



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 62 OF 2016

BETWEEN

CLEMENT ERNEST OPIYO MURENGA.....APPELLANT

AND

1. PRINCIPAL SECRETARY, TREASURY.....1ST RESPONDENT

2. COMMISSIONER OF CUSTOMS,

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

(Appeal from ruling of the Employment and Labour Court at Kisumu, Maureen Onyango J,) dated 16th February 2016

in

Petition No. 10 of 2015)

JUDGMENT OF THE COURT

The background to this appeal is a petition initially filed in the High Court at Busia and later transferred to the Industrial Court at Kisumu (the Employment and Labour Relations Court), wherein the appellant, **Clement Ernest Opiyo Murenga**, stated that he was employed in the Customs Department of the East African Community (EAC) in 1975. When the EAC collapsed, he was absorbed into the Ministry of Finance in 1977, and was stationed at the Jomo Kenyatta International Airport. In August 1981 he was charged before the Makadara Law Courts with the offence of making a customs entry without authority, but was subsequently acquitted in December 1983. After the verdict, he reported to his Reporting Officer, with a view to being reinstated to employment on a full salary. Despite several visits to the Reporting Officer, Forodha House (the Customs Head Office), the Treasury and the Public Service Commission, he was unable to obtain any information appertaining to the reinstatement to his employment.

He thereafter filed a complaint with the Commission on Administrative Justice whereupon, he was to later learn, vide a letter of 15th March 1985 that he was accused of deserting his duty. On approaching the Customs Department, he was referred to the Treasury, but still no communication of his employment status was forthcoming. As a consequence, the appellant filed a constitutional petition dated 27th March,

2014, where he sought a declaration that his rights had been violated under *Articles 47 (1) and (2), 50 (1), 28, 25 (a), 41 (1) and 35 (2) of the Constitution 2010*; an order for compensation for lost salary and other benefits and damages. The petition was supported by the appellant's affidavit also sworn on the 27th March, 2014.

In a replying affidavit sworn on 24th October 2014 by May Migizi Magomere, a Supervisor, Employee Relations, Human Resources Department on behalf the 2nd respondent, it was averred that the appellant was an employee of the Commissioner of Customs under the Ministry of Finance and Planning, until 2nd January 1985 when he was dismissed from employment. By that time, it was averred, the 2nd respondent did not exist. It was further averred that the Permanent Secretary/Treasury, Ministry of Finance, signed the appellant's dismissal letter and not the 2nd respondent, which was not a party to the allegations; and that the body capable of reinstating him was the Public Service Commission.

It was further deponed that, the appellant's claims had no constitutional basis, and that in any event, the alleged violations, if any, arose before the promulgation of the current Constitution.

On 9th December 2014, the High Court at Busia (Tuiyott, J.) ordered the parties to file their respective written submissions, whereupon the matter would be mentioned for the highlighting of the submissions or for a date for judgment to be issued by the court. On 10th March 2015, the court ordered that the suit be transferred to the Industrial Court at Kisumu.

On 2nd July 2015 when the suit was mentioned before Onyango, J. of the Employment and Labour Court, Ms. Lavuna for the 2nd respondent applied for leave to be granted to file a preliminary objection and a Notice of Motion on the issue of limitation. Though the application was opposed by the appellant's counsel, upon hearing the parties' submissions, the court allowed the 2nd respondent leave to file a preliminary objection and a Notice of Motion.

On 10th August 2015, the 2nd respondent filed a Notice of Motion where the grounds were that the appellant's petition was time barred under the *Public Authorities Limitation Act* and under *section 90 of the retired Employment Act Cap 226*; that the complaints therein arose outside of the appellant's employment, and that though the appellant had pleaded that his rights were violated, the rights alluded to were with respect to the current Constitution, yet he was dismissed before it had been promulgated; that the appellant was not at any time employed by the 2nd respondent, and therefore no cause of action arose against the 2nd respondent. The motion was supported by an affidavit of May Migizi Magomere sworn on 7th August, 2015. Also filed was a preliminary objection dated 4th August, 2015 which contended in the main that the petition was time barred.

The appellant opposed the preliminary objection on the grounds that it had been filed out of time, and further that the defence of limitation had not been pleaded. In a replying affidavit in response to the motion sworn on 21st August 2015, the appellant deponed that no limitation of time was specified by the Constitution for the institution of a suit on the violation of human rights, and therefore the suit was not time barred; that the constitutional petition instituted sought an interpretation of his constitutional rights, and whether or not his rights had been violated due to the failure by the respondents to communicate his employment status.

Having considered the applications and the submissions of the parties, the learned judge framed three issues for determination; whether the motion was properly before the court; whether the 2nd respondent was properly joined in the suit and whether the petition was time barred.

The court ruled that the Notice of Motion on limitation of time brought under the *Public Authorities Limitation Act*, was properly before the court for determination; that the 2nd respondent was not in existence at the time of the appellant's cause of action arose, and was not therefore properly joined as a party to the proceedings, and finally, that on issue of limitation, the court found that the appellant's

petition was not a constitutional petition, and that any violations alleged arose out of the termination of his employment on 29th May 1985, and therefore it was time barred. On this basis, the court dismissed the appellant's petition in its entirety.

The appellant was aggrieved by the decision and has appealed to this Court on the grounds that, the learned judge fell into error when she re-opened the case and entertained the 2nd respondent's application dated 4th August 2015 when the suit was awaiting judgment; in entertaining an application for limitation of action which was not pleaded; in failing to appreciate that the mention of 2nd July 2015 was to obtain a date for judgment; in failing to hold that the appellant's constitutional rights were violated by the respondents; in holding that the appellant's claim was time barred; in failing to give directions in respect of the 1st respondent.

In his submissions, learned counsel **Mr. J. V. Juma** submitted that on 10th March 2015, when the suit was transferred to the Employment and Labour Court, all that was awaited was a date for judgment; that during a mention for such date, the 2nd respondent's counsel sought leave to file a preliminary objection and a Notice of Motion wherein limitation was pleaded; that it was too late for such issues to be raised as the parties had closed their pleadings. Citing ***Achola vs Hongo LLR No. 4007 [CAK]*** counsel further submitted that since limitation had not been pleaded in opposition to the petition, it could not be raised after the close of the pleadings.

It was counsel's further complaint that, it was not clear whether the court was dealing with the petition or the motion, and in so doing, the court did not determine whether or not his rights had been violated by the respondents, which violations continue to persist, as the appellant is still unaware of his employment status.

Mr. Twahir Mohammed, learned counsel for the 1st and 2nd respondents opposed the appeal. Counsel submitted that, counsel for the appellant applied for the transfer of the suit from the High Court at Busia to the Employment and Labour Court at Kisumu; that on admission, the suit became subject to the applicable rules of that court, which made way for the filing of the preliminary objection and a Notice of Motion on limitation.

It was further submitted that following withdrawal of the preliminary objection, the appellant proceeded to argue against the Notice of Motion; that on the question of limitation, the court rightly found that the petition was time barred. Counsel further submitted that, the appellant was never an employee of the 2nd respondent, and that he had left employment before the 2nd respondent came into existence.

We have considered the record and the submissions of parties and are of the view that the issue in the main for our determination is whether the learned judge rightly exercised her discretion to hear and determine the 2nd respondent's Notice of Motion dated 4th August 2015 after both parties had closed their case, and were awaiting a date for judgment.

The circumstances under this Court may interfere with the exercise of discretion as stated in ***Mbogo & Another vs Shah [1968] E A 93*** are that, an appellate court has no jurisdiction to interfere with exercise of such discretionary power exercised by the trial court unless the court has acted on wrong principles, has misapprehended the law or has acted on no evidence or that he is plainly wrong.

On the issue of whether the learned judge rightly admitted and determined the application, the court stated thus;

“When this matter was transferred to this court, the suit was fixed for mention for directions on 2nd July, 2015. On that day the Respondent sought and was granted leave to file a Preliminary Objection. The 2nd Respondent filed both the Preliminary Objection and this application, and as I have already stated herein before, the 2nd Respondent abandoned the Preliminary Objection in favour of the application. The Petitioner's counsel's argument that his matter was pending for

judgment is therefore not correct as the case came up before this court for directions. There is no restriction in law to the time for filing applications. Having not objected to the 2nd Respondent abandoning the Preliminary Objection in favour of the application, the Petitioner cannot be heard to raise objections to the same.

At the outset, it is important to appreciate that this was a constitutional petition brought by the appellant against the respondents where it was alleged that the respondents had violated and were continuing to violate his constitutional rights and freedoms which included, the right to employment and dignity, freedom from torture, cruelty, inhuman or degrading treatment or punishment, and the right to fair administrative action. As such, the petition constituted the appellant's entire suit against the respondents in respect of the alleged violations where the court was being called upon to determine whether such rights had been violated, and if so, to issue an order for compensation for lost salary and other employment benefits from February 1981 to the date he was to retire from service, damages and costs.

In compliance with the Busia High court order of 9th December 2014, the appellant filed his written submissions on 22nd January 2015 and the 2nd respondent filed theirs on 10th February 2015. The 1st respondent did not enter appearance and did not participate in the proceedings. Thereafter what was awaited was a date for highlighting of the submissions or a date for judgment.

With this in mind, our reading of the 2nd respondent's motion dated 4th August 2015, points to an attempt, rather belatedly, to amend their pleadings so as to plead the defence of limitation against the petition.

Whilst **order 8** of the **Civil Procedure Rules**, stipulates the manner and allows for the amendment of pleadings, it was also specified in the case of ***Eastern Bakery vs Castelino [1958] E.A. 461***, at 462 by Sir Kenneth O'Conner, President of the predecessor of this Court, that;

“It will be sufficient ... to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.”

In the instant case, the High Court at Busia proceeded on the basis of the pleadings that were before it, and on 9th December 2014, the court ordered;

“1) The matter shall be heard on the basis of affidavit evidence.

2) The petitioner to file and serve submissions within 45 days

3) The respondent to respond within 30 days of service.

4) Mention on 10th March, 2015 for highlighting or ruling of a judgment date...”

On 10th March 2015, the appellant's counsel, Mr. Juma, applied for the petition to be transferred to the Industrial Court at Kisumu, which application was thereafter granted by that court. On 14th May 2015 the Deputy Registrar of the Employment and Labour Relations Court ordered;

“Petition fixed for mention for a Judgment date on 2/7/2015.”

When the suit was mentioned before M. Onyango, J. on 2nd July, instead of the court issuing the parties with a date for judgment, counsel for the 2nd respondent, Ms. Lavuna, without due reference to the purpose of the mention, stated;

“This matter was before the constitutional court but directions were given that it be transferred to this court for directions. My instructions are that because the issue of limitation has been raised we be granted leave to file a preliminary objection within 2 weeks.”

Ms. Lavuna's submission was not correct. The Busia High Court's orders were clear. The parties were to file written submissions, which they did, following which a date for judgment was to have been given. This meant that the proceedings were already closed, and a judgment date was awaited. The record then shows that the petition was fixed for mention before the judge with the object of obtaining **"...a Judgment date on 2/7/2015."**

Notwithstanding that the learned judge was of the view that the suit before her was for directions, it is apparent that she did not appreciate the status of the proceedings, and instead allowed the 2nd respondent to file the notice of motion, which was detrimental to the appellant's petition in which a judgment was awaited at the time.

Additionally, the lower court ought to have also taken into account the nature and impute of the application, which in this case concerned the question of limitation. More specifically, **order 2 rule 4 (1)** of the **Civil Procedure Rules** which stipulates;

"A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality;

a) which he alleges makes any claim or defence of the opposite party not maintainable;

b) which, if not specifically pleaded, might take the opposite party by surprise; or

c) which raises issues of fact not arising out of the preceding pleading."

In the case of ***Achola & Another vs Hongo & Another (supra)***, the Court cited ***Halbury's Laws of England, fourth edition, volume 36*** at paragraph 48 page 38 headed; ***"Matters which must be specifically pleaded"*** which states;

"The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality." (Emphasis ours)

Under **order 2 rule 4 (1)** of the **Civil Procedure Rules**, questions of limitation of time are required to be specifically pleaded by the respondent. See also ***Town Council of Awendo vs Nelso Oduor Onyango & 13 others [2013] eKLR***. There was no mention of the defence of limitation in the 2nd respondent's replying affidavit, and neither was it canvassed in the written submissions. In the absence of such amendment, it was not possible for the 2nd respondent to raise such defence of limitation.

We are of the view that, the learned judge ought to have taken into account that to allow the application on limitation to be filed would undoubtedly subject the petitioner to extreme prejudice and injustice as, such pleadings by their nature introduce substantively new causes of action, which in this case was not envisaged or contemplated by the petition, the replying affidavit or the impending judgment. As a consequence, their inclusion resulted in injury to the petitioner brought about by the subsequent dismissal of the petition on the basis of limitation, and not its substantive merits, which injury was not capable of being compensated in costs.

There is one final matter that we think the learned judge ought to have considered in the exercise her discretion, which was, whether the claim that was embodied in the constitutional petition was time barred. It is trite that, neither the retired constitution, nor the Constitution 2010 have specified a period of limitation within which a constitutional petition ought to be filed. What the learned judge did not appreciate was that, since the suit was concerned with allegations of violations of fundamental rights under the Constitution, which violations were alleged to have continued to date, the question of limitation did not arise, and therefore, the suit could not have been time barred.

From the above, the only conclusion we can reach is that the learned judge ought not to have exercised her discretion to allow the application filed on 10th August, 2015 seeking the dismissal of the appellant's petition. As a consequence, we must interfere with that decision and, set aside the order of the court dismissing the appellant's petition, and substitute thereto with an order reinstating the appellant's suit. We further decree that the suit in the Employment and Labour Court be heard on its merits before another judge of that court, excluding Onyango, J. We order each party to bear their own costs in this Court.

Dated and delivered at Kisumu this 20th day of July, 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.

DEPUTY REGISTRAR