



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU

APPEAL NO. 41 OF 2019

(Originally Kakamega High Court Civil Appeal No. 99 of 2018)

EVANS BUSHURU SHIUNDU

APPELLANT

v

WEST KENYA SUGAR CO LTD

RESPONDENT

(Being an Appeal against the entire Ruling of Hon. Maragia Senior Resident Magistrate

in Kakamega CMCC No. 44 of 2017 delivered on 11th July 2018)

JUDGMENT

1. Evans Bushuru Shiundu (Appellant) instituted legal proceedings against West Kenya Sugar Co. Ltd (the Respondent) before the Magistrates Court on 10 February 2017 alleging breach of statutory duty of care/negligence leading to an accident/injuries in the workplace on 14 December 2013.
2. The Respondent filed a Defence on 29 March 2017 and on 16 May 2018, it filed a Notice of Preliminary Objection contending
 1. **THAT** this Claim is time-barred and/or statute-barred by virtue of the provisions of section 90 of the Employment Act, No. 11 of 2007, Cap 226 Laws of Kenya.
 2. **THAT** this Claim is time-barred and/or statute-barred by virtue of the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya.
3. In a Ruling delivered on 10 July 2018, the trial Magistrate found that the cause of action was founded on the tort of negligence and that since the claim was filed on 10 February 2017, 5-years after the cause of action accrued without leave, it was statute/time-barred.
4. The Appellant was dissatisfied and on 24 July 2018, he filed a Memorandum of Appeal before the High Court in Kakamega contending that
 1. **THAT** the Learned Magistrate erred in law in finding that the Appellant's suit is time-barred by virtue of the provisions of section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya yet the same was not pleaded.
 2. **THAT** the Learned Magistrate erred in law in failing to find that the Appellant's suit was based on breach of contract.
 3. **THAT** the Learned Magistrate erred in law in failing to find that the preliminary objection being founded on facts requiring proof at full trial was unsustainable and the same ought to have been dismissed and allow the suit to proceed to full trial.
 4. **THAT** the Learned Magistrate erred in law in failing to find that the drastic orders of striking out the Appellant's suit was not merited nor supported in law.
 5. **THAT** the Learned trial Magistrate failed to correctly appreciate and apply his mind to the authorities/case law before her.
 6. **THAT** the entire Ruling and orders of the Learned Magistrate was an outright travesty of justice, irregular and without support in law.

5. On 25 October 2019, the High Court, citing lack of jurisdiction transferred the Appeal to this Court.
6. When the parties appeared before this Court on 4 November 2020 for directions, the Court directed the Appellant to file and serve the Record of Appeal together with submissions on or before 27 November 2020.
7. The Respondent was directed to file its submission on or before 18 December 2020 ahead of Judgment on 20 January 2021.
8. The Respondent was also directed to notify the Appellant of the directions (the Appellant was absent).
9. The Appellant's submissions were not on file by the agreed timeline. It is not clear if the Appellant notified the Respondent of the directions given on 4 November 2020.
10. The Court has considered the record.
11. The Appellant pleaded that the cause of action arose on 14 December 2013. He asserted that the cause of action was grounded upon breach of contract.
12. Under section 90 of the Employment Act, causes of action founded upon a *contract of services* should be presented before Court within 3-years (the provision supersedes the 6-years provided for in section 4(1) of the Limitation of Actions Act).
13. The Appellant did not commence the action within 3-years and therefore, he was clearly out of time. He could not even get leave or extension of time if he sought the same (see *Divecon v Samani (1995-1998) 1 EA 48 and Attorney General & Ar v Andrew Maina Githinji & Ar (2016) eKLR*).
14. Even supposing the cause of action was based on the tort of negligence, he should have instituted his claim within 3-years as contemplated by section 4(2) of the Limitation of Actions Act.
15. The Court would also wish to observe that the Appellant's failure to file submissions within the set timeline is a signification that he was not ready to prosecute the Appeal and on that basis, the Appeal was for dismissal.
16. In light of the foregoing, the Court finds no merit in the Appeal.
17. It is dismissed with costs to the Respondent.

Delivered through Microsoft teams, dated and signed in Kisumu on this 20th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Abok Odhiambo & Co. Advocates

For Respondent Ogejo, Olendo & Co. Advocates

Court Assistant Chrispo Aura