could not be applied retroactively; that had there been an intention for the statute to have retroactive effect, an express provision to that effect would have been made. Counsel referred us to a decision of this Court in **Panafrica Builders and Contractors Limited vs. Singh [1984] KLR 121** and the Supreme Court decision in **Samuel Kamau Macharia vs. Kenya commercial bank [2012] eKLR**. Counsel further urged us to banish the argument that the Employment Act, which deals with fundamental rights, duties and obligations, can be said to deal with matters of procedure so as make it amenable to retroactive application.

12. On the question whether time stops running for purposes of limitation during the active prosecution of proceedings in respect of the same cause of action although in a wrong court, counsel submitted that regard must be had to the policy considerations that underlie the statutory provisions which, in this case, is in favour of the respondent.

13. Drawing from experiences in the United Kingdom, India and the United States of America as exemplified by literature and decisions of courts from those jurisdictions, counsel argued that the holding by the Judge that the pendency of a suit between the same parties in the wrong forum stopped time from running cannot be faulted. In so doing, counsel argued, the Judge properly adopted the common law position in accordance with Section 3 of the Judicature Act that extends the common law of England to our jurisdiction.

14. In support, counsel referred us to passages from the title, **Limitation Periods**, 3rd Edition by Andrew McGee (Sweet & Maxwell) 1998 and from **Law of Limitation and Adverse Possession** by K. J. Rustomji. Counsel also found support in a decision of the Ninth Circuit of United States Court of Appeals in **Valenzuela vs. Kraft, Inc (1986) 801 F2d 1170** and a decision of the Fifth Circuit of United States Court of Appeals in **Cynthia Deblanc v St. Tammany Parish School Board, No. 15-30367**. **Analysis and determination**

15. We have considered the appeal and submissions by counsel. The central question in this appeal is whether the learned Judge of the High Court was right in refusing to uphold the appellant's defence of limitation and in refusing strike out the respondent's suit on the grounds that the period between 8th October 2009 when the respondent initiated the suit in the High Court over the alleged breach of employment contract and 14th February 2013 when that suit was struck out by the Court of appeal, time for purposes of limitation stood still and did not run.

16. The other issue is whether Section 90 of the Employment Act that came into operation in August 2008 prescribing a limitation period of 3 years to causes of action founded on contracts of employment is applicable to the circumstances of this case.

17. Beginning with the latter question, there is no doubt the cause of action arose on 25th June 2007 when the appellant tendered his resignation. By that time, the Employment Act, No. 11 of 2007 was not operational. It became operational in August 2008. The operational statutory regime on limitation of actions as at 25th June 2007 was the Limitation of Actions Act. Under Section 4(1) of that Act, actions founded on contract could not be brought after the end of six years from the date on which the cause of action accrued. Section 90 of the Employment Act, No. 11 of 2007 had the effect of reducing that period from 6 years to 3 years in relation to actions or proceedings arising out of a contract of service in general.

18. By the time the Employment Act, No. 11 of 2007 became operational the respondent had an accrued benefit in terms of a longer period of time (6 years) within which to mount the claim than the three years provided for Employment Act, No. 11 of 2007. That was in our view a substantive right and the provision could not be construed to have retrospective operation without a clear intention to the contrary. [See, **Municipality of Mombasa vs. Nyali Limited** (above)].

19. Indeed, we agree that there is nothing in the Act, express or otherwise, from which we can infer that the intention was for the statute to operate retroactively. See also **Panafrica Builders and Contractors Limited vs. Singh** (above) and **Samuel Kamau Macharia vs. Kenya commercial bank** (above). We are therefore in agreement with the Judge when he said:

> *"**As at the 25th June 2007, when the cause of action arose, the Employment Act 2007 had not commenced operation. As a matter of fact, the Act came into operation in August 2008. The provisions of Section 90 cannot be applied retroactively to this suit**."*

20. We turn to the question whether the Judge erred in holding that time did not run for purposes of limitation during the pendency of the suit in the commercial court. As already stated, the cause of action arose on 25th June 2007. Under Section 4 of the Limitation of Actions Act, "the law applicable to the present suit" as correctly noted by the Judge, the respondent had 6 years from 25th June 2007 within which to institute proceedings seeking relief for the alleged breach of contract of employment. As the Judge also correctly stated, the suit was filed at the Industrial Court on 23rd August 2013, which was "more than six (6) years from the date … the cause of action arose."

21. Part III of the Limitation of Actions Act dealing with "extension of periods of limitation" sets out the circumstances under which periods of limitation may be extended and with fresh accrual of right of action as well as the manner for doing so. Section 31 in Part III of the Limitation of Actions Act provides that "where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III of this Act were incorporated in it."

22. There is no provision in the Limitation of Actions Act or in any other statute in Kenya providing that the time when a "plaintiff has been prosecuting…another civil proceeding [in a court] against the defendant…founded upon the same cause of action" shall be excluded in computing the period of limitation. The holding by the Judge that "the entire time the matter was pending at the High Court and at the Court of Appeal, time did not run for purposes of limitation of action" does not have statutory support.

23. The Judge however found support for that proposition in a passage extracted from a 1938 Butterworths & co publication; "The Law of Limitation and Adverse Possession", Vol 1 by K. J. Rustomji thus:

> "*In computing the period of limitation prescribed for any suit, the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.*"

24. It would seem that it was not brought to the attention of the Judge that that passage was a verbatim reproduction of Section 14 of the Indian Limitation Act. In other words, the principle which counsel for the respondent urges us to apply, namely, that where a litigant pursues litigation with due diligence, but that litigation fails because the court refuses to entertain such litigation by reason of defect of jurisdiction and that time taken in such proceedings should be taken into account and excluded when computing the period of limitation for later proceedings, is a codified legal principle in India. That is not the case in Kenya.

25. Limitation of actions in this country is, in our judgment, entirely a matter of statute. It was also not demonstrated that the statutory provisions underlying the decisions from the United States Courts of Appeals to which we were referred are *in pari materia* with our statute.

26. We are therefore satisfied that the learned Judge fell into error in applying a provision of the Indian Limitation of Actions Act that has no application to Kenya. For that reason, we allow the appeal, set aside the ruling of the court given on 11th July 2014 and substitute therewith an order allowing the appellant's

preliminary objection dated 2nd October 2013 with the result that the respondent's suit, being Cause No. 1362 of 2013 is hereby struck out with costs to the appellant. The appellant shall also have the costs of this appeal.

Dated and delivered at Nairobi this10th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR