



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)**

**CIVIL APPEAL NO. 6 OF 2015**

**BETWEEN**

**KENYA AIRPORTS AUTHORITY ..... APPELLANT**

**AND**

**SHADRACK ABRAHAM KISONGOCHI ..... RESPONDENT**

*(An Appeal from the Judgment and Decree of the Industrial Court of Kenya at Kisumu (Wasilwa, J.)  
dated 17<sup>th</sup> September, 2014*

**in**

**INDUSTRIAL COURT CASE NO. 20 OF 2014)**

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**JUDGMENT OF THE COURT**

**INTRODUCTION**

1. This appeal is against the decision of the Industrial Court at Kisumu (**Wasilwa, J.**) in a claim where the respondent had sued the appellant, his employer, seeking reinstatement to a position he had earlier occupied before his services were terminated, but subsequently re-engaged after about five (5) years, albeit at a lower level. The respondent had also sought, *inter alia*, payment of withheld accrued salary, allowances and pension dues for the period he was out of employment.
2. The appellant denied the respondent's claim. It contended that the respondent's services were lawfully terminated on 31<sup>st</sup> January, 2006 and on 6<sup>th</sup> April, 2011 he was offered a new contract of employment.
3. The trial court held that the termination of the respondent's employment was unlawful, that the alleged new contract of employment ought to have been a reinstatement to his former position and therefore ordered the same. The court further ordered the appellant to pay to the respondent all withheld salaries and allowances amounting to **Kshs.4,831,652/=** and upon his reinstatement the appellant was also ordered to pay him his underpaid salaries and allowances from the date of reinstatement plus his pension savings before the respondent's suspension.

## APPEAL

4. The appellant, being aggrieved by the aforesaid decision, preferred an appeal to this Court. The appellant faulted the trial judge for failing to hold that the respondent's claims for unlawful termination and reinstatement were statute barred; for failing to find the provisions of the **Employment Act, 2007** were not applicable in the circumstances of the case; for holding that the termination of the respondent's employment was unlawful; and for misconstruing its letter dated 6<sup>th</sup> April, 2011 vide which the respondent was given a new contract of employment to imply that the respondent was being reinstated to his former position of Ground Flight Safety Officer III.

## THE APPELLANT'S SUBMISSIONS

5. Regarding the ground that the claims for unlawful termination of employment and reinstatement were time barred, **Mr. Nyaburi Omenyi**, learned counsel for the appellant, submitted that the trial court, without jurisdiction, granted the respondent's ex parte application for leave to institute the suit out of time. The application was brought under **sections 27 and 28** of the **Limitation of Actions Act**, which sections can only be relied upon to seek extension of time in respect of claims of tort. The respondent's claim was based on contract and under **section 4 (1) (a)** of the **Limitation of Actions Act** such a claim cannot be brought after the end of six years from the date on which the cause of action accrued. He cited this Court's decision in **DIVECON V SAMANI [1995-1998] E.A. 48**.
6. The respondent's employment was terminated on 31<sup>st</sup> January, 2006. That is when the cause of action accrued, and therefore any dispute regarding termination of the contract of employment ought to have been filed by 31<sup>st</sup> January, 2012. The suit, having been filed on 28<sup>th</sup> February, 2014 was clearly statute barred, Mr. Omenyi submitted.
7. Counsel further submitted that the learned judge erred in law in finding that the provisions of **sections 41 and 49 (3)** of the **Employment Act, 2007**, were breached by the appellant, as the same were not applicable, the said Act having come into operation on 2<sup>nd</sup> June, 2008 whereas the cause of action arose in January, 2006. The applicable law then was the **Employment Act, Cap 226**, now repealed. The learned judge thus applied the **Employment Act, 2007** retrospectively, the appellant's counsel added.
8. Lastly, Mr. Omenyi submitted that the respondent's employment having been lawfully terminated, he applied for reinstatement on humanitarian grounds. Although the appellant's letter of 6<sup>th</sup> April, 2011 addressed to the respondent was headed "**RE-INSTATEMENT**," its contents showed that he had been offered a fresh appointment.

## RESPONDENT'S SUBMISSIONS

9. In reply, **Mr. Yogo**, learned counsel for the respondent, submitted that the respondent's suit was based on **Clause 30.8** of the **Collective Bargaining Agreement** that existed between the appellant and the Transport and Allied Workers Union which stipulated that:

**"30.8 pending determination of such criminal charges by court of law the employee shall be on half pay for a period of six (6) months. Thereafter, he shall be on suspension without pay until the case is finalized. If eventually found not guilty, the suspension shall be lifted and the pay withheld paid."**

10. The trial court held that the appellant was guilty of violating the above quoted clause in that it terminated the respondent's employment before the finalization of the criminal case, whereas after his acquittal it was supposed to reinstate him to his employment and pay him all the withheld dues; counsel argued, adding that the trial court was right in its interpretation of the

appellant's letter of 6<sup>th</sup> April, 2011.

11. Mr. Yogo further submitted that the cause of action arose on 6<sup>th</sup> April, 2011 when the respondent was reinstated to employment, albeit on different terms, and not on 31st January, 2006 when his employment was terminated. In the alternative, counsel argued, even if the cause of action arose on 31<sup>st</sup> January, 2006, the trial court had jurisdiction to enlarge time following the application filed by the respondent. In his view, the use of the word "may" in **section 4 (1)** of the **Limitation of Actions Act** implied that the court could permit a suit based on contract to be filed even after expiry of six years from the date on which the cause of action accrued.
12. Regarding applicability of **sections 41 and 49 (3)** of the **Employment Act, 2007**, the respondent's counsel submitted that section 92 (3) of the Act permits a court in appropriate instances where the contract of employment was entered into before 2007 and if the terms thereof are less favourable than those stipulated in the Act, to apply the 2007 Act retrospectively. That line of submission was however criticized by the appellant's counsel, who argued that a proper reading of **section 92 (3)** does not permit application of the Act retrospectively.

### **DETERMINATION**

13. We have carefully considered the submissions made by counsel.

We shall first consider grounds **1** and **2** where the appellant contended that the respondent's suit was time barred. On 12<sup>th</sup> February, 2014 the respondent, appearing in person, argued his application for leave to file the suit out of time and told the trial court:

**"I ran out of statutory period of filing as I have been engaging my employer seeking justice which is not forthcoming."**

The learned judge, in her brief ruling, held:

**"Upon hearing the application herein, (sic), upon perusing his affidavit sworn on 10.2.2014, I grant order sought and allow him to file suit out of time."**

14. The appellant's counsel argued that the trial court had no jurisdiction to do so, considering the express provisions of **section 4 (1)** of the **Limitation of Actions Act** which states that:

**"The following actions may not be brought after the end of six years from the date on which the cause of action accrued –**

- (a) actions founded on contract;**
- (b) actions to enforce a recognizance;**
- c. **actions to enforce an award;**
- d. **actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**
- e. **actions including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law. "**

**Section 4 (2)** stipulates that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued, although

**section 27** stipulates instances when time may be extended in such cases.

15. The application for extension of time was filed under the provisions of **sections 27 and 28** of the **Limitation of Actions Act**. **Section 27** relates to extension of limitation period in case of ignorance of material facts in actions founded on tort where negligence is alleged. **Section 28** basically sets out the procedure of filing the applications provided for by the preceding **section 27**. The respondent's suit had nothing to do with the tort of negligence and therefore the trial court had no jurisdiction to entertain the application for extension of the statutory period for filing of the suit.

16. This Court, in **MARY OSUNDWA V NZOIASUGAR COMPANY LIMITED [2002] eKLR**, expressed its views regarding the provisions of **section 27** of the **Limitation of Actions Act** as follows:

**“This section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort.**

**This section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other cause of action other than those in tort.”**

17. We do not agree with Mr. Yogo that the use of the word “*may*” in **section 4 (1)** implies that the trial court had discretion to do that which is expressly prohibited by statute. That would be erroneous construction of the section.

18. There was no doubt in the respondent's mind that his intended suit was statute barred. He stated as much in his affidavit in support of the application for extension of time and reiterated the same in his oral arguments before the trial court. The respondent stated that his services were terminated on 31<sup>st</sup> January, 2006 before finalization of the criminal case that had been filed against him. He contended that termination was a violation on **clause 30.8** of the **Collective Bargaining Agreement** between his Trade Union and the appellant. The cause of action therefore arose on 31<sup>st</sup> January, 2006 and not on 6<sup>th</sup> April, 2011 when he was reinstated to his employment.

19. The fundamental issue is whether the trial court had jurisdiction to extend time to enable the respondent to file the suit in the first place. The answer must be in the negative. The trial court simply acted without jurisdiction. In **SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR**, the Supreme Court 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. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”**

20. Although the issue of jurisdiction was raised by the appellant's counsel in his submissions, the learned judge side stepped it completely in her judgment. Had she addressed her mind to it she would have realized that the grant of the ex parte application for extension of time was erroneous.

21. Having reached the firm conclusion that the trial court acted without jurisdiction in allowing the respondent to file his suit outside the statutory period, we must allow this appeal. It would be superfluous to make determinations on the other grounds of the appeal since in law the suit had no legal basis at all. Jurisdiction is the jurisprudential bedrock of any court decision and without it, as in this case, a court's findings are as nullity.

22. This appeal is hereby allowed and the judgment of the Industrial Court made on 17<sup>th</sup> September, 2014 is set aside in its entirety.

The respondent shall bear the costs of the suit before the trial court as well as the costs of this appeal.

**DATED AND DELIVERED AT KISUMU THIS 31<sup>ST</sup> DAY OF MAY, 2016.**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

I certify that this is

a true copy of the original.

**DEPUTY REGISTRAR**