



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A)

CIVIL APPEAL NO. 29 OF 2014

BETWEEN

BONIFACE INONDI OTIENO APPELLANT

AND

MEHTA ELECTRICAL LIMITED..... RESPONDENT

(An appeal from Ruling of the Industrial Court at Mombasa (Radido, J.)

dated 11th April, 2014

in

INDUSTRIAL COURT CAUSE NO. 290 OF 2013)

JUDGMENT OF THE COURT

This is an appeal arising out of the Judgment of Industrial Court (Radido, J.) delivered on 11th April, 2014. Briefly, the appellant herein instituted a memorandum of claim dated 12th September, 2013 which was subsequently amended on 4th March, 2014. In the memorandum of claim, he sought the following reliefs:

“1. A Declaratory order that termination while undergoing treatment was unlawful, inhumane and violation of Human Rights.

- 2. A Declaratory order that the termination without payment in full terminal dues to the claimants is unlawful (sic).***
- 3. All his benefits including salary for the months of July, August, September and October, 2006 one month’s pay in lieu of Notice all totaling to Kshs. 83,988.00.***
- 4. Compensation for loss of earning capacity at Kshs. 20,000.00 from date of termination to year of retirement at 60 years in 2026 (Annexed of marked B1014 copy National Identity Card) Totaling Kshs. 20,000 x 12 months x 20 years amounting Kshs. 4,800,000.00.***
- 5. Being industrial/work injuries seek (sic) orders to compel respondent pay cost of operation for***

- removal of implants (plates) and specialized treatment.*
6. *Compensation for wrongful termination calculated at Kshs. 20,000.00 for 12 months amounting to Kshs. 240,000.00*
 7. *Computation of underpayment and payment difference. (sic)*
 8. *Issuance of certificate of service.*
 9. *Costs of suit.*
 10. *Interest of (sic) 3, 4 and 6 from date of termination until payment in full.”*
 11. *Any other or further relief as this Honourable Court may consider just.”*

The respondent filed a Notice of Preliminary Objection dated 3rd October, 2013 and subsequently a reply to the Memorandum of claim on 19th December, 2013. In the Preliminary Objection the respondent raised two issues namely:

- i. That the suit was *Res Judicata*.
- ii. That the suit was time barred in view of Section 4 (i) (9) and 4 (2) of the Limitations of Actions Act.

The preliminary objection came up for hearing before Radido, J who delivered his Ruling on 11th April, 2014 and upheld the Preliminary Objection. The appellant was dissatisfied with the Ruling of the Industrial Court and hence this appeal.

In his Memorandum of Appeal dated 16th July, 2014 the appellant contended:-

“1. The Learned Judge erred in Law by upholding the second ground of the Preliminary Objection on the grounds that the claim was statute barred.

2. The Learned Judge erred in Law by holding that he has no jurisdiction or powers to extend time within which the claim is to be lodged.

3. The Learned Judge erred in law by allow and upholding Preliminary Objection not filed and served upon (sic) within 14 days from date of service 13th September, 2013 as required by law, disregard Appellant opposition. (Exbit (sic) page 5 Summons).”

When the matter came before us on 27th November, 2014 the parties opted to dispose of the appeal by way of written submissions. We granted them their wish. The appellant filed two sets of submissions. The first set on 10th December, 2014 and the second set on 19th February, 2015 filed in response to the respondent’s submissions that were filed on 9th January, 2015.

In his submissions the appellant placed blame on the lawyer who acted for him in Civil Suit No. 559 of 2007 for failing to provide sound legal advice as he failed to advise him on the appropriate claims; that in Civil suit No. 559 of 2007, he did not ask for loss of earnings; that he filed Misc. Application No. 2 of 2013 on 21st February, 2013 seeking leave to file suit out of time and which application was dismissed; that on 13th September, 2012 he filed a memorandum of claim which was dismissed following a Preliminary Objection; further that the Preliminary Objection was defective as it was not filed within 14 days of service and finally that ***“the Courts can invalidate any law, Act or omission that denies, violates, infringes or threatens a fundamental right and freedom.”***

In its written submissions filed on 19th January, 2015 the respondent opposed the appeal. Its contention was that under section 4 (1) of the Limitations of Actions Act, the appellant had six years from the date of termination within which to file his claim; that the appellant’s contract of employment was terminated on 18th October, 2006; that he failed to file suit within six years, the last date being on or before 18th October, 2012; and that the suit filed on 12th September, 2013 was clearly out of time. Further, that the appellant had filed Mombasa Misc. Cause No. 2 of 2013 seeking an order for enlargement of time which application was dismissed.

As for the appellant's contention that the Preliminary Objection was defective having been filed 14 days from the date of service, it was the respondent position that a Preliminary Objection can be raised at any stage of the proceedings provided that it is taken at the earliest opportunity. The respondent relied on the following authorities:

1. **Divecon Limited –vs- Samani (1995-1993) 1 EA 48 (CAK).**
2. **Gathoni –vs- Kenya Co-operative Creameries Limited (1982) KLR 104.**
3. **Timothy M. Mukalo –vs- Reuben Alubale (2005) eKLR.**
4. **Hilarion Mwabola –vs- KCB Limited (2013) eKLR.**

In his further response dated 18th February, 2015 the appellant submitted that he commenced action against the respondent by filing suit No. 559 of 2007 wherein he had pleaded breach of contract. According to him, the period when he was litigating should be taken into account in computation of time. He relied on the authority of **Kenya Airways Limited vs Donald Osewe Oluoch Industrial Court Cause No. 1302 of 2013** wherein Nduma, J. cited **K. J. Tomji, the Law of Limitations and Adverse Possession Vol. 1 ButterWorths No. 1938** page 234 paragraphs 14 (1); as follows:

“In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or in a Court of Appeal against the Defendant, shall be excluded where the proceedings is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it.”

He further relied on the authority of George **Musyoki v Sarova Hotels [2014] eKLR** where Njagi, J. delivered himself thus:

“Employment and labour relations matters and disputes must always be awarded human face. Stringent application of the law may not necessarily bring out justice in the circumstances. It would be always necessary to bridge these situations to come out with a case for justice. This is the case here.”

“I would in the circumstances allow the application with no order as to costs.”

We have considered the memorandum of appeal, the pleadings herein, the authorities cited by each of the parties as well as the written submissions. The facts of this case are fairly straightforward and undisputed. It is not disputed that the appellant filed his memorandum of claim in September, 2013 (the exact date of filing could not be discerned from the court stamp) whilst his contract of employment had been terminated by the respondent on 18th October, 2006. The appellant does not deny this, in fact he acknowledges that he filed Misc. Application No. 2 of 2013 seeking an order to be granted leave to file his claim against the respondent out of time and which application was disallowed. He also does not deny that he had filed Civil Suit No. 559 of 2007 against the respondent based on the same cause of action. He however blames his former lawyer for not including a claim for “loss of earnings.” That may well be so but 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** which 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 occurred. a) Actions founded on contract.”*

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. The citation in **Kenya Airways Limited V Donald Osewe Oluoch** relied upon by the appellant is inapplicable as in this case we are not dealing with a claim which had been dismissed for want “--- of jurisdiction or other cause of a like nature -----” but suffice to state that Civil Suit No. 559 of 2007 filed by the appellant and which was founded on the same cause of action was determined on merit. The appellants claim was not dismissed for want of jurisdiction. The citation in the

case of Kenya **Airways vs Donald Osewe Oluoch** (*supra*) is therefore not relevant to the current proceedings.

The other issue raised by the appellant was that the Preliminary Objection ought to have been filed within 14 days of service of the memorandum of claim. Being a preliminary objection on points of law, it could be raised at any stage, the only safeguard being that it has to be raised at the earliest opportune time.

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

We believe we have said enough to show that this appeal is devoid of any merit. It is dismissed with costs.

Dated and delivered at Malindi this 3rd day of July, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR