



**IN THE COURT OF APPEAL OF KENYA  
AT NAKURU**

**Civil Appeal 275 of 2003**

**JOEL BULINGA ANYAMBE & 146 OTHERS ..... APPELLANTS**

**AND**

**UNGA GROUP LIMITED ..... RESPONDENT**

*(Appeal from judgment of the High Court of Kenya at Nakuru (Rimita, J) dated 7<sup>th</sup> June*

*2000*

**In**

**H.C.C.C. No. 98 of 2000)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This is an appeal by Joel Bulinga Anyambe, and 146 Others, all former Unionizable employees of Unga Group Limited, the respondent, challenging the decision of the superior court (Rimita, J) given on 7<sup>th</sup> June, 2000 dismissing their suit against the respondent. In that suit to wit, High Court Civil Case No. 98 of 1999, the appellants had impleaded the respondent for damages for alleged wrongful retrenchment.

In their plaint dated 8<sup>th</sup> March, 1999, the appellants averred, inter alia that they were former members of the Kenya Union of Commercial Food and Allied Workers Union; that in April, 1998, the respondent as their employer then, terminated their respective employments by way of a retrenchment programme; that they did not accept the terms of the retrenchment programme as a result of which they filed a trade dispute at the Industrial Court, namely case No. 34 of 1998. That court rendered an award on 2<sup>nd</sup> December, 1998 in which, in a nutshell, it approved the terms of retrenchment and declared that the respondent was at liberty to proceed with the reduction of its employees through retrenchment on payment of a disquieted package terminating on or about April, 1998.

After the award was made a dispute arose as to what was payable to the appellants. The respondent offered two months salary in lieu of notice, one month's salary for every completed year of service as gratuity, payment for accrued but not taken leave up to 9<sup>th</sup> April, 1998 and Golden Handshake of Kshs.60,000/- as a sign of good will for services the appellants rendered to the respondent. The appellants accepted payment but contended that the termination date should not have been 9<sup>th</sup> April, 1998, but 2<sup>nd</sup> December, 1998, the date the Industrial Court rendered its award. The respondent did not accept that argument and was not prepared to pay more than the amounts computed on the basis we have set out above.

Following the respondent's refusal to pay as demanded by the appellants, the latter filed suit claiming damages on the basis of what they would have been paid had the termination date been 2<sup>nd</sup> December, 1998. The respondent was duly served with summons to enter appearance and the defence.

It neither appeared nor filed a defence within the time stipulated in the Civil Procedure Rules. Consequently, upon request by the appellants, interlocutory judgment was entered against it, and an application to set aside that judgment was dismissed. The suit was set down for formal proof.

Two witnesses testified on behalf of the appellants. These were Francis Ndungu Kimari, one of the appellants, and Olilo Nyumbu, a trade unionist. As this was a formal proof no evidence was adduced in support of the respondent's case.

In his judgment, Rimita, J held that in view of the Industrial Court award of 2<sup>nd</sup> December, 1998, the appellants' suit was *res judicata*. He found as fact that each of the appellants had been paid terminal dues which in his view were consonant with their respective contracts of employment. Consequently, he did not think any of the appellants was entitled to any further payment. He then dismissed the appellants' respective claims as being far fetched and upon dismissal this appeal was provoked.

In their joint memorandum of appeal filed by their advocates, Mirugi Kariuki & Co. Advocates, 7 grounds have been proffered but in submissions before us, the principal issue was whether or not the appellants' suit was *res judicata*. Mr. Karanja for all the appellants submitted that the issue before the Industrial Court related to the issue of redundancy for which an award was made on 2<sup>nd</sup> December, 1998. In his view the period from the filing of the suit in the Industrial Court and the rendering of the award by that court should have been taken into account in computing the appellants' terminal benefits. It was his further submission that as the Industrial Court did not invoke the provisions of **section 16 (2)** of the Trade Disputes Act, which requires the court in an appropriate case to fix a retrospective effective date of its award, the last date for computing terminal benefits was the date the award was rendered.

Mr. Njamwitha, for the respondent, supported the decision of the superior court and submitted that the rendering of the award by the Industrial Court merely confirmed the propriety of the redundancies. He urged us to uphold the decision of the superior court and hold, firstly, that this suit is *res judicata* in view of the Industrial Court decision. Secondly, he urged the view that in view of the provisions of **section 17** of the Trade Disputes Act, the superior court lacked the jurisdiction to entertain the suit. In his view the decision of the Industrial Court was final. Thirdly, Mr. Njamwitha expressed the view that the appellants' claim is for special damages, but that the appellants had not specifically pleaded the same.

Determination of this appeal principally depends on the question as to which was the last date for computing terminal benefits. According to the appellants, the last date is the date of the award. The respondent on the other hand thinks that the date of the suit is the effective date.

**O. VII** of the Civil Procedure Rules makes provision as to what a plaint in a suit should contain or include. **O. VII rule 6**, thereof provides:-

***“Every plaint shall state specifically the relief which the plaintiff claims, either simply or in the alternative, and it shall not be necessary to ask for costs, interest or general or other relief which may always be given as the court thinks just, whether or not it could be granted when the suit was filed and this rule shall apply also to a defence.”***

**Section 15** of the Civil Procedure Act, **Cap 21** Laws of Kenya, deals with among other things, causes of action. It provides as material, as follows: -

***“15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction:-***

**(a) ---**

(b) ---

(c) *the cause of action, wholly or in part, arise.”*

The appellants' cause of action arose on the date the respondent allegedly wrongfully or unlawfully terminated their respective employments. The court's decision relating to the dispute was referable to the date when the dispute arose in view of the foregoing provision. The dispute arose in April, 1998 when the respondent declared the appellants redundant. Any decision on redundancy was referable to and effective from the date of the declaration. The legality or otherwise of the redundancy is referable to the date the decision to retrench was taken. It was the date when any cause of action available to the appellants did arise. Before that date the appellants could not properly sue anybody as their cause of action had not arisen. Liability is referable to the date when the cause of action accrued to the plaintiff. That is why under **section 26** of the Civil Procedure Act interest is chargeable on the principal sum “so adjudged from the date of the decree.” By analogy, therefore, the award of the Industrial Court in the matter before us could not be referable to any other date other than the date the cause of action on the matter arose, namely April 1998. That dispute did not arise on 2<sup>nd</sup> December, 1998, but April 1998.

That being our view of the matter, we hold that any terminal dues due to the appellants would be properly computed up to the date when their redundancy was declared. Thereafter all they would be entitled to is interest adjudged on that sum calculated from the date of judgment or the award.

What was the dispute before the Industrial Court? According to the appellants they were challenging the legality or otherwise of the respondent's decision to retrench them. The appellants' case was that before the company made its decision to retrench them, it was imperative for it to engage in consultations with them. No such consultations were undertaken. Appellants contend that in absence of such consultations the decision to retrench them was unlawful or wrongful. The Industrial Court ruled, as material, thus:-

**“On general principle, the matter is one to be exclusively decided by the administration of the company, who are under no legal obligation to consult the Union or take their consent, and the court cannot step in unless it can be shown that certain particular employees have been victimized, or the redundancy was instituted in bad faith ..... The company may, therefore, proceed with the reduction of the employees or declare them redundant on payment of the said enhanced package.”**

What was the dispute or cause of action in the suit in the High Court? The appellants alleged in their joint plaint that their retrenchment was unlawful. So in both the Industrial Court case and the High Court case the issue was the legality or propriety of the appellants' respective termination of employment. The High Court suit was *res judicata* to the extent that the appellant in that suit sought to relitigate the issue of the propriety of their dismissal by the respondent. **Section 7** of the Civil Procedure Act, Provides that:-

**“7. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”**

The Industrial Court had the jurisdiction to entertain and determine the question of the redundancy of the appellants. It heard the matter fully and rendered an award on 2<sup>nd</sup> December, 1998. The appellants claim for damages in the High Court suit was based on the question of their being declared redundant. The High Court suit being a subsequent suit is by reason of **section 7** of the Civil Procedure Act, **res judicata**.

Having come to the foregoing conclusions, we do not consider it necessary to deal with the question whether the appellant's claim was for special damages which if so should have but was not specifically pleaded. Nor do we find it necessary to discuss the various authorities counsel cited on the issue.

In the result and for the reasons we have given above, this appeal is without merit. Accordingly we order that it be and it is hereby dismissed with costs.

Dated and delivered at Nakuru this 6<sup>th</sup> day of November, 2009.

**P.K. TUNOI**

.....

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR.**