



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1428 OF 2012

GABRIEL JUMA BADE & PETER ODHIAMBO BADE

(Suing as the Legal representatives & Administrators of estate

of **PAUL BADE LUCAS AGAYI (NOW DECEASED)**,.....CLAIMANT/APPLICANT

VERSUS

MODEL BUILDERS & CIVIL ENGINEERS K. LIMITED,.....RESPONDENT

JUDGMENT

Introduction

1. The claimants are the legal administrators of the estate of their father Paul Bade Lucas Agayi who died on 27.6.1997. Until his death, the deceased was still employed by the respondent as a Carpenter having joined the company on 1.5.1968. After his death the claimants approached the respondent for computation and payment of the deceased's terminal dues but their demand was not granted. As a result, the claimants brought this suit on 6.4.2011 before the Chief Magistrate's Court Milimani before it was transferred to this court where it was amended on 23.11.2018. The claimants seeks the following reliefs:-

- a. Deceased's salary for June 1997.....15,000
- b. Service pay for 31 years.....232,500
- c. Unremitted NSSF deductions from 1991-1997...138,240
- d. Special damages
- e. General damages.

2. The respondent never entered appearance after service with summons and plaint and as such the suit was heard *ex parte* on 3.12.2018 when the first claimant testified as Cw1 and closed the claimant's case.

Claimant's case

3. Cw1 testified that he is the son of the deceased herein who was employed by the respondent as a Carpenter from 1966 to 1997 when he died aged 62 years. He further testified that as at the time of his demise, the deceased was earning Kshs.15,000 per month.

4. Cw1 further testified that after the demise of his father, the respondent showed willingness to pay terminal dues but later changed her mind stating that she could only give their mother (deceased's widow) Kshs.10,000 which she rejected. Unfortunately, before the matter was settled, their mother died in October 2009 and the respondent refused to discuss the matter with them (claimants) again.

5. Cw1 testified that he reported the matter to Labour Office Industrial Area but no action took place. Thereafter he sought help from several lawyers but in vain. He however never gave up and instructed Susan Nyang Advocate who advised him that the claim had expired and he needed to seek leave of the court before filing the suit for his father's terminal benefits. He then sought and obtained the leave before filing this suit. He concluded by producing documents marked DO 1 -7 as exhibits and prayed for the reliefs set out in the Amended Statement of Claim.

Analysis

6. After considering the pleadings and the evidence produced including NSSF contribution returns, there is no dispute that the deceased was employed by the respondent. The issues for determination herein are:

- a. Whether the suit is time barred.
- b. Whether the reliefs sought should be granted.

Whether suit is time barred

7. The claimant contended that the deceased died on 26.6.1997 while still in employment with the respondent meaning, that the cause of action herein accrued on the said date. The claimant further contended that the hope of settling the suit out of court ended in October 2009 when the respondent refused to engage the claimants after their mother (deceased's widow) died. That was already 12 years gone after the termination of deceased's employment. The claimants finally brought the suit on 6.11.2011 allegedly after obtaining leave to file the suit out of time.

8. I have carefully considered the evidence adduced by the claimants and it is clear that he admits that the suit was filed out of time. He admits that his counsel advised him to seek leave before filing and he did so.

9. However, there is nothing on record to prove that leave was granted before filing the suit on 6.4.2011 which was 14 years after the cause of action arose. Even if the leave was granted, which has not been proved, this court is minded that under section 4(1) read with section 26 and 27 of the Limitation of Actions Act which is the applicable law of limitation herein, the limitation period for a cause of action founded under the employment contract cannot be extended. The said section provides that:

“4(1) The following actions may not be brought after the end of six years from date on which the cause of action accrued.

a. actions founded on contract;”

10. Section 26 of the Act provides instances when time does not run for purposes of limitation including fraud, ignorance and mistake. On the other hand, section 27 of the Act provides for extension of the limitation period only in cases involving the tort of negligence. The two sections of the Act are not applicable in this case because the claimants were fully aware of their rights and there was no mistake, or fraud pleaded and proved. Consequently, I return that the suit is time barred by dint of section 4(1) of the Limitation of Actions Act. It was filed 8 years out of time because the cause of action expired after 6 years on 27.6.2003. The corollary to the foregoing is that the court is barred by statute from exercising its jurisdiction over the cause of action herein. I therefore find my tools.

Conclusion

11. Having found that the suit herein being time barred, I proceed to strike it out with no order as to costs.

Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of March, 2019

ONESMUS N. MAKAU

JUDGE