David Ngugi Waweru v Attorney General & another (Civil Appeal 317 of 2014) [2017] KECA 420 (KLR) (14 July 2017) (Judgment)

David Ngugi Waweru v Attorney General & another [2017] eKLR

Neutral citation: [2017] KECA 420 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 317 OF 2014

PN WAKI, RN NAMBUYE & PO KIAGE, JJA

JULY 14, 2017

BETWEEN

DAVID NGUGI WAWERU ..... APPELLANT

AND

HON. ATTORNEY GENERAL ..... 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

(An appeal from the Judgment/Ruling and Decree of the Industrial Court of Kenya at Nairobi (Nzioki wa Makau, J) dated 16th June, 2014inIndustrial Cause No. 576 of 2011))

JUDGMENT

1. The appellant is challenging an order made by the Employment and Labour Relations Court (ELRC) (Nzioki Wa Makau, J.) on16th June, 2014, striking out his claim for having been filed hopelessly out of time. He listed some 15 grounds of appeal for that challenge but they were collapsed into one ground in written submissions by counsel on record for him M/s Kinoti & KibeCompany, Advocates. The issue, which is referred to as "the crux of thematter" is; when does a cause of action accrue? To that we shall revert shortly.

2. The appellant was employed as a clerical officer in the Kenyan judiciary on 21st March, 1991 but on 29th April, 2004 he received a letter from the Judicial Service Commission (JSC) dismissing him from employment for gross misconduct with loss of all benefits. He appealed the dismissal to the JSC and the dismissal was on 13th July, 2006 downgraded to termination in the public interest with payment of benefits. Two months later on 14th September, 2006, the appellant filed a Judicial Review application before the High Court seeking an order of certiorari to quash the decisions of JSC made on 29th April, 2004 and 13th July, 2006 and an order of mandamus to reinstate him to employment. On 17th June,

2009, the High Court (Nyamu, J., as he then was, and Wendoh, J.) found favour with the appellant's arguments that the dismissal/termination may well have been procedurally unfair, in breach of natural justice, unreasonable, biased and therefore deserving of judicial review order of certiorari. But the order of mandamus was not available as sought. Nevertheless, the court found that, this being a master/servant relationship, judicial review was not the most efficacious remedy and suggested the civil courts for recovery of damages. The JR was dismissed and there was no appeal.

3. The appellant did not proceed to the civil courts immediately but waited for about two years until 15th April, 2011 when he went before the IndustrialCourt and lodged his claim against the Attorney General (AG) and the JSC. The claim was based on the dismissal letter of 29th April, 2004 which was revised to termination on 13th July, 2006, and gave particulars of 'unfair dismissal' and 'wrongful, unfair and illegal retirement in public interest'. He sought the following orders:

> " (a)General and exemplary damages for unlawful and premature retirement from the Second Respondent.
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> b. Special damages in the sum of Kshs.2,197,375.
>
> c. Interest on (a) and (b) above at Court rates from the date of filing this suit.
>
> d. Costs of this suit.
>
> e. Any other further relief as the Honourable Court may deem fit and just to grant."

4. Both the AG and JSC in their joint response filed on 17th June, 2011 raised a preliminary issue of law that the suit offended section 3 (2) of the Public Authorities Limitation Act. JSC later sought leave to amend and was allowed to raise two more issues of law on 8th May, 2013:-

> " 2A. The 2nd Respondent shall raise a Preliminary Objection in limine that the claim herein is statue barred under the provisions of Section 90 of the Employment Act, Act No. 11 of 2007 and Section 4 of the Limitation of Actions Act.
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> 2B. The 2nd Respondent shall raise a Preliminary Objection in limine that the claim herein is Res Judicata as the Claimant had filed Judicial Review Miscellaneous Application Number 1423 of 2004 challenging the termination of his employment. The application was dismissed by the High Court Judges Honourable Justice Nyamu and Honourable Lady Justice Wendoh in their Judgment delivered on 17th June, 2009 and no Appeal was preferred. The Claimant is therefore stopped from filing the instant suit."

5. That is the matter upon which Nzioki Wa Makau, J. delivered himself on 16th June, 2014 allowing the objection that the suit was time barred under section4 (1) of the Limitation of Actions Act (Cap. 22) and there was no room for extension of time. In the process, the learned Judge found that the dismissal of the appellant was before the enactment of the Employment Act of 2007 and therefore the Act was not applicable. He further expressed the view that although the entire suit would not be res judicata, "certain aspects of it wouldhave been res judicata and others would be barred by issue estoppel".

6. On the sole reason for striking out the claim, the learned judge, after examining several authorities cited before him, stated as follows:-

> " Limitation is set at 6 years for matters that accrued prior to 2008 while it is limited to 3 years after the effective date. The case before me was filed on 15th April 2011. The cause of action

accrued on 29th April 2004 when the Claimant was dismissed from service. His termination was under the regime of laws prior to the enactment of the Employment Act 2007. In the premises limitation would set in 6 years from date of accrual of cause of action in line with Section 4(1) of the Limitation of Actions Act. Limitation would have set in on 29th April 2010. He filed suit in April 2011one year out of time. The Claimant filed a suit being High Court Misc. Case No. 1423 of 2004 where in Nyamu and Wendoh JJ (as they then were) held that the reliefs the Applicant sought were not capable of grant though a suitable case for recovery of damages could be filed. The decision was made on 17th June 2009 within the period when a suit could be filed for recovery. No suit was filed as far as the case before me suggests."

7. As stated earlier, the challenge to that finding is based on the answer to the question, 'when did the cause of action accrue?', which we now revert to. Learned counsel for the appellant who appeared before us Mr. Denis Muathe adopted the written submissions filed by the Firm of M/s Kinoti & Kibe and made no highlights. It is argued in the written submissions that the Employment Act 2007, was inapplicable in this matter as found by the trial court. The applicable law was section 4 (1) of the Limitation of Actions Act (LAA) which bars actions based on contract from being brought after the end of 6 years from the date on which the cause of action accrued. According to counsel, in matters of employment, the ELRC has taken multiple avenues in defining when a cause of action accrues. The case of Benjamin Wachira vsPublic Service Commision & Another [2014] eKLR was cited where the court held that the cause of action accrued when the employee was notified that his employment file had been closed, thus dashing any hope of reinstatement; the case of Hilarion Mwabolo vs Kenya Commercial Bank[2013]eKLR where the cause of action was held to have accrued from the date of termination of employment; and Hawkins Wagunza Musonye vs Rift Valley Railways Kenya Limited [2015] eKLR where, in defiance of the Court of Appeal decision in Divecon vs Samani [1995-1998] EA 48 stating that extension of time did not apply for contractual claims, the ELRC held that where parties were involved in negotiations with a view to settlement, the clock stops moving and the cause of action accrues after the breakdown.

9. In counsel's submission, it is only in simple contracts where the cause of action accrues on the date of breach. In employment contracts, there must be an understanding, especially in the current constitutional dispensation, that a breach of an employment contract is not fixed; that is, the point at which breach occurs is fluid as there are other mechanisms at play that keep the axe from falling and thus offering redress to the employee. According to him, there is a "floating breach" which may or may not crystallize into a breach of the employment contract, at which point the cause of action would accrue.

10. Counsel further distinguished the case of Attorney General & Another vsAndrew Maina Githinji & Another [2016] eKLR, a decision of this bench by majority, where the crux of the matter was the dismissal date vis-a-vis the end of a criminal trial, and asserted that the case before us involved "dismissal forgross misconduct on 29th April, 2004; appellate review before JSC ending on 13th July, 2006; end of Judicial review on 17th June, 2009; and continuing appellate review before JSC ending on 6th July, 2012". It was submitted in those circumstances that the cause of action arose when the appellant was aggrieved by the decision of JSC to retire him in the public interest on 13th July, 2006. That is why he went before the JR Court to challenge the decision-making process and was vindicated by the court after five years. The date of judgment of the JR Court could also be the date of accrual of the cause of action, suggested counsel. He called on us to have a human face and consider that the appellant was being punished for his due diligence and good faith in pursuing the JR remedy first and the inordinate delay in the JSC appellate process. He cited several authorities in aid of those submissions including:-

The New York Civil Practice Law and Rules CPLR 203 (a), Republic vs Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR, Keroche Breweries Limited & 6 Others vs Attorney General & 10 Others [2016] eKLR, Bonface Inondi Otieno vs Mehta Electricals Ltd [2016] eKLR.

11. Finally counsel imported the "doctrine of equitable tolling" from the US Supreme Court case of Heimeshoff vs Hartford Life & Accident InsuranceCo. et. al. No. 12-729, 567 US 310 (2013). Simply put it states that if a plaintiff files a suit first in one court and then refiles it in another, the statute of limitation does not run while litigation is pending in the first court if the defendant had notice of the suit, there is no prejudice to the defendant and the plaintiff's conduct was reasonable and in good faith. The appellant here, in counsel's view, met those terms and therefore the cause of action arose after the judgment of the JR Court on 17th June, 2009. It follows that the claim lodged on 15th April, 2011 was timeous, he concluded.

12. In response, State Counsel, Ms. Odhiambo for the AG similarly relied on written submissions without highlighting. She submitted that the limitation period in this case is the one provided for under the LAA since the cause of action arose before the enactment of the Employment Act, 2007. In her view, the cause of action accrued on the date the appellant was dismissed from employment, that is, 29th April, 2004. The suit was therefore legally barred as there was no provision for extension of time as stated in the case of Thuranira Karauri vs Agnes Ncheche [1997] eKLR.

13. Finally, learned counsel for JSC Mr. Mansur Issa, instructed by M/s Issa & Company Advocates, filed no written submissions but orally responded to the appeal. He was emphatic that the cause of action accrued upon the appellant's dismissal on 29th April, 2004 and he had six years up to 29th April, 2010 to file any claim. Instead, the appellant chose the wrong remedy and wasted five of those years, but time did not stop running. Despite the delay, however, observed counsel, the appellant was still within time to file his claim before a civil court after the dismissal of his JR application on 17th June, 2009. But he did not do so until 15th April, 2011, more than one year out of time. On the application of section 4 (1) of the LAA, counsel relied on the Court of Appeal decisions of Divecon Ltd vs Samani(1995-1998) EA 48;The ThuraniraKarauri case (supra); and the Andrew Maina Githinji case (supra); Industrial Court/High Court/ELRC cases of Peterson Waweru Thinwa vs JSCCause941 of 2012 (ur); Timothy M. Mukalo vs Reuben Alubale Shiramba & 3 Others [2005] eKLR and Peter Nyamai & 7 Others vs M. J. Clarke Limited [2013] eKLR.

14. Mr. Issa also took the view that by the time the claim was filed, the applicable law was the Employment Act which came into effect on 2nd June, 2008. It declared that notwithstanding the provisions of section 4 (1) of the LAA, no civil action or proceedings based or arising out of the Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of. Citing the case of Municipality of Mombasa vs Nyali Limited [1963] EA 37, counsel submitted that the Employment Act had retrospective effect unless it expressly says it did not. According to him, the legislative intent was that the limitation period of three years would apply despite the existence of section 4 (1). He nevertheless supported the decision of the ELRC to terminate the claim.

15. We have considered the issue of law raised, the submissions of counsel and the authorities placed before us. As we consider the issue, we are alive to the position taken by this Court in the Thuranira Karauricase (supra) that the issue of limitation goes to jurisdiction and ought to be dealt with in limine. It is not a procedural matter or a matter of discretion unless there was a specific application for that purpose.

16. We first deal with the rather incongruous submission by Mr. Issa that the Employment Act, 2007 had retrospective application and yet he supported the application of section 4 (1) of LAA by the trial court. The authority he relied on for that proposition, the Municipality of Mombasa vs Nyali Ltdcase (supra) seems to give the answer, per Newbold, J.A, thus:

> " Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction.
>
> One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective effect unless a clear intention to that effect is manifested. Whereas, if it affects procedure only, prima facie, it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and rule of construction is only one of the factors to which regard must be had in order to ascertain that intention". [Emphasis added].

17. More recently, the Supreme Court clarified the law on retroactivity and retrospectivity of legislation in the case of Samuel Kamau Macharia &Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR, stating:-

> " As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:
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> i. is in the nature of a bill of attainder;
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> ii. impairs the obligation under contracts;
>
> iii. divests vested rights; or
>
> iv. is constitutionally forbidden."

18. We take the view in this matter that there are no express words in the Employment Act, 2007 or the necessary implication to compel us to declare that it was retrospective in effect. On the contrary, there were clear obligations under contract, vested rights and liabilities in this case that would be affected if the new Act was applied. At all events, the appellant's claim was struck out for violation of section 4 (1) of the LAA after a finding was made that the Employment Act was not applicable. There was no cross appeal by the JSC on that finding. We reject that line of argument by Mr. Issa.

19. There is a long line of authorities on the application of section 4 (1) and we do not share the desperation of the appellant, through counsel, that the law is in a state of confusion or flux in the ELRC. Yes, some conflicting decisions in that court exist. But this Court, which guides the ELRC, has been emphatic that there is no discretion to extend the time limitation of six years set under section4 (1) of LAA - see the Divecon case (supra). The Court has also held in the Boniface Inondi Otieno case (supra) that the pursuit of a parallel remedy does not stop time from running, thus overruling the ELRC which

had extended sympathy to the appellant on account of having pursued similar remedy before another court. The Court stated:

> " ..the preliminary objection taken by the respondent was upheld principally on the basis that the cause of action was time-barred. The appellant?s claim having been filed in September, 2013, it was clearly outside the limitation period provided by section 4(1) of the Limitation of Actions Act ....The appellant?s rejoinder to the fact of the lateness was that he was litigating in claim No. 559 of 2007 against the respondent and based on his submissions, the period when he was litigating should be disregarded in computation of time. Again that may well be the case but the fact of this litigation does not stop the time running. .... As to the issue that court?s must have human face, it is our view that the sword of justice cuts both ways. It applies to the appellant as well as to the respondent. Being courts of justice, we cannot look at only one side and shut our eyes to the other side as there are always competing interests. As an Arbiter, we are called upon to take the interests of each of the parties and to dispense justice without fear or favour. We therefore cannot bend backwards to accommodate the appellant as this would be injustice to the respondent."

That decision also answers the appellant's invitation for adoption of the American "doctrine of equitable tolling" which has statutory basis in that country, and the call to have a human face in considering the appellant's plight in this matter.

20. Finally, this Court has had occasion to grapple with the issue of defining a cause of action and determining when it arises in a contract of employment in the case of Attorney General & Another vs Andrew Maina Githinji & Another[2016] eKLR. Waki, JA with whose decision Kiage, JA agreed, examined the same issue and stated in part, as follows:

> "
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> " 7. The critical question to ask, which I will endeavor to answer, is this: What is a cause of action and when does it arise in a claim for unfair /wrongful termination? .....
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> 8. "A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint." That definition was given by Pearson J. in the case of Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs. Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:-
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> „Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court?.
>
> Lord Diplock, for his part in Letang vs. Cooper [1964] 2 All ER 929 at 934 rendered the following definition:-
>
> „A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.?
>
> I am sufficiently persuaded by those definitions and I adopt them.
>
> 9. When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy from their employer through the court? On the one hand, the AG contends that it was on the date of the respondents? dismissal while the respondents insist it was after their criminal trial was exhausted. There does not seem to be a direct authority

from this Court on the issue, but the Employment and Labour Relations Court has pronounced itself on the matter in several cases, sometimes in conflicting fashion. In many of them however, it has been held that the cause of action for wrongful/unfair termination arises once a claimant is terminated from employment. I will refer to a few of them by way of illustration.

10. In the Benjamin Wachira case (supra), for example, the court, (L. Ndolo J.) expressed itself as follows:-

„On the accrual date of the cause of action which has a direct bearing on running of time, the Claimant takes the view that the cause of action in his case did not accrue until 8th August 2006 when he was notified that his employment file had been closed, thus dashing any hopes of his reinstatement to the public service.

This Court has however taken a different view on this matter in the case Hilarion Mwabolo vs Kenya Commercial Bank [2013] eKLR to the effect that accrual of the cause of action in a claim emanating from an employment contract takes effect from the date of termination as stated in the letter communicating the termination. The fact that an employee whose employment has been terminated seeks a review or an appeal does not mean that accrual of the cause of action is held in abeyance until a final verdict on the review or appeal. In the instant case, the Claimant's termination from the 1st Respondent's employment took effect on 1st October, 2000 as communicated by letter dated 29th September, 2000. It follows therefore that the cause of action upon which the Claimant's claim is based accrued on 1st October, 2000 and that is the date when time began to run as against the Claimant's claim?."

21. We may ask the same question about the appellant in this case: when did he become entitled to complain or obtain a remedy in damages from his employer through the civil court? Was it at the time he received the letter of dismissal on 29th April, 2004 or at the time he received the letter converting the dismissal to termination in public interest on 13th July, 2006 or after the decision of the JR court on 17th June, 2009? The answer, we think, is the 29th April, 2004. For it bears no logic for a cause of action to accrue and then, instead of proceeding to court, the aggrieved party pursues an appellate disciplinary process that would take him outside clearly stated statutory limitation periods. The detour to the JR Court was a calculated risk since, as stated in the Boniface Inondi Otienocase (supra), time did not stop running. In any event, it seems the appellant has himself to blame since time had not run out by the time the JR Court was through with him. He had more than a year to file his claim within the statutory limit but he did not. We have considerable sympathy for him, especially considering the sentiments expressed by the JR Court, but the law must take its course.

22. It must be restated that time limits in litigation serve an important purpose. Under the LAA they were fairly generous but are now considerably shortened in the Employment Act, 2007. In the Andrew Maina Githinjicase it was observed:-

" Time limits in the former Act were subject to the Limitation of Actions Act which in some cases could be as long as 12 years and amenable to extension. By expressly inserting Section 90, the intention of Parliament , in my view, at least in part, must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses dead or untraceable. It is understandable therefore when the Section peremptorily limits actions by the use of the word „shall?."

23. For the foregoing reasons, we uphold the decision of the Industrial Court (ELRC) made on 16th June, 2014, with the consequence that this appeal stands dismissed with no order as to costs.

CONCLUSIO

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR