IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & MURGOR, JJ,A)

CIVIL APPEAL NO. 209 OF 2015

BETWEEN

MAERSK KENYA LIMITED..…….....……..…….APPELLANT

AND

MURABU CHAKA TSUMA..…….....……...…..…..RESPONDENT

(Appeal from Ruling and Order of the Employment and Labour Relations Court at

Nairobi ((Hellen Wasilwa, J.) delivered 25th May 2015)

in

Industrial Cause No. 374 of 2013)

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JUDGMENT OF THE COURT

This appeal is concerned with whether a claim filed by ***the respondent, Murabu Chaka Tsuma*** against ***the appellant, Maersk Kenya Limited*** on 21st March 2013 was time barred under the provisions of ***section 4 (1) (a)*** of the ***Limitations of Actions Act Cap 22 Laws of Kenya*** or whether time for filing of the claim could be extended by ***order 50 rule 4*** of the ***Civil Procedure Rules***.

As a brief background, by a Statement of Claim filed on 21st March 2013, the respondent stated that the appellant employed him as a Security and Safety Coordinator. The respondent's employment letter specified that the appellant would be entitled to terminate the respondent's employment without notice if the respondent was found guilty of any conduct that would justify a summary dismissal. On 11th September 2005, the respondent was suspended from employment following the institution of investigations into a criminal matter in which he was implicated. On 20th September 2006, the respondent was charged in *Criminal Case No 1723 of 2006* with the offence of stealing contrary to ***section 275*** of the ***Penal Code***, and on 20th November 2006, he was summarily dismissed from employment. Subsequently, he was cleared of the charges, following which he filed the claim stating that his dismissal was unjust and unwarranted. He also claimed compensation, loss of earnings, two months' salary in lieu of notice, a Certificate of Service, interest and costs.

The appellant filed a statement of defence wherein it stated that the respondent was summarily dismissed

on 20th November 2006 for gross misconduct arising from a failure to account for money obtained from the appellant in the sum of US Dollars 2205 and a further amount of Kshs. 497,351.

Before the suit was heard, the appellant filed a preliminary objection on a point of law where it was stated that the respondent's claim which had been instituted outside the 3 years' time limit was time barred under ***section 90*** of the ***Employment Ac***t, and as such, ought to be struck out with costs.

The respondent filed grounds of opposition on 7th July 2014 where he asserted that his Employment Contract was dated 20th September 2005 and therefore it was not subject to the provisions of the Employment Act 2007; that limitation of time should be computed under the Limitation of Actions Act Cap 22, which act specified that the time frame for instituting a cause of action was within a period of six years.

In contemplation of this, the appellant filed another preliminary objection on 9th July 2014, this time contending that the respondent's claim was instituted outside the six year limitation period set out under ***section 4 (1)*** (a) of the ***Limitation of Actions Act***, and for this reason it ought to be struck out with costs.

Relying on the case of ***Keziah Stella Pyman & 2 others vs Paul Mwololo Mutevu & 8 others [2013] eKLR*** where this Court applied ***order 50 rule 4*** of the ***Civil Procedure Rules*** to exclude the court's Christmas recess to extend time for filing of a record of appeal, the Employment and Labour Relations Court ruled that, on the basis of the same order and rule, the period between the 21st December in any year and the 13th day of January in the year next following (both days included) in each year commencing 20th November 2006 to 19th November 2012, totaling 210 days, be excluded when computing time for filing of the respondent's claim. The court concluded, *"…the number of days taken from 19th November 2012 pushed the limitation period about 7 months forward to about June 2013"*.

The appellant was dissatisfied with the decision of the Employment and Labour Relations Court and appealed to this Court on grounds that the learned judge erred in finding that the claim was not time barred under the provisions of ***section 4 (1) (a)*** of the ***Limitations of Actions Act Cap 22*** Laws of Kenya; by holding that time did not run during the Court's vacation in respect of the computation of time under the Limitation of Actions Act, and in so doing failed to uphold the appellant's notice of preliminary objection; that the learned judge failed to properly exercise her discretion having regard to the appellant's submissions and authorities.

Mr. Mbaluto, learned counsel for the appellant submitted that the claim should have been struck out on the basis of ***section 4 (1) (a)*** of the ***Limitations of Actions Act***; that according to the Statement of Claim, the cause of action arose on 20th November 2006 when the respondent was dismissed from employment due to gross misconduct; that by this time the Employment Act Cap 226 was in force, but did not comprise a period of limitation to file causes of action unlike ***section 90*** of the present Act; that instead the applicable provision was ***section 4 (1) (a)*** of the ***Limitations of Actions Act*** which specified the time limit as six years; that the cause of action was time barred by 19th November 2012; that the suit was filed on 21st March 2013 which was four months after the limitation period had expired. Counsel cited the cases of ***Mary Kasiwa vs Scorpio Enterprises Limited [2103] eKLR*** for the proposition that a claim filed outside the six year period stipulated by the Limitation of Actions Act was time barred.

In counsel's view, the learned judge misdirected herself when she found that the suit was not time barred by virtue of ***order 50 rule 4*** of the ***Civil Procedure Rules*** whereby during the Court's Christmas vacation period, time stopped running. Counsel asserted that the Civil Procedure Rules were subsidiary legislation, and ***order 50 rule 4*** could not override the stipulations of statute. see the Interpretation and General Provisions Act; that the application of ***order 50 rule 4*** is limited to court orders and has nothing to do with the Limitations of Actions Act.

Mr. Kalii, learned counsel for the respondent opposed the appeal and argued that ***order 50 rule 4*** is applicable to the Limitations of Actions Act and that it could not be overridden by ***section 4 (1) (a)*** of the

Limitation of Action Act; that the respondent was entitled to exclude the Court's vacation period when computing the limitation period. In support of this, counsel relied on ***section 23 (2)*** of the ***Interpretation and General Provisions Act*** which provides that where a statute is repealed, a reference by another law to the provisions so repealed, shall unless a contrary intention is expressed, be construed as reference to the provision of the new law; that ***section 39 (1) (b)*** of the ***Limitation of Actions Act*** qualifies the running of time where a person is estopped from filing a claim. In this case the respondent was on suspension awaiting the employer's decision on the fate of his employment, and therefore the employee was misled into relying on the letter from the employer, and as a consequence failed to file his claim within the limitation period. Counsel cited the case of ***James Mugera Igati vs Public Service Commission of Kenya [2014] eKLR*** for the position that where the employer advises the employee that he is suspended pending the outcome of police investigations, or a decision of the Criminal Court, then it may be taken that the employer has forfeited the right to steer the disciplinary process, and subordinated the managerial prerogative in disciplining the employee to third parties. Counsel concluded by submitting that the few days delay should not be involved in the prejudice of the respondent, as it was his fundamental right to ventilate his case before the court.

In reply Mr. Mbaluto countered that the issue of estoppel was not canvassed before the lower court.

We have considered the pleadings and the submissions of the parties and are of the view that the question in this appeal turns on whether the learned judge was right in declining to strike out the respondent's suit for being time barred by virtue of ***section 4 (1) (a)*** of the ***Limitation of Actions Act,*** for reasons that ***order 50 rule 4*** of the ***Civil Procedure Rules*** provided for exclusion of the court's Christmas recess every year from 2006 until 2012 from the computation of time so as to extend the limitation period for filing of the claim.

In determining whether the claim filed by the respondent was time barred, it is not in dispute that the cause of action arose on 20th November 2006 when the respondent was dismissed from employment. It is also not in dispute that the cause of action arose prior to the enactment of the Employment Act, 2007, so that in computing whether the suit was time barred, the applicable law was ***section 4 (1) (a)*** of the ***Limitation of Actions Act*** which provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

When six years is computed from when the cause of action arose on 20th November 2006, there is no question that the suit ought to have been filed latest before 19th November 2012. Instead it was filed four months later on 21st March 2013.

However, the learned judge applied ***order 50 rule 4*** of the ***Civil Procedure Rules*** and excluded the Christmas recess period for each year commencing 2006 until 2012, which had the effect of extending limitation time, and in so doing, declined to strike out the suit for reasons that it was not time barred.

The question at this juncture is whether the learned judge rightly applied ***order 50 rule 4*** of the ***Civil Procedure Rules*** to hold that the six year period stipulated by the Limitation of Actions Act could be extended in each year from 2006 to 2012 by exclusion of the period between 21st December and 13th January. In other words, did time stop running in each year from 2006 to 2012 during the period between 21st December and 13th January thereby extending the time specified by the Limitation of Actions Act for filing of the respondent's claim? In determining the issue, a consideration of ***section 33*** of the ***Interpretation and General Provisions Act*** will be of necessity. It provides;

> ***"An act shall be deemed to be done under an Act by virtue of the powers conferred by an Act or in pursuance or execution of the powers of or under the authority of an Act, it is done under or by virtue of or in pursuance of subsidiary legislation made under a power contained in that Act."***

The Civil Procedure Rules have been made pursuant to the provisions of the Civil Procedure Act. Under the rules, the court is empowered to enlarge time for doing any act or admitting any proceedings under the rules or where the court has itself specified the time limit.

More specifically, ***Order 50 rule 4*** upon which this appeal turns, is concerned with computation of time in relation to the court's Christmas recess. It stipulates;

> ***"Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleadings or the doing of any other act:***
>
> ***Provided that this rule shall not apply to any application in respect of a temporary injunction."***

In the case of the ***Republic vs. Public Procurement Administrative Review Board & another exparte Teachers Service Commission [2015] eKLR*** the High court cited the case of ***Mokombo Ole Simel & Others vs. County Council of Narok & Others Nairobi HCMA No. 361 of 1994*** which concerned similar circumstances. There, the High Court considered whether ***order 49 rule 5*** of the repealed Civil Procedure Rules was capable of enlarging time specified by ***section 9(2) and (3) of the Law Reform Act,*** and succinctly expressed itself thus;

> ***"If the limited time is prescribed under the Civil Procedure Rules or by an order of the court or by summary notice, the court could enlarge the period. But here the absolute period of six months has been laid down by a different statute namely the Law Reform Act. Order 49 rule 5 of the Civil Procedure Rules cannot be invoked to supersede the express provisions of the Act...Order 49 rule 3A is similarly a piece of delegated legislation and cannot have the effect of amending the express provisions of section 9(2) and (3) of the Act. The said provisions can only be altered or amended by an Act of the Parliament..."***

We respectfully adopt those observations for the purposes of this case. ***Order 50 rule 4*** makes it clear that the rule applies specifically to computing time under the Civil Procedure Rules, or in accordance with an order of the court. Nothing in the rule shows that it was intended to be applied to the time limits fixed by the Limitation of Actions Act, which is a different act from the Civil Procedure Act and the rules. The decision in ***Keziah Stella Pyman & 2 others vs Paul Mwololo Mutevu & 8 others (supra),*** which was relied on by the learned judge concerned an application for extension of time to file a record of appeal under the rules. Unlike the circumstances of the instant case, that decision did not concern, or make any reference to the Limitation of Actions Act.

Conversely, we have closely examined the Limitation of Actions Act. The limitation period in question has been specified by ***section 4 (1) (a)*** of the ***Limitation of Actions Act***, and by virtue of ***section 31,*** in ***Part III*** of the Act, which is headed "extension of the period of limitation" the manner and circumstances have been set out in which the periods of limitation specified by the Act can be extended. No reference has been made under Part III to the Civil Procedure Rules or indeed to ***order 50 rule 4*** so as to enable time to be computed in the manner particularized thereunder. And without such enabling powers, an order or rule is incapable of augmenting the absolute period of limitation stipulated by an Act of Parliament. Consequently, the conclusion reached by the learned judge that the period between 20th November 2006 to 19th November 2012 in each year totaling 210 days could be excluded from the period of six years stipulated by ***section 4 (1) (a)*** so as to extend the period by about 7 months to June 2013, did not have any support in law, and in our view amounted to a misdirection.

Finally, on the issue of estoppel, though we consider it to be an afterthought, for the sake of completeness, we will proceed to dispense with it. Counsel for the respondent submitted that the appellant was estopped from pleading limitation under ***section 39*** of the ***Limitation of Actions Act*** for having failed to communicate the outcome of the investigations following the respondent's suspension from employment on 11th September 2006.

Section 39 of the ***Limitation of Actions Act*** provides that a period of limitation does not run if (a) there is a contract not to plead limitation or (b) that the person attempting to plead limitation is estopped from so doing.

We have considered the materials placed before the court and find that they do not disclose any contract made by the appellant stating that it would not plead limitation, and the respondent has not demonstrated in any way how the appellant was estopped from pleading limitation, more particularly as it is not in dispute that the respondent was dismissed from employment on 20th November 2006. Following his dismissal, nothing precluded him from filing a claim for compensation and loss of earnings within the stipulated period. In our view, the respondent slept on his rights, and equity does not come to the aid of the indolent.

In view of the reasons aforestated, we are satisfied that the learned judge fell into error in applying ***order 50 rule 4*** to the provisions of the Limitation of Actions Act to extend time for filing of the respondent's claim, and we must therefore interfere with that decision.

As such, we allow the appeal, set aside the ruling of the lower court dismissing the appellant's preliminary objection dated 9th July 2014, with the result that the respondent's suit being Industrial Cause No. 374 of 2013 is hereby struck out with costs to the appellant. The appellant shall also have the cost of this appeal.

It is so ordered.

Dated and delivered at Nairobi this 10th day of November, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……..……..

JUDGE OF APPEAL

A. K. MURGOR

……..……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR