Council, Kisii University & another v Ouma (Appeal E030 of 2023)
[2024] KEELRC 2545 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2545 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E030 OF 2023

JK GAKERI, J

OCTOBER 23, 2024

BETWEEN

THE COUNCIL, KISII UNIVERSITY ..... 1ST APPELLANT

THE VICE CHANCELLOR, KISII UNIVERSITY ..... 2ND APPELLANT

AND

ONYANGO PETER OUMA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of Hon. J. N. Wambilyanga SPM in Kisumu CM ELRC No. 25 of 2020 delivered on 28th April, 2023 which awarded the Claimant a sum of Kshs.993,000.00 with costs.

2. The background of the case is that by a memorandum of claim filed on 20th February, 2020, the Claimant/Respondent alleged that he was employed by the Respondent/Appellant as a part time lecturer at its Kisumu Campus at Kshs.60,000.00 per course before tax for undergraduate students prorated with classes with less than 15 students.

3. He claimed that he was not paid the sum of Kshs.1,053,876.00 out of a total sum of Kshs.1,802,1 66.00. In its response, the Respondent/Appellant admitted that the Claimant was a part time lecturer but denied the amount claimed.

4. According to the Respondent only lecturers who submitted the relevant documents not later than one month after the end of the semester were entitled to payment and the Claimant/Respondent had not.

5. That in any case the Claimant was engaged under fixed term contracts which lapsed by effluxion of time and the last lapsed in April, 2024 and no termination of employment took place.

6. The Appellant/Respondent contended that the attendant claim procedure had to be complied with for payment to ensue.

7. In its submission, the Respondent expressed doubt as to how the amount of Kshs.1,802,166.00 claimed was arrived at since the employment was period based.

8. According to the Appellant/Respondent, the Claimant/Respondent did not follow the prescribed procedure for claiming.

9. In its Judgment delivered on 28th April, 2023, the trial Court found that the Claimant/Respondent had proved his case on a balance of probabilities and awarded the sum of Kshs.1,200,000.00 less the sum of Kshs.207,040.00 already paid leaving a balance of Kshs.993,000.00.

10. This in the decision that is the subject of this appeal, which is predicated on the grounds that; the learned trial Magistrate erred in law and fact in;

    a. Failing to evaluate the entire evidence as well as the submissions.

    b. Failing to hold that the Respondent's suit was time barred.

    c. That the Court awarded the sum of Kshs.993,000.00 without justification.

    d. Failing to dismiss the Respondents case with costs.

    e. Failing to appreciate that the claim procedure by the Appellant was essential and the Respondent failed to adhere to it.

    f. Failing to consider that no claim form accompanied by the appointment letter, examination processing form and examination attendance sheets were presented to the Respondent for payment or produced in Court.

11. The Appellant prays for the setting aside of the Judgment and dismissal of the Respondents case with costs.

Appellant's submissions

12. Counsel for the Appellant submitted on the period of employment September, 2014 – October, 2017, breach of terms of engagement by the Appellant if any, whether the claim was statute barred and justification of the award.

13. On the 1st issue Counsel submitted that the Respondent did not avail a letter of appointment for the entire period 2014 to October 2017, save for the periodic contracts dated January, 2015 to April, 2017. That the contracts were fixed term and terminated on expiry and claims accrued immediately. Counsel urged that the Respondent failed to prove that he was employed by the Appellant for the entire duration as claimed.

14. As to whether the Appellant breached the terms of employment, Counsel submitted that the Appellants had a SSP Policy on the filing and processing of claims acknowledged by the Respondent during the hearing namely; completion of a claim form showing the course, number of hours taught, attach the original appointment letter, examination attendance sheet for each course taught to verify the students who had paid fees, sat the examination and the examination processing form and all the forms were available to all part time lectures, online and a lecturer would retain a copy of the claim form stamped by the University and payment would be made after the approval by the relevant persons.

15. Counsel urged that a lecturers teaching dues could only be ascertained by compliance with the prescribed procedure. Reliance was made on the sentiments of the Court in Seth Osundwa Cholwa V Kisii University [2021] eKLR as well as George Marara Ontumbi V Moi University ELRC No. 230 of 2017 on submissions of required documentation for purposes of filing a claim and National Bank of

Kenya V Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR to urge that parties are bound by the terms of their contract and a court of law cannot rewrite it.

16. As to whether the claim was time barred, Counsel urged that whereas the Respondent's claim is for the period 2014 – 2017, the suit was filed on 12th February, 2020 and was thus statute barred under Section 90 of the *Employment Act*, an argument the trial Court dismissed on the premise that the Respondent worked until September 2017, a finding Counsel assails as jurisdiction goes to the root of the matter and can be raised at any time in the course of a trial.

17. Reliance was made on the sentiments of the Court of Appeal in Kenya Ports Authority V Modern Holding (EA) Ltd (2017) eKLR on the Centrality of Jurisdiction in court proceedings. Reliance was also made on Charles M. Kiget V Majani Mingi Group of Companies Ltd (2019) eKLR on the import of Section 90 of the *Employment Act*.

18. As to whether the award of Kshs.993,000.00 was justified Counsel submitted that it was erroneous as the Court does not appear to have interrogated each claim and computed the same and the claims from September, 2014 to February, 2017 were time barred and the award was unjustified.

19. Counsel submitted that the Court did not consider the amount paid to the Respondent per course based on the number of students taught and examined and use of the sum of Kshs.600,000.00 was unjustified. Counsel, finally submitted that the Claimant's suit was premature as he had not exhausted the Appellant's internal mechanism of resolving disputes.

The Respondent did not file submissions

Analysis and determination

20. The Appellant's Counsel faults the Judgment of the trial Court on the evidence adduced, limitation of actions and the award.

21. This being a first appeal, the Court is enjoined to reconsider and re-evaluate the evidence on record and arrive at its own conclusions bearing in mind the reality that it neither saw nor heard the witnesses, as eloquently captured in the often cited decision in Selle & Another V Associated Motor Boat Co. Ltd. & Others (1968) EA 123.

22. As to whether the trial Court properly evaluated and assessed the evidence before it, the Court proceeds as follows.

> " There is no doubt that the Respondent placed before the Court substantial documentary evidence comprising the Judgment Decree, copies of Appointment letters 2015 to 2017, Student Examination Attendance Sheets, Claim forms, summary of units taught with grades and a copy of demand letter".

23. Noteworthy, the oldest appointment letter is dated 21st July, 2015 and the latest 17th October, 2017. However, most of the letters operated retrospectively as appear to have been the Respondent's modus operandi.

24. It is common ground that the Appellant had a prescribed procedure on the filing of claims for purposes of payment of part-time Lecturers for the classes taught and examined. Clearly, the claim form had to be accompanied by the examination attendance register or sheet, original appointment letter and the examination processing form.

25. Although the Respondent availed many copies of Appointment Letters, Examination Attendance Sheets and examination processing forms (the latter were very fewer in number), he did not provide

a complete claim for any of the duration he rendered services being in mind that the contracts were time-bound and hence the claims were distinct.

26. Equally, copies of the examination Attendance Sheets are more than any of the other documents filed.

27. Strangely, the Respondent tendered no evidence as to when he submitted the individual claims or any of them.

28. From the sample contracts availed, it is discernible that each contract involved the teaching of one or two or three identified units for a semester. For instance, under the letter of Appointment dated 17th October, 2017, the Respondent was retained to teach;

EDFO 121 Philosophy of Education,

PHIL 104 Philosophy and Society,

29. EDFO 112 Philosophy of Education, in the Faculty of Education and Human Resource Development from January, 2017, to April, 2017. This is the last contract on record.

30. The 1st letter dated 21st January, 2015, appointed the Respondent retroactively presumably because he had already started teaching before the letter was issued for the period January to April, 2015 at Kshs.60,000.00 for 16 students and above and prorating for 15 students and below for Certificate, Diploma and Bachelors, 8 for masters and 3 for PhD classes.

31. The Respondent adduced no evidence to demonstrate that he rendered teaching services outside the Bachelors level. Significantly, all the letters were emphatic that payment for teaching would be based on the SSP Policy, September to December, 2014. The sum of Kshs.60,000.00 per course unit was subject to tax deductions.

32. Clearly, the Appellant was obliged to make all his claims as per the Appellants SSP Policy, as and when such claims feel due.

33. The Respondent maintained that the Respondent's case was premature as he had not filed his claims as required, as the copies in Court were not stamped by the Appellant and although the Respondent testified that he filed the claims, he adduced no verifiable evidence as to when he did so and for what semester(s).

34. It is notable that neither the Respondents written statement dated 11th February, 2020 nor the oral testimony adduced in Court tabulate the individual claims against the Appellant.

35. In the circumstances, the Court is constrained to agree with the Appellant's Counsel that it is unclear as to how the sum of Kshs.1,802,166.00 was arrived at having regard to the fact that out of about 31 Examination Attendance Sheets sampled by the Court ,only 9 classes had more than 15 students which would suggest that in all the other cases payment would have been prorated and not the Kshs. 60,000.00 per semester.

36. In two instances, for example, only one (1) student took the examination and the payment due would be nominal in view of the threshold.

37. It is unclear to the Court whether the Respondent took into consideration such a dynamic in his computation. This argument is important because the trial Court found and held that since the Respondent had vailed 12 Letters of Appointment for 20 units at Kshs.60,000.00 per unit course the sum total payable was Kshs.1,200,000.00 less the sum admitted as paid of Kshs.207,640.00 leaving a balance of Kshs.993,000.00, which in the Court's view was a misdirection by the trial Court in light of the above-mentioned dynamic.

38. On the burden of proof, it is common ground that the same lay on the Respondent under the provisions of Section 107, 108 and 109 of the *Evidence Act*. Section 109 of the Act provides that;

> The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

39. A panoramic view of the documentary evidence on record shows that whereas the Respondent has demonstrably established that he served as a Part Time Lecturer at the Kisii University, Kisumu campus, under distinct fixed term contracts, he failed to establish that the Respondent owed him the sum of Kshs.1,802, 166.00 or the sum awarded by the Court. No doubt the Respondent owed him some money; the quantum of which he failed to prove.

40. Flowing from the foregoing, it is discernible that the trial Court's evaluation of the evidence in its totality was faulty as contended by the Appellant's Counsel as the evidence was clear that the Appellant had a clearly defined claim procedure or process which the Respondent was aware of and ought to have adhered to and tendered no verifiable evidence on when a single complete claim was lodged.

41. Finally, the demand letter dated 24th January, 2020 identified a figure of Kshs.1,261,516.00 as salary arrears and made no attempt to demonstrate the amount due per the letter of appointment or when the claim was made. In the absence of documentary evidence to prove that the Respondent lodged claims at any time, it is difficult to find or hold that the Respondent has proved the amount owed.

42. Counsel for the Appellant also assails the learned trial Magistrate for failing to find that the Respondents suit was statute barred. Counsel argues that all claims that had not been filed in Court by February, 2017 were time barred since the suit was filed on 12th February, 2020.

43. As to whether the Respondent's claim was statute barred, the learned trial Magistrate reasoned that the issue was raised too late and in any case, the Respondent worked till September, 2017. Moreover, Article 159(2)(d) of *the Constitution* of Kenya can cure such a defect. As regards the Respondent rendering services in September, 2017, the record is clear that the last contract is for the period 1st April to 30th April, 2016.

44. It is unclear if he was rendering services in October, 2017 and even assuming he did that reason per se would not address all the claims the Respondent may have had against the Appellant, and in particular those dating 2015 and 2016 and indeed the bulk of the claims.

45. Reliance on the provisions of Article 159(2)(d) of *the Constitution* of Kenya as the cure for the argument of the suit being statute bared is critical and requires a comment. Article 159(2)(d) enjoins Courts and tribunals to exercise their judicial authority and administer justice "without undue regard to procedural technicalities".

46. In the Court's view, this provision was not intended to do away with procedural requirements or technicalities, but to require Courts and tribunals not to accord procedural requirements disproportionate, excessive or unwanted consideration in the administration of justice.

47. In the Court's view, in instant suit there was nothing for Article 159(2)(d) of *the Constitution* of Kenya to cure, for the simple reason that a time barred claim or cause of action implicates the Court's jurisdiction to hear and determine a suit which is dispositive of a matter and as classically captured by Nyarangi JA in Owners of Motor Vessel "Lillian S" V Caltex Oil Kenya Ltd [1989] KLR 1.

> "...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.

A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

48. From the foregoing analysis it is decipherable that the Court is not persuaded that the issue as to whether the Respondent's cause of action was time barred was sufficiently interrogated by the trial Court and a finding made notwithstanding that the issue was raised late as the Court found.

49. An issue that implicates the jurisdiction of a Court should be of cardinal interest to that Court irrespective of when it is raised, including by way of submissions. The Court itself can raise it suo motu if none of the parties raises it. See Pauline Wanjiru Thuo V David Mutegi Njuru CA No. 2778 of 1998.

Section 90 of the *Employment Act* provides that;

> Notwithstanding the provisions of Section 41 of the *Limitation of Actions Act* Cap 22, no Civil action or proceedings based on or arising out of this Act or a contract to 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 a continuing injury or damage within 12 months after the cessation thereof.

50. This provision is couched in mandatory terms and in the negative for emphasis that no action lies three years after the cause of action accrued and Courts have considered and determined the question as to when a cause of action arises in employment matters and it is when the relationship comes to an end by dismissal, redundancy, termination, resignation, mutual consent or other mode.

51. In Attorney General & Another v Andrew Maina Githinji & Another [2016] eKLR for instance, the Court of Appeal held that;

> " The Respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October, 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved...."

52. Similarly, in G4S Security Services (K) Ltd V Joseph Kamau & 486 Others [2018] eKLR where the Court of Appeal relied on the provisions of Section 90 of The *Employment Act* to hold the claims of 464 Respondents time barred on account of not been filed within 3 years.

The Court further held that time does not stop running on account of;

> " Commencement of reconciliation or other alternative dispute resolution mechanism provided for under *the Constitution* or any other law"

53. In the instant case, it is clear that the Respondent served the Appellant as a part-time lecturer under distinct fixed term contracts that had a beginning and a definite end date and it follows that he did not render services during the holidays.

54. Similarly, payment was pegged to the unit(s) taught for the prescribed duration. It therefore follows that the Respondent had different causes of action against the Appellant after successful completion of every contract of engagement.

55. The Respondent admitted having received the sum of Kshs.207,640.00. Puzzlingly, the Respondent adduced no evidence to show when the sum was paid and in respect of what claim(s).

56. This evidence was essential because the Respondents demand letter is dated 24th January, 2020 almost 3 years from the date of his letter of engagement in April, 2017.

57. Evidently, the Respondents last cause of action accrued when the last engagement was concluded sometime in 2017 and did not sue until 12th February, 2020.

58. It follows that all claims payable by the Appellant and in respect of which no step had been taken by way of institution of legal proceedings by February, 2017 are statute barred and the Court had no jurisdiction to hear or determine them. The only enforceable claims are those whose cause of action accrued after 12th February, 2017.

59. Consequently, the Respondent's claim for amounts due for services rendered prior to 12th February, 2017 were unenforceable by the Court for want of jurisdiction.

60. Finally, as to whether the Court should interfere with the exercise of discretion by the trial Court, the Court is guided by the sentiments of the Court of Appeal in Mbogo V Shau & Another [1968] EA echoed by Madan JA (as this was) in United India Insurance Co. Ltd V East Africa Underwriters (Kenya) Ltd [1985] EA as follows:

> "The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

61. The trial Court failed to consider the fact that the Respondent's suit related to claims dating 2015 and 2016 without particulars of the specific claims and the bulk of the claim was statute barred and the trial Court had no jurisdiction to hear or determine the claims.

62. Equally, in making the award of Kshs.993,000.00, the trial Court assumed that for all the 20 course units taught, the Respondents classes had at least 16 students who were fully-paid which was not the case as the Examination Attendance Sheets rendered rered.

63. In the circumstances, the Court is satisfied that a case for interference with the award made by the trial Court had been made.

64. The Judgment of the trial Court is set aside in its entirety and in its place the parties shall tabulate the Claimant's entitlement for all the course units taught and examined in 2017, within 30 days and file the same for adoption by the Court.

65. Parties shall bear their own costs.

66. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 23RD DAY OF OCTOBER 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments

and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.