



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. 15 OF 2018**

**(Before Hon. Justice Mathews N. Nduma)**

**OGEMBO TEA FACTORY COMPANY LIMITED.....APPELLANT**

**VERSUS**

**ONDIEKI OKENDA.....RESPONDENT**

**JUDGMENT**

1. The appeal is from the judgment of Hon. Naomi Wairimu, Principal Magistrate delivered on 3<sup>rd</sup> May 2017 in Ogembo PMCC NO. 23 of 2013 in favour of the Plaintiff/Respondent.

2. The main ground of Appeal is that the learned trial magistrate erred in law and fact in failing to hold that that the respondent's claim was statute barred by dint of the provisions of *sections 90 of the Employment act 2007, as read with section 4(1) of the limitation of Actions Act cap 22 laws of Kenya*

3. The appellant also states that the magistrate erred in finding the appellant liable in negligence contrary to the evidence adduced and that the trial magistrate erred further in law and fact in using the wrong principle in assessing damages and thus awarded excessive damages.

4. The duty of the court in a first appeal such as this one was well spelt out in *Selle vs Associated Motor Boat Company Limited (1968) EA 123 and Peter vs Sunday Post Limited (1958) EA 424*. The Appeal court must analyze and re-evaluate all the evidence adduced before the lower court and draw its own independent conclusions and determine whether the decisions/conclusions by the learned trial magistrate should stand or not. The Appeal Court should however be minded that it had no opportunity to hear the witness directly so as to weigh credibility issues.

5. In the present matter the issue whether the suit was time barred in the first place takes precedence in terms of the of *Iga vs Makerere University (1972) EA65* where the court held that:

“A plaint which is barred by limitation is a plaint barred by law”

The court of Appeal decision in *The Owners of the Moor Vessel “Lillian S” vs Caltex Oil Kenya Limited*, mandated the trial court and this court to determine a preliminary objection firstly and down the tools as soon as the court finds that the matter is time barred and it has no jurisdiction therefore to entertain the matter.

6. From the Appeal record the plaint initiating the suit was filed on 6<sup>th</sup> May 2013. In paragraph 5 of the said plaint, the respondent pleaded that on or about the 11<sup>th</sup> day of June, 2007 the plaintiff was lawfully discharging his duties in the course of employment at the defendant's place removing tea leaves from a vehicle when he fell down and sustained injuries on his right arm as a consequence of which he suffered pain, loss and damage.

7. It is therefore discernable from the pleadings without getting into adduced facts during trial that the cause of action arose on 11<sup>th</sup> June 2007 and the respondent filed the suit about 5 years and 11 months later on 6<sup>th</sup> May 2013.

8. The issue of time bar was not raised by the Appellant in the statement of defence filed on 9<sup>th</sup> May 2013. That notwithstanding the trial court was obliged on its own motion to deal with the issue since it touched on the jurisdiction of the court to hear and determine the matter.

9. However, in the judgment of the trial court delivered on 3<sup>rd</sup> May 2017, the trial magistrate despite noting the actual date when the cause of action arose did not deal with the issue of time limit.

10. This court is now bound to deal with it before delving on the merits of the Appeal.

11. This suit was filed before the Employment Act 2007 came into effect in August 2008. The provision applicable to this suit is *section 4 of the Limitation of Actions Act, Cap 22 laws of Kenya* which provides:

“(4) Actions of contract and tort and certain other actions.

1. The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

a. actions founded on contract;

2. An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

12. This court has held that suits by employees against an employer in which the employee claims damages arising from injuries sustained in the course of employment due to alleged negligence of the employer are claims founded on negligence and are therefore founded on tort and not contract.

13. Therefore, the provision of *Section 4(2) of the Limitation of Actions Act Cap 22 laws of Kenya* apply to this claim and not *section 90 of the Employment Act, 2007*.

14. Accordingly, the suit ought to have been filed within 3 years from the date the cause of action arose. The respondent did not apply for extension of time before filing the suit.

15. The court is unable to discern any facts from the record of Appeal that would have qualified the respondent to be granted extension of time in terms of part III Section 22, 26 and 27 of the Limitation of Actions Act, Cap 22 Laws of Kenya for reasons of disability, fraud, mistake or ignorance. No such defence was pleaded by the respondent nor was any such evidence adduced during trial and so the suit does not qualify for extension of time.

16. Accordingly, the Appeal is allowed on the ground that the plaint was barred by statute and the trial court lacked jurisdiction to entertain the suit.

17. The court would otherwise not have interfered with the merits of the appeal since the trial magistrate had not erred in law and fact in finding the Appellant liable for the injuries sustained by the respondent and applied sound principles in assessment of damages.

18. However as stated earlier the suit being statute barred is struck out for want of jurisdiction and the appeal upheld with no order as to costs before the trial court and this court since the suit proceeded due to the omission by the court to strike it out in the first instance.

**Judgment Dated, Signed and delivered at Kisumu this 15<sup>th</sup> day of October, 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Onyigo for Appellant

Mr. Nyangosi for Respondent

Chrispo- Court clerk