



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CIVIL APPEAL NO. 43 OF 2020

TEACHERS SERVICE COMMISSION.....APPELLANT

v

JANE AWINO OWOKO

(suing as personal representative of Benedict C.W. Owoko).....RESPONDENT

(Being an appeal from the Judgment of the Honourable P.N. GESORA,

Chief Magistrate delivered on 30th July 2019

in Nairobi CMCC No. 202 of 2009)

JUDGMENT

1. Jane Awino Owoko (Respondent) sued the Teachers Service Commission (the Commission) before the Chief Magistrates Court alleging breach of contract/statute by the Commission (payment of pension to the estate of the Benedict C.W. Owoko).
2. After the close of hearing and pending the delivery of the judgment, the Respondent filed an application seeking leave to amend the Plaint.
3. The Chief Magistrate declined to allow the application and the Respondent appealed to the High Court.
4. The High Court allowed the application for amendment and directed that the suit be remitted to the Chief Magistrates Court for hearing and/or determination.
5. On 5 February 2019, the Commission filed a Notice of Preliminary Objection before the Chief Magistrates Court to wit

TAKE NOTICE that the Defendant herein shall at the hearing hereof raise and argue a Preliminary Objection on the grounds that the Plaintiff's Claim herein is time-barred and grossly offends the mandatory provisions of section 4(1)(a) of the Limitation of Actions Act and section 3(2) of the Public Authorities Limitation Act and shall pray that the Plaint be struck out with costs to the Defendant.

6. The Chief Magistrate, after hearing arguments, delivered a Ruling on 30 July 2019 dismissing the Preliminary Objection citing a passage from the determination by the High Court that

In the end and on the basis of the above reasons, I allow the appeal. Consequently, the order dismissing the summons dated 17.12.2010 is set aside and substituted with an order allowing the aforesaid summons. A fair order on costs which I make is to direct each party to meet its costs of the appeal and summons. The matter is remitted back to the subordinate Court to hear the parties on the submissions and thereafter render its judgment on the suit on the basis of the amended plaint according to law.

7. The Commission was dissatisfied and it lodged an Appeal with this Court setting out the Grounds of Appeal as

1. By declining to hear and determine the Appellant's preliminary objection on its merits, the Learned Magistrate seriously misdirected himself and misinterpreted the Ruling of the High Court in HC Civil Appeal No. 301A of 2011.

2. The Learned Magistrate wholly misunderstood the Appellant's Preliminary Objection dated 31st January 2019.

3. The Learned Magistrate erred in law and fact in failing to consider that the Plaintiff's suit is time-barred by dint of section 3(2) of the Public Authorities Limitation Act and section 4(1)(a) of the Limitation of Actions Act having been filed outside the statutory limitation period.

4. The Learned Magistrate erred in law in failing to consider that he had no jurisdiction to hear and determine a suit filed out of time.

5. The Learned Magistrate erred in law when he confused the nature and character of HC Civil Appeal No. 301A of 2011 which was premised on leave to amend the Complaint and the Appellant's Preliminary Objection which was premised on time bar.

6. The Learned Magistrate erred in law and in fact when he found that there was a correlation between the Appellant's Preliminary Objection and the Appeal in HC Civil Appeal No. 301A of 2011 which was determined on 19th February 2016.

7. The Learned Magistrate erred in law in failing to consider the Appellant's submissions and authorities placed before him.

8. The Learned Magistrate grossly misinterpreted and misapplied the relevant law and arrived at an erroneous conclusion of law.

9. The Learned Magistrate erred in law when he dismissed the Appellant's Preliminary Objection without determining its merits.

8. The Court gave directions on 5 June 2020 as a result of which the Commission filed its submissions on 2 July 2020 while the Respondent filed her submissions on 7 August 2020.

Competency of the Appeal

9. The Respondent raised an objection on the competency of the Appeal on the ground that the Commission had not, at the first instance sought leave from the Chief Magistrate to appeal. Order 43 Rule 3 of the Civil Procedure Rules and section 75 of the Civil Procedure Act were cited.

10. According to the Respondent, the Commission did not have a right of appeal as of right. Siaya High Court Misc Civil Appl No. 19 of 2019, *Nicholas Ayoro v Kevin Ochieng Jabedo* was brought to the attention of the Court.

11. Order 43 Rule 1 of the Civil Procedure Rules contemplates that appeals arising from Order 2 of the Rules (pleadings generally) ensue as of right. One of the defences given as an illustration is a statute of limitation.

12. The Court, therefore, finds the competency objection as unmerited. In any case, this Court granted leave to appeal on 5 June 2020 and the Respondent should have objected at that stage.

Failure to hear and determine the objection on Limitation

13. In declining to entertain the Commission's preliminary objection, the Chief Magistrate relied on a passage from the High Court's determination (already set out above).

14. The High Court was dealing with an appeal arising from the dismissal of an application to amend the Complaint. It is the application the High Court allowed and directed the suit be placed before the Chief Magistrate to continue consideration of the suit.

15. Since the Respondent's application for amendment was allowed by the High Court, the Commission had a right to formally respond to the amendments by at least amending its Defence.

16. By filing the Preliminary Objection, the Commission was within its rights and the Court should have entertained the Objection on the merits.

17. The Commission and the Respondent should have been afforded the opportunity to be heard on the Objection.

18. Limitation goes to jurisdiction and is not merely procedural and can be raised at any time before Judgment. The Court can also bring it up *suo moto*.

19. **In *Mukisa Biscuits Manufacturing Company Limited v West End Distributors (1969) EA 696*, the Court had the following to say**

So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

20. The Court finds that the Chief Magistrate fell into error by declining to entertain the Preliminary Objection on merit.

Declaratory suit not subject to limitation

21. Addressing the question of limitation, the Respondent submitted that her suit was a declaratory suit and where it is alleged that statutory rights have been violated such suits were not susceptible to limitation or time bar plea(s).
22. The Respondent cited the Court of Appeal authority *Corporate Insurance Company Ltd vs Elias Okinyi Ofire* (1999) eKLR.
23. The Court finds the contention ingenious but without merit, as there is no holding by the Court of Appeal in the aforesaid authority that declaratory suits are immune from limitation challenges.
24. The Respondent in the amended Plaintiff sought more than a declaration. She sought certain sums and computation and payment of pension. The foundation or gravamen of her complaints were contractual albeit underpinned by law.
25. It is not in dispute that the causes of action advanced by the Respondent accrued in 2002. The suit was filed in 2009 long outside the time prescribed by section 4(1)(a) of the Limitation of Actions Act (the prescribed limitation is more generous than that set out in the Public Authorities Limitation Act).
26. From the foregoing, the Appeal is allowed and the Ruling of 30 July 2019 is substituted with an order dismissing the Chief Magistrates Court Civil Case No. 202 of 2009.
27. No order on costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 23rd day of October 2020.

Radido Stephen

Judge

Appearances

For Appellant	Ms. Rutto, Advocate, Teachers Service Commission
For Respondent	Wasuna & Co. Advocates
Court Assistant	Lindsey