



Butali Sugar Mills v Museveni & another (Employment and Labour Relations Appeal E039 of 2022) [2023] KEELRC 661 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 661 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E039 OF 2022**

**JW KELI, J
MARCH 9, 2023**

BETWEEN

BUTALI SUGAR MILLS APPELLANT

AND

HUMPHREY MUSEVENI 1ST RESPONDENT

FRODAK SERVICES (FRODAK KENYA LIMITED) 2ND RESPONDENT

(Appeal from the ruling of the Hon. Eric Malesi (PM) delivered on 6th September 2022 in Kakamega Chief Magistrate court in CMCC NOS. 120, 155,144, 105, 109,114, 115 and 119 of 2020 various Claimants -v- Frodak Kenya Limited & Butali Sugar Mills appealed under Bungoma ELRCA No. E034,E035, E036,E037,E038,E039,E040 and E043 of 2022 Appellant v various 1st Respondents and the 2nd Respondent)

JUDGMENT

1. The Appellant aggrieved by the Ruling and order of Honourable Eric Malesi (PM) delivered on the 6th September 2022 in Kakamega CMCC No. 120 of 2020 brought the instant Appeal vide Memorandum of Appeal dated 27th September 2022 and record of appeal received in court on the 27th January 2023 seeking the following Orders:-
 - a. This appeal be allowed.
 - b. That the Ruling delivered by Honourable Malesi (PM) at Kakamega Chief Magistrates court on 6th September 2022 be aside and the appellant's application be allowed.
 - c. That stay of proceedings in the lower court be granted pending the hearing and determination of this appeal.
 - d. That the Cost of this Appeal be borne by the respondents.



2. The Appeal was premised on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact by dismissing the appellant's Preliminary Objection dated 17th June 2022 as filed in Kakamega CM ELRC No. 120 of 2020 yet the application had merit.
 - ii. The learned judge (sic) erred in law and fact by ignoring and or failing to consider in totality the Appellant's pleadings and submissions.
 - iii. The learned trial Magistrate erred in law and fact by failing to appreciate that the instant suit was filed against the appellant over 4 years after the cause of action arose and the same ought to have been struck out.

Background to the Appeal

3. The 1st Respondent filed a suit Kakamega CMCC Case No. 120 OF 2020 against the 2nd Respondent dated 6th December 2019. The 1st Respondent on the 4th October 2021 amended the statement claim and filed the same in court on the 16th March 2022 seeking judgment against the respondents for the following reliefs:
 - a. May salary for Kshs. 11926.40/-
 - b. One month salary in lieu of notice Kshs. 11926.40/-
 - c. Prorate leave Kshs. 33,393.92/=
 - d. Underpayment of wages Kshs. 50,481.60/=
 - e. Public holidays Kshs. 50,287.60/=
 - f. Overtime for extra hours worked Kshs. 43,200/=
 - g. Rest days Kshs. 76,328.96/=
 - h. 12 months compensation salary Kshs. 143,116.40/=
 - i. Cost of the suit
 - j. Certificate of service
 - k. House allowance Kshs. 85,870.08/= (page 3-7 of the record of appeal)
4. The appellant entered appearance and filed defence (pages 13 to 34 of the record). While the suit was pending the Appellant filed notice of preliminary objection dated 17th June 2022 as follows:-
 - i. That the suit offends the mandatory provisions of section 90 of the *Employment Act* Chapter 226, No. 11 of 2017 Laws of Kenya. The claimant alleges that his employment was terminated in 2017 and the present suit against the 2nd respondent has been instituted five years after the alleged act.
 - ii. That the suit does not disclose a cause of action or dispute against the 2nd Respondent within the meaning of the *Employment Act* to be resolved by this court thus rendering it fatally and incurably defective.
 - iii. That this Honourable Court lacks territorial jurisdiction to determine the suit.



- iv. That the suit against the 2nd Respondent is otherwise an abuse of the court process and ought to be struck out with costs to the 2nd respondent as an illegitimate use of the court process.”(page 35 of the record of appeal)
5. The court gave directions for the judgment in this appeal to apply in Bungoma ELRCA Nos. E034, E035, E036, E037, E038, E040 and E043 of 2022 and for the appeal to be canvassed by way of written submissions. The Appellant’s written submissions drawn by MNO Advocates LLP were dated 27th January 2023 and received in court on even date. The 1st respondent’s written submissions drawn by V.A. Shibanda & Company Advocates were dated 18th January 2023 and received in court on the 10th February 2023 together with supplementary record of appeal dated 6th February 2023 which produced the statement of claim dated 6th December 2019 together with payment receipt and the summons to enter appearance and the response to the claim by the 2nd respondent and its memorandum of appearance. The 2nd respondent did not file submissions in the appeal.

Determination

Issues for determination.

6. The Appellant in their written submissions identified the following issues for Determination:-
 - a. Whether the trial court erred in law and fact by failing to appreciate that the instant suit was filed against the appellant 4 years after the cause of action arose.
 - b. Whether the trial court erred in law and fact by conferring territorial jurisdiction on itself.
7. The 1st respondent addressed the issues raised by the appellant.
8. The Court adopts the issues as addressed by the parties in the instant judgment namely:
 - a. Whether the trial court erred in law and fact by failing to appreciate that the instant suit was filed against the appellant 4 years after the cause of action arose.
 - b. Whether the trial court erred in law and fact by conferring territorial jurisdiction on itself.
9. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle and another V Associated Motor Boat Company Ltd & others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
10. In the instant appeal, the impugned ruling is on matters of law and facts so the court will re-evaluate the law, facts and authorities relied on in determining the preliminary objection by the trial court guided by the decision in *Selle and another v Associated Motor Boat Company Ltd & others*, [1968] EA 123(supra)



Whether the Trial Court erred in law and fact by failing to appreciate that the Instant Suit was filed against the Appellant 4 Years after the Cause of Action Arose.

11. The trial court ruling subject of the instant appeal was delivered by Hon. Eric Malesi (PM) in Kakamega Chief Magistrate Court MCELRC 155 of 2020 to apply suits cited herein including the instant 120 of 2020 on 6th September 2022(pages 45-46 of the record of appeal). The trial court upon consideration of the Preliminary Objection by the Appellant / Respondent delivered a ruling on the first issue as follows:- ‘The first limb of the preliminary objection is that the claims is time barred. I have looked at the statement of claim and note that the cause of action arose in May 2017. The claim was filed in court in May 2020, this is within the period prescribed under section 90 of the Employment Act and therefore this limb must fail”. (page 45-46 of the record of appeal)
12. The court was of the opinion that the trial court in its ruling did not address the issue of limitation of time raised by the appellant with respect to joining the appellant after time limit of 3 years under section 90 of the Employment Act. The court will then consider that ground of preliminary objection by evaluating the facts and the law.

Appellants Submissions

13. The Appellant submits that the 1st respondent instituted suit against the appellant vide statement of claim dated 4th October 2021 while cause of action arose on the 6th may 2017. That the 1st respondent instituted these claims 4 years after the cause of action contrary to section 90 of the Employment Act 2007 which provides for limitation in employment matters to wit:- ‘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.” To buttress this ground of appeal the appellant relied on the decision in John Kiiri Njiri v University of Nairobi (2021)eKLR where the court expressed itself thus:- “section 90 of the Employment Act is framed in mandatory terms. A claim based on a contract of employment must be filed within 3 years from the date the cause of action arose. This court is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose. ”
14. The Appellant submits that the trial magistrate court misguided itself that the claim was instituted in 2020 while the amended statement of claim was dated 4th October 2021 which joined the appellant as a party to the suit.
15. The Appellant to buttress this ground appeal on limitation of time further relied on decision in Gathoni v Kenya Cooperative Creameries td (1982)2 KLR 104 to wit: ‘the law on limitations of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and take reasonable steps in his own interest.’ The appellant submits that the claimant was guilty of laches and time should not be extended and relied on the decision in Hilarion Mwabolo v Kenya Commercial Bank [2013]eKLR where the court dismissed the claimant’s suit for lack of leave to extend time since the suit was time barred. The appellant further relied on decisions on jurisdiction which the court read.

1st Respondent Submissions

16. The 1st respondent submits that the primary suit was filed vide a statement of claim dated 6th December 2019 and received in court on the 5th may 2020 (page 1 of the supplementary record of appeal dated



6th February 2023). That the claim would have been time barred if filed after 6th May 2020. That their claim was filed within the 3 year statutory period.

Decision

17. It was not in dispute that the 1st respondent was terminated from employment on the 6th May 2017. He filed the statement of claim on the 4th May 2020 and stamped on 5th May 2020 within the 3 years statutory period under section 90 of the [Employment Act](#). (page 1 of the supplementary record).
18. It was also not in dispute that the 1st respondent amended statement of claim and joined the Appellant which was document was received in court 16th March 2022 (page 3 of the record of appeal). This way outside the 3 years statutory time limitation for filing claims under employment contracts pursuant to section 90 of the [Employment Act](#). The 1st Respondent submits that the primary suit having been filed within the 3 years then the suit was not time barred. The 1st respondent did not address the issue of the amendment outside the 3 years to join the appellant.
19. Section 90 of the [Employment Act](#) 2007 provides for limitation of instituting claims under employment contracts to wit:- ‘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.’ The court agreed with the decision in [John Kiiri Njiri V University of Nairobi](#) (2021)eKLR where the court expressed itself thus:- ‘section 90 of the [Employment Act](#) is framed in mandatory terms. A claim based on a contract of employment must be filed within 3 years from the date the cause of action arose. This court is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose.’
20. The court found Justice Visram J addressed a similar appeal where the magistrate court rejected application by plaintiff to amend suit after expiry of limitation time to join a new defendant in [Fredrick M. Waweru & another v Peter Ngure Kimingi](#) [2007] eKLR. The issue identified by the court then was:- ‘This Appeal raises an important issue of law and procedure. The issue here is not just one of the amendment of Plaintiff, and the circumstances in which it can be done. Rather, the issue is one of substitution of a party, through an amendment application, long after the limitation period to commence the action has expired.’
21. Section 100 of the [Civil Procedure Act](#) provides for General power to amend as follows:-‘ The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.’
22. Order 8 of the [Civil Procedure Rules](#) provides for amendment of pleadings without leave before pleadings are closed. The court found that the amended claim was lodged on 15th march 2022. The Defence by 2nd respondent was filed in court on the 27th July 2020. On the 9th November 2021 the matter was listed for hearing directions. That means by time of filing the amended claim in march 2022 the pleadings had closed and leave ought to have been sought under Order 8 rule 3 of the [Civil Procedure Act](#) which reads:- ‘(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.”

23. In the instant case the court found no evidence of leave having been sought to amend the claim to join the appellant the time limit of 3 years under section 90 of the *Employment Act* having expired. The court also finds that it does not have power to extend time under section 90 nor does the magistrate court as held in *John Kiiri Njiiri V University of Nairobi* (2021)eKLR where the court expressed itself thus:- “section 90 of the *Employment Act* is framed in mandatory terms. A claim based on a contract of employment must be filed within 3 years from the date the cause of action arose. This court is denied jurisdiction to extend time to file suits not lodged with the court within 3 years from the date the cause of action arose.”
24. Justice Visram in *Fredrick M. Waweru & Another V Peter Ngure Kimingi* [2007] eKLR(*supra*) cited with approval English decision in *Liptons Cash Registers v. Hugin* (1982) 1 AER 595 where issue of joining defendant upon expiry of time limitation was found to be prejudicial to that party as they were entitled to defence of statute barred claim. Justice Visram cited with approval several decisions cited in Liptons Cash Registers case as follows:-

In the course of his Judgment, Hawser, J stated as follows: “Before expressing my view as to the course taken by Walton J, it is necessary to look at the authorities which have been cited. They are:

- (a) *Weldon v Neal* (1887) 19 QBD 394. The headnote says: ‘A Plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the Statute of Limitations.’ Perhaps if I could just refer to Lindley LJ’s Judgment where, having said that he agreed with Lord Esher, MR, he said (at 395-196): ‘I am of the same opinion. I do not think it would be just to the defendant to allow these amendments, the effect of which would be to deprive him of his defence under the Statute of Limitations.’
- (b) *Mabro v Eagle Star and British Dominions Insurance Co Ltd* [1932] 1 KB 485, [1932] All ER Rep 411. That was a decision of a two-judge Court of Appeal consisting of Scrutton and Greer LJJ. The headnote says ([1932] 1 KB 485): “The Court will not, under Order xvi., r.2 allow a person to be added as plaintiff to an action if thereby the defence of the Statute of Limitations would be defeated. Scrutton LJ said this ([1932] 1 KB 485 at 487, [1932] All ER Rep 411 at 412: ‘In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the Court to disregard the statute.’
- (c) *Davis v Elsby Bros Ltd* [1960] 3 All ER 672, [1960] 1 WLR 170. That was a case in which the court refused to allow by amendment the substitution of a new defendant, the claim against whom was statute-barred. The case turned mainly on the question of whether the proposed amendment was a correction of a mere misnomer or the substitution of a new party. Of course the question of principle arose. Pearce LJ, having referred to Mabro’s case said this ([1960] 3



All ER 672 at 674, [1961] 1 WLR 170 at 173): ‘In my opinion the addition of a defendant is governed by the same considerations as the addition of a plaintiff. Therefore the principle of Mabro’s case prevents the amendment in this case if the amendment involves the addition of a party and not the mere correction of a misnomer. That principle also applies to the substitution of a party, since substitution involves the addition of a party in replacement of the party that is removed. Moreover, if contrary to that principle, a party were added or substituted, then the final words of R.S.C., Ord. 16, r. 11, would defeat the purpose of the addition or substitution since the new defendant could still rely on the statute against the party so added. Those words are: “... and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice.” The court further stated: -“No amendment can be allowed when the effect of the amendment is to take away from the other side a valuable right accrued to it by the lapse of time. The Court of Appeal decision in the Joseph Ochieng case (supra) confirmed the position as much where Shah, JA (as he then was) said: “The Learned Judge was right in saying that Order VI rule 3(5) does not permit an amendment to be made to complete a defective cause of action where the statute of limitation would have barred the claim.”(cited is Richard Kuloba v James Ochieng Oduol (HCCC No. 1 of 2000, reported in (2001)1 EALR 101)

25. The court reading of Order 8 Rule 3 (2) of the *Civil Procedure Act* was that leave was required to file the amended statement of claim at the magistrate court time having lapsed within which to file an employment claim under section 90 of the *Employment Act*. Though the power to grant leave is discretionary, there was no evidence before court that the lower court was even invited to exercise the power. No leave was granted and further no leave could have been granted to introduce a new defendant upon lapse of the 3 years since the termination of employment contract. Applying the foregoing English authorities, the English civil procedure rules being similar to ours on amendment of pleadings cited in *Fredrick M. Waweru & Another V Peter Ngure Kimingi* [2007] eKLR it is the court finding that the appellant was entitled to defence of the claim being statute barred as proceedings against it were deemed to only have begun upon service of summons to enter appearance which summons were issued on the 16th March 2022 (page 12 of the record of appeal).
26. The court upholds the appeal in finding that the amended claim filed in court on 16th March 2022 seeking to join the appellant was statute barred as far as the appellant was concerned.

b. Whether the Trial Court erred in Law and Fact by Conferring Territorial Jurisdiction on itself.

27. The learned magistrate in the instant case held:- ‘The third limb of the preliminary objection is that this court is robbed territorial jurisdiction to determine this suit. This being a court in the County where the Cause of action arose, I find it within the Claimant’s right under section 11,14 and 15 of the *Civil Procedure Act* to have instituted this claim in this court.’
28. In the instant issue the court found no need to delve into merit of the issue agreeing with the 1st respondent that the court vide its ruling delivered on 2nd December 2022 in Bungoma ELRC Misc Application E009 of 2022 Isaiah Chikamai v Frodak Services & Butali Sugar Mills Limited the court ordered transfer of the primary suit in Kakamega MCELRC No. 120 of 2020 to Butali law courts hence the issue is overtaken by events. The court finds the issue is now resjudicata the court having addressed the issue of territorial jurisdiction of the primary suits.



Conclusion and Disposition

29. The court having found that the amendment to join the appellant as 2nd defendant was time barred allows the appeal, sets aside ruling on joining the Appellant by Hon. Malesi (PM) of 6th September 2022 and upholds the notice of preliminary objection dated 17th June 2022 by striking out the name of the appellant as joined in Kakamega CMCC Nos. 120,155, 144,105,109,114,115 and 119 of 2020 various Claimants v the Respondents with costs to the appellant at the trial court.
30. The suits at trial to proceed against the 2nd Respondent only.
31. Right of appeal in 30 days.
32. Each party to bear own costs in the appeal.
33. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 9TH MARCH 2023.

JEMIMAH KELLI,

JUDGE.

In the Presence Of:-

Court Assistant : Brenda Wesonga

For Appellant: Kedogo (Ms) Advocate

1st Respondent – Absent

2nd Respondent : Ms Twena Advocate

