



Wilfred v Radar Limited (Employment and Labour Relations Appeal E033 of 2022) [2025] KEELRC 1451 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1451 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E033 OF 2022
MA ONYANGO, J
MAY 15, 2025**

BETWEEN

DENIS ORENGE WILFRED APPELLANT

AND

RADAR LIMITED RESPONDENT

(Being an appeal against the ruling of Honourable B. Kiptoo, Senior Resident Magistrate delivered on 5th August 2022 in Eldoret CMELRC No. 233 of 2019)

JUDGMENT

1. This is an appeal from the ruling of the trial court delivered on 5th August 2022 in respect of a preliminary objection dated 18th April 2022. In the Preliminary objection, the Respondent had raised the following grounds: -
 - i. The claim is hopelessly time barred under the provision of section 90 of the [Employment Act](#)
 - ii. The Memorandum of Claim as currently framed is incompetent and incurably defective
 - iii. The court lacks jurisdiction to hear and determine this claim as currently framed/instituted
2. The trial court in its ruling found the preliminary objection to be well founded and upheld it.
3. The Appellant being aggrieved by the decision of the Trial Court, filed this appeal vide the Memorandum of Appeal dated 18th August 2022 on the following grounds:
 - i. The learned trial magistrate erred in law and fact in finding that the Appellant's suit was time barred while the suit against the Respondent was instituted prior to expiry of the 3 years since the cause of action arose.
 - ii. The learned Magistrate erred in law and in fact in dismissing the suit for being time barred.



- iii. The learned Magistrate erred in law and in fact in finding that the suit against the Respondent was instituted on 7th February, 2022 after the amendment of the Statement of Claim and not on 4th September, 2019 before the amendment of claim.
 - iv. The learned Magistrate erred in law and in fact in failing to appreciate that the amendment in the Statement of Claim was to correct an error in the name of Respondent but not an addition and/or substitution of the Respondent or addition of the Respondent as a party to the suit.
 - v. The learned Magistrate erred in law and in fact in finding that initially the claim had been instituted against an entity unknown to the Respondent and not the Respondent.
 - vi. The learned Magistrate erred in law and in fact in failing to appreciate that the summons together with the Claimant's pleadings had been served upon the Respondent herein who had duly entered appearance but not on the entity that had been quoted (Radar Security (K) Limited on the parties listed in the initial Statement of claim.
 - vii. The learned Magistrate erred in law and in fact in finding that the suit had been instituted on time against a different entity while the error apparent on the face of the record shows that there was an error in including the name "security (K)" but the postal address indicated in the Statement of Claim belongs to the Respondent.
 - viii. The learned magistrate misdirected itself in law and fact in not considering the Appellant's submissions and authorities in defence of the preliminary objection in its entirety.
 - ix. The learned magistrate erred in law and in fact in holding that it does not have jurisdiction to entertain the suit.
4. The Appellant therefore sought for orders that:
- a. This appeal be allowed
 - b. The ruling of the trial court delivered on 5th August 2022 be set aside or varied
 - c. The costs of this Appeal be borne by the Respondent
 - d. This court makes such and further orders as it deems fit and just to meet the ends of justice
5. The appeal was disposed of by way of written submissions. The Appellant filed his written submissions on 7th March 2024 while the Respondent filed its submissions on 29th April 2024.

The Appellant's submissions

6. In his submissions, the Appellant identified the issues for determination to be: -
- i. Whether the trial court erred in law and in fact by failing to appreciate that the amendment in the Statement of Claim was to correct an error in the name Respondent but not an addition and/or substitution of the Respondent or addition of the Respondent as a party to the suit.
 - ii. Whether learned Magistrate erred in law and in fact in finding that the suit against the Respondent was instituted on 7th February, 2022 after the amendment of the Statement of claim and not on 4th September, 2019 before the amendment of claim.
 - iii. Whether the learned magistrate misdirected himself in law and fact in not considering the Appellant's submissions and authorities in defence of the preliminary objection in its entirety.



- iv. Whether the learned magistrate erred in law and in fact in holding that it does not have jurisdiction to entertain the suit for being statute barred.
7. On the first issue, the Appellant submitted that he filed the Statement of Claim on 5th September 2019 and amended it on 7th February 2022 and that the nature of Amendment was a slight correction to the Respondent's name and not an addition of a name as argued by the Respondent. The Appellant contended that in the original Statement of Claim filed on 5th September 2019, he intended to sue the Respondent herein, Radar Limited and that even if the Respondent was indicated as Radar Security K Limited in the pleadings, the notice of summon served upon the said Radar Security K Limited depicts the postal address of 76690, Nairobi which is the same address of the current Respondent as indicated in the Amended Statement of Claim at page 32 of the record of Appeal. It is also submitted that the postal address is also reflected in the demand letter dated 11th January 2019 which was addressed to the Respondent, Radar Limited, postal address and that the Claimant's documents like the pay slips and work ID show the said postal address.
8. The Appellant thus submitted that it is evident that there was an intention to sue the Respondent herein and the amendment was to correct the error in the name but not to add a new Respondent from the one that had been sued.
9. The Appellant therefore submitted that the suit against Respondent was instituted on 5th September 2019 and not 7th February 2022, a factor that the learned magistrate failed to appreciate. That had the amendment been made and pleadings indicated a different postal address and email address this would have been addition and/or substitution of a party.
10. In this regard, it was the Appellant's submission that the learned Magistrate erred in law and in fact in failing to appreciate that the amendment of the Claim was to correct an error in the name of Respondent but not an addition and/or substitution of the Respondent or addition of the Respondent as a party to the suit.
11. On the second issue, the Appellant submitted that having established that the amendment of the claim was to correct the name of the Respondent, it follows that the suit against the Respondent was instituted on 4th September 2019 and the amendment of 7th February 2022 was to correct Respondent's name, pleadings having been served upon the Respondent herein and not the quoted party in the initial claim.
12. The Appellant urged the court to find that the learned Magistrate erred in law and fact by finding that the suit against the Respondent was instituted on 7th February, 2022 after the amendment of the Statement of Claim and not on 4th September, 2019 before the amendment of claim.
13. With regard to the third issue, the Appellant submitted that the learned magistrate in his ruling never considered his submissions at all. The Appellant averred that the trial magistrate rushed to the conclusion that the claim was statute barred and ignored his submissions where the Appellant relied on the decision in *Agnes Mukami & 5 others vs Ngeweji Company Ltd (2005) eKLR* which was relevant in his case. In addition, it was the Appellant's submission that the preliminary objection raised by the Respondent was frivolous since it required the court to inquire into facts and determine the issue of whether the suit is time barred
14. On whether the learned magistrate erred in law and in fact in holding that it does not have jurisdiction to entertain the suit for being statute barred, the Appellant reiterated that the date of employment and the date of termination is discernible within the pleadings and that from the face of the pleadings, the Claimant was terminated on 5th December 2018 while the suit herein was filed on 4th September, 2019,



a period of 9 months from the date of termination. It is submitted that the evidence on record shows that the suit was filed within the stipulated period and as such it was not affected by the limitation period provided under section 90 of the *Employment Act*.

15. The Appellant thus submits that the Leaned trial Magistrate erred in law and fact by upholding the preliminary objection and striking out the suit.
16. In the end, the court was urged to set aside the orders of the trial court and to issue an order for the case be heard on merit. The Appellant also sought to be awarded of the appeal.

The Respondent's submissions

17. The Respondent in its submissions framed the issues for determination to be:
 - i. Whether the trial court erred in failing to appreciate that the amendment of the claim was to correct an error and not the addition or substitution of a party
 - ii. Whether this court has jurisdiction to hear and determine the matter
18. On the first issue, the Respondent avers that the Appellant has argued that the amendment was to make slight corrections to the pleadings but not add a name or substitute a name but according to the Respondent, the effect of the correction meant that the Respondent had changed as the Claimant had to re-serve with the pleadings to the new Respondent herein. It is submitted that it was only after the amendment that the Respondent herein became aware that there was a case and subsequently filed a Memorandum of Appearance.
19. The Respondent asserted that it is only upon service of the amended Memorandum of Claim that proceedings against a party are deemed to have begun. While placing reliance on the case of Kenneth Kibimuru Kigalo v Mastermind Tobacco (K) Limited (2020) eKLR, the Respondent submitted that the amendment herein changed the party's name completely as it goes to the root of the case as well as the cause of action. In this regard, the Respondent submitted that, if the Appellant was to obtain a judgment against Radar Security K Limited, there would be no way to enforce the judgment as it is non-existent.
20. The Respondent thus submitted that the Appellant's claim was time barred having been filed past the three-year limitation period.
21. On the second issue, the Respondent submitted that it has proved that the claim by the Appellant is time-barred under the provision of section 90 of the *Employment Act* as it was filed outside the three-year limitation period. The Respondent urged the court to down its tools as it doesn't have jurisdiction and to dismiss the Appeal with costs.

Analysis and Determination

22. As the first Appellate court, I am aware of my obligation to re-evaluate the record including the affidavit evidence and come up with my own conclusions as stated in the case of *Selle & another v Associated Motor Boat Co. Ltd. & others*
23. From the grounds in the Memorandum of Appeal, the only issue that presents itself for this court's determination is whether the Claimant's claim against the Respondent was time barred.
24. There is no dispute that the original Statement of Claim was filed on 4th September 2019 against Radar Security (K) Limited as the Respondent. From that Statement of Claim, the Claimant averred that he was unfairly terminated from employment on 5th December 2018. The cause of action therefore arose



on 5th December 2018. It would have become time barred by virtue of section 4(1) of the Limitations of Actions Act as read with section 90 of the Employment Act, on the 6th December 2021.

25. However, on 7th February 2022, the Appellant amended his Statement of Claim by removing the names “Security K” and leaving Radar Limited as the Respondent. This amendment was the basis of the preliminary objection raised by the Respondent at the trial court.

26. I have considered the record at length and particularly, the affidavit of service at page 25 of the record of appeal and trail mail at page 27 of the record of appeal which indicate that the original pleadings were served upon the Respondent herein via the email address info@radarsecurity.co.ke. Also, from the contract the Respondent filed as part of their documents at page 44 of the record of appeal, the email address is indicated as info@radarsecurity.co.ke. and the postal address as 76690, Nairobi. It is clear, that the addresses upon which the Appellant served the Respondent with the original pleadings and the pleadings after the amendment was the same.

27. Even if the person served was different, Order 1 Rule 10 provides:

[Order 1, rule 10.] Substitution and addition of parties.

10.(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3)

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

28. Further, Order 8 rule 3 provides as follows:

3. [Order 8, rule 3.] Amendment of pleading with leave.

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.



- (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
 - (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
 - (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
29. From the foregoing it is clear that the preliminary objection was not based on a correct interpretation of the law as the Appellant was at liberty to correct or substitute the name of the Respondent as provided in Order 1 and Order 8 of the Civil Procedure Rules.
30. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to present their cases for determination upon the merits of the case.
31. In view of the foregoing, I find that the ruling by the trial court dismissing the Claimant's suit on account of the amendment was erroneous.
32. The upshot is that this court finds that the appeal herein has merit. The appeal is hereby allowed and orders made as follows:
- i. The ruling of the trial court dated 5th August 2022 allowing the preliminary objection and dismissing and/or striking out the Appellant's suit is hereby set aside and substituted with an order dismissing the preliminary objection.
 - ii. The suit in the lower court is hereby reinstated for hearing and determination on merits.
 - iii. Costs of the appeal shall be paid to the Appellant by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 15TH DAY OF MAY 2025

MAUREEN ONYANGO

JUDGE

