



REPUBLIC OF KENYA



KENYA LAW
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**Njunge v Muasya (Appeal E040 of 2023)
[2024] KEELRC 265 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 265 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E040 OF 2023
NJ ABUODHA, J
FEBRUARY 9, 2024**

BETWEEN

ALEX KAMWERU NJUNGE APPELLANT

AND

ANNIE MUNINI MUASYA RESPONDENT

(Being an appeal from the Judgment of Hon. S.A Opande (PM) issued in Milimani Chief Magistrate's Court at Nairobi CMEL No. E412 of 2018 between Annie Munini Muasya vs Alex Kamweru Njunge delivered on 20th March, 2023)

JUDGMENT

1. Through the Memorandum of Appeal dated March 29, 2023, the Appellant appeals against the Judgment of Honourable S.A Opande (PM) delivered on March 20, 2023) in Milimani Chief Magistrates Court Nairobi CMEL No. 412 of 2018 (*Annie Munini Muasya vs Alex Kamweru Njunge*).
2. The Appeal was based on the grounds that:-
 - i. The Learned Trial Magistrate erred in law and fact in determining that the claim was well-founded and that the Respondent's claim was not time-barred under *Limitations of Actions Act*.
 - ii. The Learned Trial Magistrate erred in law and fact in holding that the Respondent was employed by the Appellant.
 - iii. The Learned Trial Magistrate erred in law and fact in holding that the Appellant did not controvert the claims by the Respondent.



- iv. The Learned Trial Magistrate erred in law and fact in holding that the Appellant had not offered any plausible explanation as to why it was not the employer of the Respondent and yet there was evidence on record that in the year 2005 the Appellant travelled out of the Country.
- v. The learned Trial magistrate wholly misapprehended the defence/response by the Appellant that he was not the employer of the Respondent and could thus not be expected to provide documents to controvert the claim by the Respondent.
- vi. The learned Trial magistrate erred in law and fact by failing to appreciate the import of statutory provisions and judicial precedents that were cited before him in opposition to the claim which statutory provisions and judicial precedents are binding upon the learned Trial Court.
- vii. The learned Trial magistrate erred in law and fact in failing to consider the written Submissions and arguments of Counsel for the Appellant on the *Employment Law* and the Law of *Limitation of Actions*.
- viii. The decision of the learned Trial Magistrate was against the weight of evidence adduced by the Appellant.
- ix. The learned Trial Magistrate was biased against the Appellant and even reopened the hearing of the case for the Respondent to allow her look for more evidence.
- x. The learned Trial magistrate erred in law and fact by hearing a claim that was statute barred under Section 90 of the *Act*.
- xi. The learned Trial magistrate erred in law and fact by failing to evaluate and determine the issue of the *ex parte* order that extended the time for filing suit on the final determination of the claim.
- xii. The learned Trial magistrate erred in law and fact by finding that the issue of limitation of time for filing claim had been determined through the Preliminary Objection ruling by Hon. Muholi on May 26, 2020.
- xiii. The learned Trial magistrate erred in law and fact by failing to appreciate the distinction between the Preliminary Objection on lack of an order to extend time and the substantive objection raised in final submissions of the *ex parte* orders for extension of time been contrary to the law and unmerited.
- xiv. The learned Trial magistrate erred in law and fact by shifting the burden of proof from the Claimant to the Appellant to disprove/controvert the claim that was not proved.
- xv. The learned Trial magistrate erred in law and fact by failing to find that the Claimant did not prove the specific and particular claims on a balance of probabilities.
- xvi. The learned Trial magistrate erred in law and fact by failing to find that the Respondent did not prove the entitlement to the full compensation of 12 months for unfair termination in light of the Respondent's evidence that she left work upon getting injured in February 17, 2014 and only returned with her work injury claim in November 2014.
- xvii. The learned Trial magistrate erred in law and fact by failing to consider the evidence of the Appellant that he was employed outside the country and could not have personally employed the Respondent.



- xviii. The learned Trial magistrate erred in law and fact by failing to fully consider the documentary evidence presented by the Appellant for their full import and true purpose and in particular that Sheqel Investments Ltd was a company Limited and a separate legal entity from the Appellant.
- xix. The learned Trial magistrate erred in law and fact by reopening the Respondent's case after she had closed and giving the Respondent undue advantage to avail evidence even when it was clear the Respondent had no credible evidence.
3. The Appellant prayed that the appeal be allowed and the Judgment of Honourable S.A Opande in favour of Respondent be set aside and he be awarded the costs of the Appeal.
4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant in its submissions dated October 23, 2023 submitted on the issue of whether the trial magistrate erred in determining that the claim was well-founded and that the Respondent's claim was not time barred under Limitation of Actions Act that the trial magistrate erred.
6. It was the Appellants submissions that firstly Hon. Muholi had only dealt with the existence of the order to extend time and cannot be said to have determined the issue of limitation of time as per the statute.
7. Counsel submitted that court order extending the time to file the claim was not issued by Hon. Muholi but was issued *ex parte* at Kiambu Chief Magistrates Court by Hon. Khaemba. That the trial magistrate erred on this fact.
8. It was the Appellant's submissions that the proper avenue to interrogate the *ex parte* order to extend time to file the claim was supposed to be by the trial Magistrate who erred in law in failing to hear and determine it.
9. Counsel submitted that since the issue was not determined at trial stage this court should determine the issue and find the claim as time barred as it is a contract of employment and the same could not legally merit an order for extension of time; no reasons were given to grant the orders to extend time to file the claim.
10. It was the Appellant's submissions that the issue of statutory time barred of a claim is fundamental and goes to the jurisdiction of the court and thus ousts the jurisdiction of the trial Magistrate to determine the case who should have downed his tools once he found that he lacked jurisdiction.
11. Counsel submitted that this court is mandated to do substantive justice devoid of technicality by the Constitution. That this court is to also follow the overriding objective in this case.
12. Counsel submitted that the extension of time to file the claim was given *ex parte* and the Appellant was not allowed by the trial court to raise legal objections to the same. Counsel urged this court to find the said extension as an error which the trial court erred in refusing to interrogate this issue.
13. On the issue of whether the trial magistrate erred in holding that the Respondent was employed by the Appellant the Appellant submitted that the Respondent during cross examination did not care if the Appellant was separate from the company that engaged her and she refused legal representation from Kituo cha Sheria for free.



14. Counsel submitted that the trial magistrate erred when he failed to find that the company and the Appellant are separate legal entities. That Shegel Investments Ltd is a body corporate with a separate independent identity in law, distinct from its shareholders, directors and agents.
15. On the issuing of whether the trial magistrate erred by shifting the burden of proof from the Claimant to the Appellant to disprove/controvert the claim that was not proved the Appellant submitted that the onus of proof is always on the Claimant to prove the Claims on a balance of probability.
16. On the issue of whether the trial magistrate erred by failing to find that the Claimant did not prove the specific and particular claims on a balance of probabilities the Appellant submitted that the trial magistrate erred by granting the prayers in an omnibus manner. That he did not analyse the particulars claims and their merit and whether the same were proved and merited. Counsel submitted that the claims for underpayments were not merited and were continuing claims that had not been complained against.
17. On the issue of 12 months compensation to the Respondent when she left work upon getting injured in February 17, 2014 and only to return with her work injury claim in November 2014 the Appellant submitted that the trial magistrate erred in awarding the Respondent the compensation when she left work on an alleged injury that she could not prove to the Labour Officer.
18. On the issue of the trial court reopening the Respondent's case after she had closed and giving the Respondent undue advantage to avail evidence even when it was clear the Respondent had no credible evidence the Appellant submitted that this was prejudicial to the Appellant and fell in to trap of Respondent refusing to have legal aid or legal representation so as to circumvent the law.
19. It was the Appellant's submissions that the theatrics of the Respondent in court of crying and of false accusations to the presiding court officer and opposing counsel led the court to even ignore the cardinal principles of hearing a claim that was statute barred and the court had no jurisdiction to entertain.
20. In conclusion the Appellant prayed that the appeal be allowed, the trial court judgement be set aside with costs being awarded to him.

Respondent's Submissions

21. On the other hand, the Respondent who is acting in person from the trial court filed her submissions dated November 15, 2023 and submitted on the issue of filing the suit out of time that trial magistrate rightly handled the issue and agreed there was leave of the court to file the matter and therefore the court can use its discretion to extent time upon listening to the parties to the suit.
22. On the issue of who was her employer the Respondent submitted that she was not issued with an appointment letter to know who had employed her. That she was dealing with the Appellant herein who never informed her who was her employer and therefore the matter of technicalities should not be used to affect an innocent party.
23. It was the Respondent's submissions that for the period she worked with the Appellant for 9 years she was never granted leave or any payment in lieu which the trial magistrate agreed with her.
24. The Respondent submitted that she gave evidence that she was underpaid, was not paid house allowance and was not a member of NSSF and therefore it was her right to receive fair labour practice which the trial magistrate agreed with her as the Appellant did not bring any evidence to the contrary.



25. It was her submissions that she proved that her services were terminated on February 17, 2014 after working continuously for 9 years which evidence remained uncontroverted hence the trial court agreed with her.
26. On leave the Respondent relied on section 28(1) (a) of the *Employment Act*. That she was entitled to the leave as the trial court granted since the Appellant did not prove that took her leave.
27. On the issue of service pay the Respondent submitted that she led evidence to the effect that she was not a member of NSSF and relied on section 35 of the *Employment Act*. That she was entitled to the service pay as granted by the trial court. That the Appellant did not produce evidence to show they had registered her or any contributions to the NSSF offices.
28. On the issue of underpayments, the Respondent submitted that she led evidence that she was paid salary below the gazetted salaries and therefore the trial court was right in awarding her the underpayment amounts. That the Appellant did not rebut with evidence her evidence. That the argument by the Appellant that she was supposed to be paid wages for municipality area did not mean she was not underpaid and the Appellant should have provided that evidence in court which he did not.
29. It was the Respondent's submissions that she agreed with the trial court judgment and that the Appellant did not produce any employment records or any evidence to rebut her claim. She requested this court to dismiss the Appeal with costs.

Determination and Disposition

30. Whereas this appeal raised several grounds, one fundamental ground which has to be determined first, is whether the Court below had jurisdiction to hear this matter in view of the fact that the same had been commenced beyond the limitation period stipulated under section 90 of the *Employment Act*. It was common ground that the suit was commenced beyond the limitation period set out under section 90 of the *Act*. The respondent however stood on the ground that although the limitation period had lapsed, she sought and obtained leave to extend the limitation period prior to the commencement of the suit herein.
31. The appellant on the other hand contended that such leave was sought *ex parte* and that he reserved the right to revisit the same at the trial which he did but the trial Court did not appreciate and sustain the objection.
32. An allegation that a claim is statute barred goes to the jurisdiction of the Court and if found to be true the Court cannot proceed further. As was held in the now famous "*Lilian S*" case, jurisdiction is everything. Further, no amount of innovation can confer jurisdiction on a Court where it does not plainly have one.
33. Section 90 of the *Employment Act* provides:

“Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this *Act* or a 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.”

A plain reading of the above section clearly shows that it is couched in mandatory terms. That is to say “no..action shall lie” which implies that once the three year period lapses, no civil action shall lie on a claim based on the act or contract of employment. Further, it is important to note that an action



arising out of a contract of employment is an action based on contract. Therefore under the Limitation of Actions Act which previously governed contracts generally including contracts of employment, no extension was permissible once the limitation period lapsed.

34. The Court of Appeal in the case of Beatrice Kabai Adagala v Postal Corporation of Kenya [2015] eKLR observed as follows:

" Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. Section 90 of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As this Court stated in the case of Divecon Limited -vs- Samani [1995-1998] 1 EA P.48, ... in Josephat Ndirangu - vs - Henkel Chemicals (EA) Limited, [2013] eKLR, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of Sections 27 and 28 of the Limitation of Actions Act."

35. From the foregoing, the Court is of the view that the first Court seized of this matter had no jurisdiction to extend time to bring action against the appellant once it was evidently clear that the claim was based on contract of employment and that the mandatory three year period had lapsed. Further, the trial court ought to have heard in limine the issue of limitation prior to proceeding with the merits of the suit.

36. On the above ground alone, the Court finds and holds that the trial magistrate made an error of jurisdiction when he proceeded to hear a matter that was barred by virtue of section 90 of the Employment Act. The Appeal therefore succeeds to that extent.

37. In conclusion the Court allows the Appeal and hereby substitutes the finding of the lower court entering judgment in favour of the respondent with an order dismissing the suit in the Court below.

38. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY FEBRUARY, 2024 AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY, 2024

ABUODHA NELSON JORUM

JUDGE

