



**Variety Flooring Works Limited v Matheka (Appeal 22 of 2016)
[2021] KEELRC 2418 (KLR) (3 November 2021) (Judgment)**

Neutral citation: [2021] KEELRC 2418 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 22 OF 2016
NZIOKI WA MAKAU, J
NOVEMBER 3, 2021**

BETWEEN
VARIETY FLOORING WORKS LIMITED APPELLANT
AND
MATITI MATHEKA RESPONDENT

JUDGMENT

1. Being dissatisfied with the ruling delivered by the decision of Hon. Senior Principal Magistrate Mrs. Grace Mmasi on 19th August 2016 in respect of the Notice of Motion dated 5th April 2015 filed in Milimani CMCC No. 2476 of 2015, the Appellant, Variety Flooring Works Limited, filed a Memorandum of Appeal dated 14th September 2016 appealing against the same on the grounds that:
 1. The Learned trial Magistrate erred in fact and in law by disallowing the Notice of Motion application dated 5th April 2015.
 2. The Learned trial Magistrate erred by failing to appreciate that the Respondent's subject suit was statute-barred having been filed outside the period prescribed by Section 90 of the [Employment Act](#), 2007.
 3. The Learned trial Magistrate erred in both fact and in law by failing to appreciate the [Employment Act](#), 2007 was in force at the time the subject suit was filed and its provisions applicable thereto.
2. The Appellant prays that the Learned Magistrate's order of 19th August 2016 be set aside and substituted with an order allowing the Notice of Motion application dated 5th April 2016 as prayed and striking out the Plaintiff and consequently the suit (Nairobi CMCC No. 2476 of 2015). It also prays for costs of both this Appeal and the proceedings before the lower court. The matter was disposed by way of written submissions.



Appellant's Submissions

3. The Appellant submits that the subject suit's Plaintiff which was evidently and admittedly filed on 30th April 2015, indicates that the cause of action occurred on 2nd July 2012 which was in the cause of the employment contract and thus subject to the [Employment Act](#). The Appellant asserts that in the circumstances, any claim by the Plaintiff from the cause of action should have been filed on or before 2nd January 2015 by dint of Section 90 of the [Employment Act](#) and that the subject Plaintiff having however been filed more than three months later was clearly statute-barred. The Appellant asserts that in its submissions before the trial Court, it relied on the ruling by this Honourable Court in Misc. App No. 46 of 2013 Nairobi – Laban Chema Libabu v Bata Shoe Company (K) Limited [2013] eKLR and that the Learned Magistrate was bound under the principle of stare decisis to adopt the said decision. It submits that the Learned Magistrate erred as her ruling merely observes that “the application has no merit” and fails to give reasons or address the Applicant's arguments and authorities.
4. It is the Appellant's further submission that Section 90 of the [Employment Act](#) does not provide instances when the prescribed limitation period ceases to run and that it referred the trial Court to the decision in Industrial Cause No. 6 of 2013 – Banking Insurance & Finance Union (Kenya) v Kirinyaga District Co-operative Union Ltd & Anor [2014] eKLR and the Ruling in Misc. App No. 3 of 2015 - Kenya Electrical Traders & Allied Workers Union v Kenya Power & Lighting Company Ltd. It submits that the Learned Magistrate however erred in failing to address the said argument and the authorities in her ruling. The Appellant further submits that the Respondent's Replying Affidavit and submissions relied heavily on the [Limitation of Actions Act](#) which as indicated in the authorities above, is inapplicable to claims based on the [Employment Act](#) or arising out of contracts of service in the subject suit. It asserts that if the [Limitation of Actions Act](#) were applicable then Section 26 would not have saved the Respondent's suit.
5. It is the Appellant's submission that fraud is a serious allegation with criminal connotations and that the Respondent/Claimant was careless and reckless to have alleged it was fraudulent without giving any explanation or evidence. The Appellant asserts that though court proceedings are privileged, the Respondent should not abuse that privilege to defame the Appellant and that this Court ought to reprimand the Respondent and allow the appeal as prayed.

Respondent's Submissions

6. The Respondent submits that his claim was filed within the prescribed timelines. He asserts that he got injured on or around 2nd January 2012 while still an employee of the Appellant and it severally promised to settle the matter but later refused/avoided/neglected to. The Respondent asserts that the said interactions between him and the Appellant amounted to alternative dispute resolution and that the law prevailing as at the time of filing his suit was that once a dispute is referred to conciliation or such other alternative dispute resolution mechanism, accrual of the cause of action is suspended until the outcome of the conciliation/alternative dispute resolution process is rendered. The Respondent asserts that this position is fortified by the reasoning in the cases of Kenya Plantation & Agricultural Workers Union v Mununga Leaf Base [2013] eKLR and Leonida Makokha & 3 Others v Munene Estate Limited [2014] eKLR. He further cited the case of Kenya Scientific Research International Technical and Allied Institutions Workers Union v Rainald Schumer's & Another [2012] eKLR where the Court held that time stops running when the process of conciliation starts and only runs again after the determination of the conciliation process. He further submits that he notes the finding of the Court of Appeal in the case of G4S Security Services (K) Limited v Joseph Kamau & 468 Others [2018] eKLR that time does not stop running on the commencement of reconciliation or other alternative dispute



resolution mechanisms provided for under the Constitution or any other law. That nevertheless, the said decision in the foregoing G4S Security Services case was delivered on 16th February 2018 whereas he filed his claim on 30th April 2015, at what time the law was that time stops running until after the outcome of conciliation or such other dispute resolution mechanism.

7. The Respondent submits that it was only reasonable that he would expect his claim to be treated in the same way as the other cases he has cited in support of his case had been determined, i.e, that time stops running when a matter is referred to conciliation. That the Supreme Court in the case of Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR held that the doctrine of legitimate expectation applies the principles of fairness and reasonableness in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise. He submits that the principles that must be succinctly set out are that: there must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which was competent and lawful for the decision-maker to make; and there cannot be a legitimate expectation against clear provisions of the law or the Constitution. That therefore acting fairly in the circumstances and pursuant to the doctrine of legitimate expectation means that the rationale in the cases aforementioned by the Respondent ought to apply to his case. It is the Respondent's further submission that the Appeal herein is misguided and ought to be dismissed forthwith with costs to the Respondent.

Determination

8. The appeal is in respect of the issue of limitation of time. The Appellant argues that the suit as filed by the Plaintiff in Milimani CMCC No. 2476 of 2015, Matiti Matheka v Variety Flooring Works Limited is barred by the limitation of actions as per Section 90 of the Employment Act. The Respondent herein who is the Claimant/Plaintiff in the suit below, asserts that the law as at the time was declared to be one where the time spent in conciliation was not reckoned as part of the time when computing limitation. The Respondent argues that on the basis of previous decisions he was within time in moving the Chief Magistrates Court as he did. The suit in the lower court was filed on 30th April 2015. It is asserted to have been filed out of time as the injuries that took place on 2nd February 2012 were the genesis of the claim. I have perused the Plaintiff's case filed before the Chief Magistrates Court and subject of the ruling the Appellant has challenged. It is trite law that limitation is prescribed in statute. In the case of claim arising out of the regime in the employment sphere, Section 90 of the Employment Act provides a clear time line. The Section bars action brought after the lapse of 3 years. It does not matter that there may have been no pronouncement that 3 years is the limitation period. The fact that the law has been in force since 2007 is proof that the legislature intended to have limitation capped at 3 years. Whether the Plaintiff was undergoing treatment or not, time was running and limitation set in on 2nd February 2015. The suit filed in April 2015 was therefore misplaced and ought to have suffered the fate befitting a stale suit.

Conclusion and orders

9. The inevitable outcome of the foregoing is that the the Learned Magistrate's order of 19th August 2016 be and is hereby set aside and substituted with an order allowing the Notice of Motion application dated 5th April 2016 and striking out the Plaint and consequently the suit in Nairobi CMCC No. 2476 of 2015 with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2021



NZIOKI WA MAKAU
JUDGE

