



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI, J. MOHAMMED & OTIENO-ODEK JJ.A)

CIVIL APPLICATION NO. NAI. 100 OF 2015 (UR 81/2014)

BETWEEN

Mr. & Mrs. JUSTICE E.TORGBOR.....APPLICANTS

AND

LADISLAUS ODONGO OJUOK.....RESPONDENT

(An application for stay of further proceedings pending the hearing and determination of an intended appeal from the Ruling and Order of the Employment & Labour Relations Court at Nairobi (Mbaru, J.)

dated 5th February 2015

in

IND. C. C. No. 153 of 2012)

RULING OF THE COURT

1. Before us is a Notice of Motion dated 17th April 2015 by the applicant seeking *inter alia* the following order:

a. That there be a stay of further proceedings in the Employment & Labour Relations Court Cause No. 153 of 2012 Ladislaus Odongo Ojuok -v- Mr. & Mrs. Hon. Torgbor, pending the hearing and determination of Civil Appeal No. 65 of 2015, Justice E. Torgbor (rtd) & another -v- Ladislaus Odongo Ojuok.

2. The respondent has lodged a claim against the applicants before the Employment & Labour Relations Court at Nairobi being Cause No. 153 of 2012. In the claim, the respondent avers that on or about 4th March 1999 he was employed by the applicants as a night security guard at their home at a monthly salary of Ksh.4,000/= without housing allowance of Ksh.750/= per month as contained in the **Employment Act** under the **Protective Security Services Order of 1998**; that under the said Protective Security Services Order, he was to work for 52 hours a week and any overtime was to be paid for at the rate of 1.5 times the

normal rate of hours worked and that he worked for 72 hours per week from 4th March 1999 to 1st July 2011 when his services were unfairly terminated. Consequently, the respondent claims against the applicants *inter alia* a sum of Ksh. 20,186,726/= being a total of 213,120 hours of overtime worked between 4th March 1999 to 1st July 2011.

3. Upon service of the claim upon the applicants, a statement of defence was filed and a Notice of Preliminary Objection filed. The applicants raised the following points of law in their preliminary objection:

“(i) The alleged claim is in any event statute barred under the provisions of Section 4 (1) of the Limitations Act as read together with Section 90 of the Employment Act 2007.

ii. That the Statement of Claim is incurably defective, as a non-existent person has filed it whose national identity number is neither stated nor verifiable, thereby contravening the rules of natural justice and the respondent’s right to a fair trial.”

4. When the matter came up for hearing before the Employment & Labour Relations Court, the court directed the parties to address and argue the preliminary objection with regard to operation of **Section 4 (1)** of the **Limitation of Actions Act** and **Section 90** of the **Employment Act**. The gist of the preliminary objection is whether the respondent’s claim for overtime from 4th March 1999 to 1st July 2011 is statute barred and caught by the Limitation of Actions Act.

5. **Section 4 (1)** of the Limitation of Actions Act provides as follows:

“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.

c.

d.

e.

f.”

6. **Section 90** of the Employment Act, 2007 provides as follows:

“Notwithstanding the provisions of Section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based on or arising out of this Act or 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 or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

7. The applicants in the preliminary objection submitted that the respondent’s claim for overtime is for a period exceeding six years and as such, **Section 4 (1)** of the Limitation of Actions Act applies making any claim beyond six years time-barred; the applicant further contends that **Section 90** of the Employment Act reduced the six year limitation under **Section 4 (1)** in the Limitation of Actions Act to three (3) years and as such, the respondent is only entitled to lodge any overtime claim for a maximum of three years.

8. The respondent in reply to the preliminary objection stated that his contract of service was terminated on 1st July 2011 and this is the date upon which his cause of action for overtime claim accrued and

limitation period should be calculated from 1st July 2011 and not from 4th March 1999; the respondent urged that he was in continuous employment from 1999 to 2011 and all overtime claims accrued becoming due and payable from the date of dismissal.

9. The learned judge (Mbaru, J.) upon hearing the parties, delivered a ruling dated 8th February 2015 dismissing the preliminary objection. It is this ruling that is subject of the intended appeal. In dismissing the preliminary objection, the learned judge expressed himself as follows:

“In this case, where the basis of the claim filed by the Claimant is his termination noted to be on 1st July 2011, then limitation of time must be looked at as under the applicable law as of 1st July 2011. The claim was filed on 31st January 2012. ... I therefore find that the Claimant is within the provisions of Section 90 of the Employment Act. The suit is not time barred as it is filed within the appropriate legal limitation.”

10. Aggrieved by dismissal of the preliminary objection, the applicant has filed this interlocutory appeal citing various grounds which can be summarized and compressed as follows:

“(i) That the learned judge having appreciated that the claim was lodged on 31st January 2012 erred in law and misdirected herself in finding that the court had jurisdiction to hear and consider the whole of the respondent’s claim for overtime; that the cause of action for each monthly overtime claim accrued at the end of each monthly pay cycle as provided under Section 5 (2) (d) of the Employment Act (Cap 226) which was the applicable law until 2008.

ii. That the learned judge erred in failing to appreciate that the 6 year limitation period for each monthly overtime claim commenced independently under Section 4 (1) (a) of the Limitation of Acts Act and any claim for overtime payment under the Regulation of Wages (Protective Security Wages) Order 1998 from 1st April 1999 to 2nd October 2002 became statute barred by 2nd October 2008 under the six year limitation period under Section 4 (1) of the Limitation of Actions Act.

iii. That the learned judge erred in failing to note that the six year limitation period under Section 4 (1) (a) of the Limitation of Actions Act was replaced with a statutory 3 year limitation period for each monthly overtime claim.

iv. That the learned judge erred in failing to note that the cause of action for each monthly overtime claim, accrued at the end of each monthly pay cycle under Section 18 (2) of the Employment Act 2007.

v. That the learned judge erred in failing to find that the Court had limited jurisdiction to consider claims of overtime, house allowance or leave only for periods not covered by the limitation periods as provided by Section 90 of the Employment Act.

iv. That the learned judge erred in not striking out all statute barred claims.”

11. At the hearing of this appeal, learned counsel Ms. Najma Sheib appeared for the applicant while learned counsel Messrs Daniel Rakoro appeared for the respondent. The respondent did not file a replying affidavit to the Notice of Motion.

12. Counsel for the applicant reiterated the grounds of the intended appeal as cited in the Memorandum of Appeal as filed; it was submitted that the record of appeal had been filed and the main appeal is Nairobi Civil Appeal No. 65 of 2015. This Court was urged to grant stay orders pending the hearing and determination of the appeal that had been filed and served.

13. On the merits of the present application, counsel for the applicant submitted that the intended appeal raises the question of jurisdiction of the Employment and Labour Relations Court to hear and determine claims that are statute barred. Specifically, it was submitted that interpretation of **Section 4 (1)** of the

Limitation of Actions Act and **Section 90** of the Employment Act go to the jurisdiction of the Employment & Labour Relations Court; that the intended appeal relates to a jurisdictional question that should be canvassed and determined before the Employment and Labour Relations Court can be allowed to hear the claim now pending before it. Citing the *dicta* of Nyarangi J. in **Owners of the Motor Vessel “Lillian S” v. Caltex Oil, (Kenya) Ltd [1989] KLR 1** counsel emphasized that jurisdiction is everything and if a court has no jurisdiction it must down its tools. It was submitted that this Court should grant an order to stay proceedings before the Employment & Labour Relations Court to enable this Court consider and determine the correct interpretation of **Section 4 (1)** of the Limitation of Actions Act as read with **Section 90** of the Employment Act and to determine whether the cause of action in a claim for leave and overtime payments accrue monthly or is a continuous claim whose cause of action accrue and arise at termination of employment.

14. Counsel for the appellant submitted that the intended appeal is arguable in that it raises the issue of jurisdiction of the Employment & Labour Relations Court to hear statute barred claims; that if stay of proceedings is not granted, the intended appeal shall be rendered nugatory to the extent that the Employment & Labour Relations Court shall consider and determine claims upon which it has no jurisdiction and the applicant and other potential litigants will be subjected to a jurisdiction that does not exist in law; that it is in public interest that this Court should grant stay orders to protect the applicant and other potential litigants from being subjected to a non-existent jurisdiction.

15. Counsel for the respondent in opposing the application for stay urged this Court to find that there was no arguable appeal; that the intended appeal is against a ruling delivered in a preliminary objection and the learned judge properly held that the respondent’s claim was made within 3 years of termination of his contract of employment. Counsel urged this Court to find that the operative provision of law was **Section 90** of the Employment Act and not **Section 4 (1)** of the Limitation of Actions Act; that there is no issue of interpretation of **Section 4 (1)** of the Limitation of Actions Act; that the facts of this case are not disputed particularly that the respondent’s contract of employment was terminated on 1st July 2011. It was further submitted that the present application as well as the intended appeal are premature; that the Employment & Labour Relations Court has not even heard the respondent’s claim; that this Court should not grant stay orders but should let the respondent’s claim before the Employment & Labour Court to be heard and determined and thereafter the applicant can appeal if dissatisfied with any judgment that shall ensue. Counsel submitted that a comparison of the Preliminary Objection filed with the Memorandum of Appeal filed in the intended appeal shows that the applicant is intent on making a partial appeal against the claims made by the respondent; that there are other claims made by the respondent which are not disputed or caught up by the alleged limitation of actions. As regards prejudice being suffered by the respondent, counsel submitted that the respondent is out of employment, his contract having been terminated; he has not been paid wage arrears, leave days, overtime and other benefits; that stay of proceedings will mean the respondent shall continue being denied his wage arrears and other benefits which are not statute barred.

16. We have considered the application before us and the submissions made by counsel in the matter. This being a motion asking the Court for an order of stay of proceedings under **Rule 5 (2) (b)** of the Rules of this Court, the applicant is required to satisfy the Court that its appeal, which has already been filed, is an arguable one and that unless we grant the stay order the appeal if successful will be rendered nugatory.

17. On the issue of arguability of the appeal, it is our understanding that the applicant contends that at the core of the intended appeal is the jurisdictional competence of the Employment and Labour Relations Court in so far as limitation of actions is concerned under **Sections 4 (1)** of the Limitation of Actions Act as read with **Section 90** of the Employment Act. Whenever a cause of action is statute barred, a court has no jurisdiction to deal with the matter. In **Gathoni vs. Kenya Co-operative Creameries Ltd Civil Application No. 122 of 1981**, Potter, J. observed in *obiter* that;

“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest”

18. From the facts of this case, there are two arguable dates from which the overtime claim and limitation of actions should be computed. It is the applicant's case that overtime claim and limitation of action should be computed from 4th March 1999 when the respondent was employed; on the other hand the respondent contends that the overtime claim should be computed from 1st July 2011 when his contract of employment was terminated. This by itself is an arguable point and whether it is successful will depend on whether it is held that the cause of action in a claim for overtime arose in 1999 or in each monthly pay cycle or in 2011 when the employment was terminated.

19. We have discerned another arguable point to involve a determination as to when the respondent's cause of action arose in relation to overtime and other claims. The applicant contends that a claim for overtime is a cause of action that arises at the end of each and every month when monthly wages fall due and owing. In contrast, the respondent asserts that his cause of action and claim for overtime payment arose when his contract of employment was terminated on 1st July 2011. These competing assertions reveal an arguable point. Is overtime payment due and owing on the regular payday for the pay period covered or is it due and owing when the contract of employment is terminated? Is the cause of action in a claim for overtime a distinct, separate and independent claim for each pay period or is it one continuous claim whose cause of action arises at termination of the employment contract? Does the time for limitation run from the date of failure to pay the monthly overtime claim or from the date of termination of employment? From the foregoing questions, we are convinced that the applicant has demonstrated that the intended appeal raises arguable points of fact and law.

20. We note that at the core of the intended appeal is interpretation of the provisions of **Section 4 (1)** of the Limitation of Actions Act and **Section 90** of the Employment Act in so far as they affect the jurisdictional competence of the Employment and Labour Relations Court. We have examined recent decisions from the Employment and Labour Relations Court to enable us determine if there is an arguable point of law that requires determination by this Court. In **Maria Machocho -v- Total (K) Industrial Cause No. 2 of 2012**, Radido, J. expressed as follows:

“Before the coming into operation of section 90 of the Employment Act, the statutory limitation period for causes of action based on breach of employment contract or contract of service was that provided for contracts in general, in Section 4(1) of the Limitation of Actions Act, and it was 6 years. Section 90 of the Employment Act has now amended the Limitation of Actions Act to specifically provide for a limitation period of three years in actions based on breach of contract of service or arising out of the Employment Act. I now have to determine whether this Court has the jurisdiction to grant leave or extend time in respect to causes of action based on breach of contract generally and breach of contract of service or actions arising out of the Employment Act specifically. The precedent in this regard was set out by the Court of Appeal in Divecon Ltd v Samani [1995-1998] 1 EA 48 at 54 that section 4(1) of the Limitation of Actions Act was clear beyond any doubt and that the section meant that no one shall have the right or power to bring an action after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.....A perusal of Part III shows that its provisions do not apply to actions based on contract. In the light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that ‘the wording of section 4(1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked.’”

21. In the case of **Fred Mudave Gogo -v- GS Security Services (K) Limited, Industrial Cause No. 846 of 2013** Mbaru, J. observed that a pertinent question is the determination of whether the limitation provisions in **Section 90** of the Employment Act, 2007 is applicable to contracts of service and whether a claim brought after, a period over 3 years from the date of filing this claim is barred by operation of the law and the claim has already lapsed. In **Nicodemus Marani -v- Timsales Limited, Industrial Cause No. 204 of 2013**, Ongaya, J. held that no power of the court has been established empowering the court to extend the time of 3 years prescribed in **Section 90** of the Employment Act to justify the court's entertainment of the suit outside the three year limitation period; that **Section 90** of the Employment Act

provides a time of limitation of 3 years and in an appropriate case, exceptions may exist like is envisaged in **Section 39** of the Limitation of Actions Act. See also **Joyce Wanjiku Muchiko & Another -v- Telkom (K) Limited Industrial Cause No. 1299 of 2011** where Rika, J. held that claims outside three (3) years are statute barred under **Section 90** of the Employment Act.

22. Taking into account the various decisions mentioned above, we note that in the instant case, the learned judge ruled that the respondent's various claims arising between 1999 and 2011 are within the provisions of **Section 90** of the Employment Act and are not time barred. It is our considered view that an arguable point is raised in the intended appeal to reconcile the various authorities cited in this ruling.

23. As to whether the intended appeal shall be rendered nugatory, the applicant submitted that jurisdiction is everything and if a court has no jurisdiction it should down its tools; that it is in public interest that this Court should consider and determine the issues raised to guide and prevent the Employment & Labour Relations Court from considering matters of which it has no jurisdiction; that the appeal shall be rendered nugatory to the extent that the applicant will be subjected to proceedings which are a nullity when a court which has no jurisdiction delves into matters outside its jurisdictional competence.

24. On our part, we reaffirm the *dicta* that jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the court to pause and determine the issue before proceeding with the case. The Supreme Court of Kenya in the cases of **In Re The Matter of the Interim Independent Electoral Commission S.C., Constitutional Application No. 2 of 2011; [2011] eKLR** and in **Samuel Kamau Macharia & A nother v. Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR**, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. It stated:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.

25. In the instant case, it is pertinent for this Court to determine whether the learned judge vide the Ruling delivered on 5th February 2015 exceeded her jurisdiction in light of **Section 90** of the Employment Act. We concur that the intended appeal shall not only be rendered nugatory but there shall be waste of valuable judicial time if it turns out the Employment and Labour Relations Court had no jurisdiction to hear and determine statute barred claims.

26. For the reasons stated above, we are inclined to grant the order as prayed for in the Notice of Motion dated 17th April 2015. Accordingly, we hereby order that there be a stay of further proceedings in the Employment & Labour Relations Court Cause No. 153 of 2012 **Ladislau Odongo Ojuok -v- Mr. & Mrs Hon. Torgbor**, pending the hearing and determination of **Civil Appeal No. 65 of 2015, Justice E. Torgbor (rtd) & Another -v- Ladislau Odongo Ojuok**. Costs of this application shall abide by the outcome of **Civil Appeal No, 65 of 2015**.

Dated and delivered at Nairobi this 17th day of July, 2015

G.B.M. KARIUKI

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR