



REPUBLIC OF KENYA



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Jesmiel v Mwirua Farmers Co-operative Society Ltd (Employment and Labour Relations Appeal E011 of 2021) [2023] KEELRC 131 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 131 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E011 OF 2021
ON MAKAU, J
JANUARY 26, 2023

BETWEEN

PAUL WACHIRA JESMIEL APPELLANT

AND

MWIRUA FARMERS CO-OPERATIVE SOCIETY LTD RESPONDENT

(An Appeal from the Ruling/Judgment of Honourable A.K Ithuku, Chief Magistrate at Kerugoya Chief Magistrates Court ELRC No. 1 of 2020 delivered on 28th September, 2021)

JUDGMENT

1. On 3rd July 2020 the appellant filed a Statement of Claim in the subordinate court alleging that he was employed by the respondents from 1st December 1982 and served in various positions until 16th October 1997 when he was suspended to pave the way for investigations. He further averred that on 29th January 1998 he was arrested by CID officers and later charged in court. While the trial was ongoing, he was summarily dismissed from employment on 13th April 1999. In his view the dismissal was unlawful and as such he sought to recover compensatory damages plus costs.
2. In response the Respondent filed a Notice of Preliminary Objection on three grounds, namely, that the suit was defective because it was initiated by a statement of claim; that the suit was statute barred; and that the claim had fully been negotiated and settled vide agreement that was binding on the appellant.
3. The trial court (Hon. Ithuku CM) heard the objection and rendered his ruling on 28th September 2021 whereby he allowed the objection and struck out the suit with costs on ground that it was statute barred.



4. Aggrieved by the said ruling the appellant filed the present appeal on 12th October 2021 raising 8 grounds of appeal. On 10th May 2022, the appellant filed “Supplementary grounds of appeal” raising 20 grounds of appeal. The said grounds can be collapsed into one ground that:

“The trial court erred in law and fact by striking out the suit on ground that it was statute barred.”

5. On 20th June 2022, Marete J directed the parties to file written submissions to dispose of the appeal. The appellant filed on 30th June 2022 and the respondent filed notice of preliminary objection to the respondent’s submissions filed on 7th September 2022.

Submissions

6. The appellant submitted that he was medically incapacitated until 15th June 2016 when he was discharged. He contended that under the *Limitation Actions Act* revised in 2010/2012, limitation period can be extended on ground of disability. Accordingly he contended that the suit was filed within the statutory period and the court had jurisdiction to determine it.
7. The rest of the submissions were not relevant to the appeal.
8. The respondent submitted that the suit was time barred by dint of Section 90 of the *Employment Act* because the cause of action arose on 13th April 1999 and the suit was filed on 3rd July, 2020. It submitted that from the date when the cause of action arose and the date when the suit was filed was 20 years and as such the suit was filed out of time. Consequently it submitted that the trial court did not err in law and fact by allowing the preliminary objection.

Determination

9. The only issue for determination in this appeal is whether the appellant’s suit was filed out of time and therefore statute barred.
10. This being a first appeal, and more so on points of law, this court is mandated to review the submissions made in the subordinate court on the preliminary objection and make independent conclusions.
11. The objection was three thronged. The first ground was that the suit was defective because it was commenced by a statement of claim as opposed to a plaint or other means known to law. That ground lacked merits because Rule 4(1) of the *Employment and Labour Relations Court (Procedure) Rules* provides that a party who wishes to refer a dispute to the court under any written law shall file a statement of claim accompanied by a verifying Affidavit.
12. The second ground of the objection was that the suit was statute barred by dint of Section 4 of the *Limitation of Actions Act* Cap 22 Laws of Kenya. It was submitted that the suit was filed after 20 years from 13th April 1999 when the appellant was dismissed from employment. I have considered paragraph 17 of the statement of claim which states that

“On 13th April 1999, the respondent dismissed the claimant from employment while the case was still in court.”
13. The said paragraph points to the fact that the cause of action arose on the stated date and the applicable law on Limitation was the *Limitation of Actions Act* because the *Employment Act*, 2007 had not yet been enacted.



14. Section 4(1) of the *Limitation of Actions Act* provided that;
- “ (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
- a. actions founded on contract;
 - b. ...”
15. The appellant submits that under Section 22 of the *Act* a person under disability is entitled to extension of the statutory period up to 6 years from the date when the disability ceases. The said Section 22(1) provides that:-
- “ This section does not affect any case where the right of action first accrues to a person who is not under disability and through whom the person under disability claims.”
16. Going by the above provision, it would appear like if the cause of action arises when the claimant is under disability there is extension of Limitation period by 6 years. In this case it has not been pleaded in the statement of claim that the appellant was under disability when the cause of action arose.
17. The foregoing notwithstanding, there is a legion of judicial precedents that are unanimous that limitation period for claims founded on contracts cannot be extended by the court. In *Divecon v Samari* (1995-98) EA 48 the court held that:
- “ No court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for bringing action.”
18. Again in *Mary Osundwa v Nzoia Sugar Company Limited* (2002) eKLR the Court of Appeal held that Section 27 of the *Limitation of Actions Act* only give jurisdiction for extension of time in actions founded on tort. The court went on to state:-
- “ The section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort... That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the Judge by their consent.”
19. It becomes clear from the precedents that, limitation of time for commencing claims founded on contract cannot be extended by leave of the court or even by consent of the parties. The cause of action herein arose on 13th April 1999 and the suit was brought on 3rd July 2020, about 21 years thereafter. The cause of action was governed by Section 4 of the *Limitation of Actions Act* and therefore could only be filed within 6 years from the date it arose. It follows that the suit was filed 15 years out of time.
20. In the circumstances the court finds the suit was statute barred by dint of Section 4(1) of the *Limitation of Actions Act* and the trial court did not err in striking out the suit for being statute barred.
21. The final ground of the Preliminary Objection was that the claims in the suit had been settled vide agreement negotiated by the respondent and the appellant’s trade union. This is obviously an issue that requires taking of evidence and therefore not a proper ground for preliminary objection. In the



case of *Mukisa Biscuits Manufacturers Co.Ltd v West End Distributors Ltd* (1996) EA 696, the court (Law JA) held :-

“... a preliminary objection consists of a pure point of law which has been pleaded and which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit examples are an objection on jurisdiction of the court or a plea of Limitation and submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. In the same case, Newbold P. added that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

23. On the basis of the foregoing precedent, the court finds that the ground that the claims were settled before filing the suit is not a proper ground for raising preliminary objection. Consequently, the court also finds that the trial court did not err in dismissing the said ground of the objection.

24. In view of the observations and finding herein above, the court has reached the conclusion that the appeal lacks merits and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF JANUARY, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

