



REPUBLIC OF KENYA



KENYA LAW
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**Maridadi Flowers Limited v Manasi (Appeal 7 of 2019)
[2022] KEELRC 96 (KLR) (10 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 96 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL 7 OF 2019
DN NDERITU, J
MAY 10, 2022**

BETWEEN

MARIDADI FLOWERS LIMITED APPELLANT

AND

TERISIA MAGUTA MANASI RESPONDENT

JUDGMENT

1. Introduction

1. In a plaint dated 29th May, 2013 received in court on 30th May, 2013 the Respondent in this appeal (the plaintiff in Naivasha CMCC No 308 of 2013) filed a suit against the Appellant herein (the Defendant in the lower court) seeking compensation for injuries that the Respondent had allegedly sustained in the course of her employment on 31st March, 2008.
2. The Appellant filed its defence in that suit in the lower court and raised a preliminary objection (PO) to the effect that the said suit had been filed out of time without leave of court. The said PO was based on the Employment Act, 2007 and the Limitation of Actions Act (Cap 22).
3. The said PO was argued and in a ruling delivered on 22nd January, 2015 the learned trial Magistrate (Hon. P. Gesora CM) dismissed the PO with costs.
4. It is that ruling that the Appellant has appealed against by way of a Memorandum of appeal dated 26th January, 2015 filed in the High Court at Naivasha on even date. However, the High Court Judge at Naivasha directed that the appropriate forum for the hearing and disposal of this appeal is ELRC at Nakuru.
5. On 24th July, 2019 this court (Mbaru J) directed that this appeal be heard by way of written submissions. The Appellant's counsel filed on 25th July 2019 and counsel for the Respondent on 26th September, 2019.



6. After a considerable time of dormancy the matter came up for mention before this court on 3rd November, 2021 when neither party nor Counsel appeared and the matter was reserved for judgment to be delivered on notice.

II. Issues for Determination

7. The Appellant has listed four grounds of appeal in its Memorandum of appeal:-
 - (1) That the learned trial magistrate failed to note the express and mandatory requirements of Section 90 of the Employment Act, 2007.
 - (2) That the learned trial magistrate erred in dismissing the objection by failing to appreciate that the suit in the lower court was filed out of time without leave, the cause of action having arisen (occurred) on 31st March, 2008 and the suit was filed on 29th May, 2013 after lapse of 3 years.
 - (3) That the learned trial magistrate erred in law in dismissing the objection as the cause of action arose on 31st March, 2008 when the Employment Act was in force.
 - (4) That the preliminary objection as pleaded had merits in law.
8. It is on the basis of the above four grounds that the Appellant prays:-
 - (a) That the preliminary objection as pleaded in the lower court Civil suit No. 308 of 2013 at Naivasha be upheld and the plaintiff's (Respondent's) suit be struck out with costs to the Defendant (Appellant).
 - (b) The costs of this appeal and the suit in the lower court be in favour of the Defendant (Appellant).
9. This court has gone through the pleadings in the lower court and the ruling by the learned magistrate, the memorandum of appeal, and the written submissions by Counsel for both parties, and in my view the issues for determination in this appeal are the following:-
 - (a) Was the claim by the Respondent herein in Naivasha CMCC No.308 of 2013 filed out of time by virtue of the Employment Act, 2007 or the Limitation of Actions Act, or any other law?
 - (b) Costs.

III. The Law

10. It is not in dispute that the Respondent herein commenced Naivasha CMCC No. 308 of 2013 against the Appellant on 30th May, 2013 vide a plaint dated 29th March, 2013. There is in the lower court file a duplicate court file receipt for court fees on filing of the plaint issued on 30th May, 2013 and as such there is no dispute as to the date on which the suit was filed.
11. That suit is in respect of injuries sustained by the Respondent while working for the Appellant on a contract of service on 31st March, 2008. In the said suit the Respondent attributed the injuries to breach of contractual obligations on the part of the Appellant and the particulars thereof are set out in paragraphs 5 and 6 of the plaint.
12. From the pleadings in the lower court it is clear that the claim or the proceedings in the lower court were based on or arising out of a contract of service (employment) between the Appellant and the Respondent.



13. The Employment Act, 2007 was assented to on 22nd October, 2007 but its operation and application commenced on 2nd June, 2008. This Act repealed the Employment Act (Cap 226).
14. From the foregoing, if the Respondent was injured on 31st March, 2008, and that is the pleading in the lower court, the Employment Act 2007 was not in operation and hence did not apply to her in her employment relationship with the Appellant. This is a rather straightforward issue that should not attract any controversy.
15. From the time of the alleged injury to the time the claim was filed in court on 30th May, 2013 a period of over five(5) years had expired.
16. It is important to note and distinguish that the cause of action by the Respondent was not about the terms of her contract or any other such term of employment. It was not about termination or dismissal but concerned injuries sustained at work.
17. For avoidance of doubt Section 90 of the Employment Act provides as follows:-

"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 or service in general shall be or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof."
18. Clearly, the above provisions from the Employment Act, 2007 ousts application of Section 4 of the Limitation of Actions Act in matters based on or arising out of employment relationships, or contract of service generally. All matters or disputes under and arising out of employment and labour relationships under the Employment Act, 2007 shall be filed in court within three (3) years of the occurrence complained of or in case of a continuing injury or damage within twelve months next after the same has stopped.
19. Be that as it may, what was the employment law when the Respondent was injured on 31st March, 2008 and what was the applicable law on limitation when she filed her claim in court on 30th May, 2013?
20. As noted above the Employment Act, 2007 came into operation on 2nd June, 2008 and hence the same was not in force when the Respondent's cause of action arose on 31st March, 2008.
21. The repealed Employment Act (Cap 226) did not contain any provisions on limitation akin to Section 90 of the Employment Act, 2007 and hence the applicable law in respect of limitation of actions based on employment and labour matters prior to 2nd June, 2008 was Section 4(1) of the Limitation of Actions Act (Cap 22).
22. Paragraphs 5 and 6 of the plaint in the suit are clear that the Respondent filed the suit in the lower court based on breach of contractual obligations by the Appellants or its agent or supervisor. Her claim is not based on tort but on breach of a provision in the contract or condition whether express or implied, and hence Section 4(2) of the Limitation of Actions Act on torts does not apply.
23. It is the view of this court that the Employment Act, 2007 did not apply retrospectively to the Respondent. The cause of action by the Respondent clearly arose before operationalization of the above Act and hence the law applicable to her suit in terms of statutory time limitation is the Limitation of Actions Act (Cap 22).
24. In view of the foregoing the Respondent had a period of six (6) years to file her claim from 31st March, 2008 which should have expired on or about 30th March, 2015. The Respondent therefore filed her



claim within the time allowed in the law applicable then and as such she did not need to apply for extension of time.

25. Clearly the decision of Radido J in *Peter Nyamai & Others -Vs- M.J. Clerke* is distinguishable from the circumstances of the Respondent's suit as the Respondent did not apply or need to apply for extension of time for the reasons stated above. The same applies to the decision of Ongaya J in *Meshack Ongeng'o Omondi -Vs- Municipal Council of Eldoret & Another*.
26. However, this court is in concurrence with Mbaru J in *Esther Kabai Kihima -Vs- Trident Insurance Company Limited* (2013) eKLR wherein the learned judge stated:-

"The application of Employment Act, 2007 Section 90 relate to all claims that arise or arose since its date of commencement being the 2nd of June, 2008.

This was at a time, when the Claimant's termination had already occurred and if she applied to court before the commencement of this law her claim would have still been under the repealed Employment Act, Cap 226 Laws of Kenya and not as under the Employment Act, 2007. The transitional provisions under Section 93(1) of the Employment Act, 2007 apply to specific situations and stated above and do not distinguish claims that were valid before Act came into force as the same was not meant to act retrospectively."

27. In *Charles Kiruthi Mwangi -Vs- G4S Security Services (K)* (2012) eKLR Radido J had the following to say on a similar situation:-

"My reading of the Employment Act, 2007 has not found any provision in the Act which states that it shall have retrospective application. The only respect in which the Employment Act, 2007 applies to contracts of service entered into before its commencement in 2008 is its amendment of the terms of such contracts which were still subsisting to be construed as if they were made in accordance with it."

This court is in agreement with the above sentiments.

28. For the reasons stated above this court holds that the Respondent's suit was not statutorily barred at the time of filing and therefore returns the first issue in the negative.
29. The effect of the above findings is that the decision of the lower court is upheld, though for different reasons as expressed herein, and this appeal is hereby dismissed.

IV. Costs

30. The Respondent is awarded the costs of this appeal.

V. Disposal

31. This court makes the following orders in final disposal of this appeal:-
- (a) The appeal is hereby dismissed.
 - (b) The suit file in the lower court being Naivasha CMCC No. 308 of 2013 shall immediately be returned to the lower court for hearing and disposal at the earliest opportunity as that suit has been pending since 2013.
 - (c) Costs of this appeal to the Respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF MAY, 2022.



DAVID NDERITU
JUDGE

