



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CIVIL APPEAL NO. 17 OF 2018

[Formerly H.C.C.A NO. 105 of 2017, Mombasa]

BETWEEN

SURYA DEVELOPMENT LIMITED.....APPELLANT

VERSUS

HAMISI CHITOLE MWANDORO.....RESPONDENT

[Appeal from a ruling and order of the Hon. Senior Resident Magistrate Mombasa,

Mr. E. Mutunga, dated 26th April 2017, in SRMCC No. 1718 of 2014]

Rika J

Court Assistant: Benjamin Kombe

Kishore Nanji Advocate, for the Appellant

H.N. Njiru & Company, Advocates for the Respondent

JUDGMENT

1. The Respondent filed a Complaint in the Senior Resident Magistrate's Court, whose registration details are given above. The Appellant was his Employer. The Complaint was filed on 3rd September 2014. The Respondent sought special and general damages for work injury against the Appellant.
2. At paragraph 5 of the Complaint, the Respondent pleaded that the factory accident leading to work injury, happened "on or about 30th November 2008." It was not disputed that this is the date the cause of action arose. It was not disputed that the Complaint was filed on 3rd September 2014.
3. The Appellant raised a point of preliminary objection through a Notice dated 19th July 2016, also raised at paragraph 9 of the Statement of Defence, based on limitation of time under Sections 4[2] of the Limitation of Actions Act Cap 22, and Section 90 of the Employment Act 2007.
4. The Trial Court made a Ruling on 26th April 2017, dismissing the objection. It was reasoned by the Trial Court that: the wording of Section 4 of the Limitation of Actions Act is not mandatory in nature; the action was based on contract, and 6 years had not lapsed at the time the action was initiated; Articles 47 and 50 of the Constitution of Kenya on fair administrative action and fair hearing respectively, applied in favour of the Respondent; it was prudent to hear the Claim on merit; and the Appellant had not demonstrated it would suffer any prejudice by having the Claim heard on merit.
5. The Appellant did not agree with the Ruling and presented a Memorandum of Appeal at the High Court on 24th May 2017, listing 4 Grounds of Appeal, which can be reduced to a single ground- that the Trial Court erred in finding that the Claim before it, was not time-

barred.

6. The Appeal was transferred to the E&LRC on jurisdictional ground. This Court has many times expressed its failure to understand, why Parties are still taking a long detour to the High Court, before filing work injury Appeals at the right forum.

7. The Parties filed their Closing Submissions at the High Court. The Appeal was mentioned before the E&LRC on 5th December 2019, when Parties confirmed filing of Submissions and indicated to the Court they wished to have a determination based on those Submissions and the Record of Appeal.

The Court Finds:-

8. Temporal jurisdiction [*jurisdiction ratione temporis*] of the E&LRC, in employment disputes, is given by Section 90 of the Employment Act 2007.

9. The cause of action in the dispute before the Trial Court, undoubtedly arose in 2008, during the life of the Employment Act 2007.

10. At paragraph 3 and 4 of the Complaint, the Respondent stated he was employed by the Appellant as a Casual Labourer, and was in a contract of employment. Casual labour is a form of contract of employment, and it is, like all other forms, regulated under the Employment Act 2007.

11. Section 90 of the Employment Act 2007, applies to civil actions or proceedings arising out of the Act, or a contract of service in general. It applies notwithstanding the provisions of Section 4 [1] of the Limitation of Actions Act, that is to say, irrespective of the time – limits created under the Limitation of Actions Act. The time-limits prescribed under Section 90 apply, notwithstanding that the Limitation of Actions Act provides for a longer period of 6 years to claims based on contract. It is recognized that employment contracts are special contracts, with a specialized regime for enforcement. Section 90 is the sole applicable law on limitation of time, to employment claims arising out of the Act, or a contract of service in general.

12. Actions based on the contract of employment, after the Employment Act 2007 came into force, must therefore be initiated in accordance with Section 90 of the Employment Act 2007. The Limitation of Actions Act, particularly the 6 year limitation on contractual actions, would only apply to contracts of employment breached, before the Employment Act of 2007 came into force.

13. The Respondent could not therefore rely on Section 4[1] [a] of the Limitation of Actions Act, to argue that he went to the Trial Court in under 6 years. Section 90 of the Employment Act was in force, and applied to his contract of employment, which was the foundation upon which his claim against the Appellant was built.

14. Resort to fair administrative action and fair hearing Articles under the Constitution of Kenya, as well as the fleeting mention in the Trial Court Ruling, of Article 159, could not validate the Complaint and grant the Trial Court temporal jurisdiction.

15. In protecting Employees against unfair labour practices, unfair administrative actions, and even in protecting the right to fair hearing, the Court must first have jurisdiction. Even in discharging its authority under Article 159, the Court must first have jurisdiction. Without jurisdiction, the Court is immobilized. It cannot discharge authority. Section 90 of the Employment Act is a jurisdictional law. It gives the Court time-mobility. It was a wrong approach for the Trial Court to hold that the Appellant would not suffer any prejudice if the Claim was heard. How would the Parties not be prejudiced by a Judgment issued without jurisdiction? Focus was not about the Appellant or the Respondent, or about protection and enforcement of constitutional rights; it was about the jurisdiction of the Trial Court. In Supreme Court of Kenya decision, ***Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others [2012] e-KLR***, which has religiously been cited by other Courts, it was held that a Court's jurisdiction flows from either the Constitution or Legislation, or both; and the Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it, by the law. The Trial Court appeared to arrogate to itself jurisdiction outside that which is conferred by Section 90 of the Employment Act 2007.

16. The Court is satisfied that this Appeal has merit.

IT IS ORDERED:-

a. The Appeal is allowed.

b. The order of the Trial Court declining preliminary objection, is substituted with an order upholding preliminary objection, and rejecting the Claim before the Trial Court under Section 90 of the Employment Act.

c. No order on the costs of the Appeal and the Trial.

Dated and delivered at Mombasa this 27th day of February 2020.

James Rika

Judge