



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**APPEAL NO.24 OF 2017**

**[formerly Naivasha High Court Civil Appeal No.10 of 2014]**

**LONGONOT HORTICULTURE LIMITED.....APPELLANT**

**VERSUS**

**JAMES WAKABA MAINA.....RESPONDENT**

[being an appeal against the Ruling and orders of the Resident Magistrate dated 2<sup>nd</sup> May, 2014 in Naivasha RMCC No.68 of 2013]

**JUDGEMENT**

The appellant filed application dated 2<sup>nd</sup> October, 2013 in Naivasha RMCC No.68 of 2013 seeking to have the plaint filed by the respondent struck out on the grounds that the suit was time barred under the Limitation of Actions Act and under Section 90 of the Employment Act. the application was based on the grounds that the plaint dated 28<sup>th</sup> January, 2013 was filed on 4<sup>th</sup> February, 2013 on the grounds that the claimant [respondent herein] was injured on 23<sup>rd</sup> January, 2009 which is more than 3 years after the date when the cause of action arose. The claim having been filed 3 years from the date the cause of action arose is time barred under section 90 of the Employment Act and to file the claim is in abuse of the court process. The application was also based on the ruling in **CMCC No.658 of 2012 – Joseph Waguru Wainaina versus Finlays Horticulture Kenya Limited [formerly Home-grown (K) Ltd]**.

The respondent filed his Replying Affidavit and opposed the application by the appellant and averred that the cause of action arose out of an industrial accident which occurred on 23<sup>rd</sup> January, 2009 at the appellants' premises. He made effort to have the matter settled out of court but this did not bear fruit. He instructed his advocates to file suit but was advised the claim was time barred and required leave to file suit out of time. Such leave was obtained vide Notice of Motion application dated 17<sup>th</sup> October, 2012 and file don 18<sup>th</sup> October, 2012 and which application was allowed by the court on 21<sup>st</sup> November, 2012.

Upon being granted leave to file suit out of time, the reposit filed suit on 20<sup>th</sup> February, 2013 and the appellant filed defence on 5<sup>th</sup> March, 2013.

Justice demands that the matter be heard on the merits.

The trial court by ruling dated 2<sup>nd</sup> May, 2013 made a finding that the respondent was granted leave on 21<sup>st</sup> November, 2012 and the Limitation of Actions Act allowed for enlargement of time and section 90 of the Employment Act did not apply as it relates to employment contracts while the respondent's case related to tort under the Limitation of actions Act and the court had the requisite jurisdiction to enlarge time to file suit out of time.

Aggrieved by the ruling and orders of the trial court the appellant filed the appeal on the grounds that the learned trial magistrate erred and there was misdirection under the provisions of the Limitation of Actions act and Employment Act and in the finding that the claim for negligence arose by virtue of contract of employment and was based on the terms of contract and breach of contract which was within the Employment Act. that the court failed to address the totality of the matter and arrived at a wrong finding.

The appellant is seeking that the ruling in RMCC No.68 of 2013 be set aside and the suit be struck out with costs.

Both parties addressed the appeal by way of written submissions.

The appellant's case is that the application filed before the lower court and dated 2<sup>nd</sup> October, 2013 was based on the grounds that the suit was time barred under section 90 of the Employment Act which requires claims based on an employment contract be filed within 3 years. The cause of action is alleged to have arisen on 23<sup>rd</sup> January, 2009 and plaint filed on 4<sup>th</sup> February, 2012 a period of over 3 years.

Section 90 of the Employment provides that notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil claim or proceedings based or arising out of a contract of employment may be filed after 3 years.

Section 4(1) of the Limitation of actions Act provides that claims based on contract may not be filed after 6 years since the date the cause of action arose.

Therefore section 90 of the Employment Act is an exception to section 4(1) of the Limitation of Actions Act and all claims arising out of employment must be filed within 3 years.

The appellant also submitted that in paragraph 4 of the plaint the respondent's claim is based on the facts that he had an implied term of contract that the appellant was to provide him with a safe work environment while he was at work and that he got injured while undertaking his duties as an employee. Such was due to the negligence and breach of contract and statutory duty by the appellant.

The appellant filed defence and admitted the respondent was an employee but he failed to file his claim within the provisions of section 90 of the Employment Act. The appellant relied on the case of **Denis Kisang Ripko versus Kenya Commercial bank [2016] eKLR** where the court held there was no jurisdiction to extend time in a claim based on contract.

The trial court made a finding that the respondent's claim was based on tort but failed to appreciate the totality of the issues before the court and erred in its findings and failed to appreciate the case law especially **Peter Nyamai versus M. J. Clarke, Civil Case No.78 of 2012 – High Court Mombasa** and the findings that the Employment Act has not made a provision for the extension of time to file claims outside of the 3 years period stipulated under section 90 of the Act.

The respondent submitted that leave was properly applied for and granted by the trial court and allowed for the filing of suit which was done in compliance. Section 90 of the Employment act, 2007 to apply a claim must be by virtue of section 87 and based on the Employment Act and Industrial Court Act. The suit was filed with the Magistrate's court under the common law which applies the general law or tort and contract law. Where cause of action arose on 23<sup>rd</sup> January, 2009 suit was filed with leave on 4<sup>th</sup> February, 2013 in accordance with section 4(1) of the Limitation of Actions Act.

The respondent submitted that the court should rely on the provisions of Article 159 of the constitution and apply substantive justice.

I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle versus Associated Motor Boat Co. [1968] EA 123** that the court is not bound necessarily to accept the findings of fact by the court below. A re-evaluation of the matter is allowed. In this regard the issues which emerge for the appeal are whether the trial court erred in its finding with regard to the application of the Limitation of Actions Act and the Employment Act in a matter premised injury at work and whether the findings on time limitations should be set aside.

The respondent has in the written submissions relied on the provisions of the *Industrial Court Act* which has since been repealed and in place the Employment and Labour Relations Court Act, 2011 enacted.

The employment of the respondent by the appellant is not contested.

During the course of employment, the respondent alleges that on 23<sup>rd</sup> January, 2009 while undertaking his duties the appellant placed him under unsafe work environment and while he was driving a bumper, he stepped on a stone, lost balance as it was defective and as a result was thrown to the ground and sustained serious injury to the left leg. The claim is that the accident and injury arose due to the negligence, breach of statutory duty and breach of contract by the appellant.

The respondent claims are based on the alleged negligence and breach of a statutory duty and contract and seeking general and special damages.

Work injuries and the remedy (remedies) therefrom are regulated under the Work Injury Benefits Act, 2007 (WIBA). The Employment Act, 2007 define the fundamental rights of employees, provide basic conditions of employment of employees, and provide for matters connected with the foregoing as set out in the preamble.

Under WIBA, the preamble provides as follows;

*An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.*

The WIBA came into force on 20<sup>th</sup> December, 2007.

In this regard, the respondent whose claim is grounded on his employment by the appellant and claims to have been injured while at work on 23<sup>rd</sup> January, 2009 the appropriate legislation with regard to any claims made against the appellant is WIBA. The Employment Act, 2007 does not apply in this instance as there is a specific legislation with regard to work injury and disease.

Are there time limitations for filing claims under WIBA?

Part IV (four) of WIBA lay out the provisions to follow once there is an industrial accident. A report must be made to the employer by the employee and upon which a report must be made to the Director of Occupational Safety and Health Services (the Director) and who must do

an inquiry into the matter for assessment of the compensation due to the employee. Section 27 of WIBA provides as follows;

*(1) A right to benefits in accordance with this Act shall lapse if the accident is not reported to the employer within twelve months after the date of such accident.*

*(2) Notwithstanding the provisions of subsection (1), the failure to report an accident to an employer as required in subsection (1) is not a bar to compensation if it is proved that the employer had knowledge of the accident from any other source*

**Section 10(4)** on the other hand relates to right to compensation to an employee who is injured at work due to contravention of any law or instructions by the employer or which has occurred due to lack of instructions by the employer and provides as follows;

*10(4). For the purposes of this Act, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting—*

*(a) in contravention of any law or any instructions by or on behalf of his employer; or*

*(b) without any instructions from his employer*

Any such industrial accident must therefore be reported to the Director. section 16 provides that;

*No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death*

The Court of Appeal has delved into this issue of work injury and the resulting time limitations therefrom in the case of **Attorney General versus Law Society of Kenya & Central Organisation of Trade Unions Civil Appeal No.133 of 2011 [2017] eKLR**

*... The section [section 16] is to the effect that no employee or his dependents can institute a court action against the employer to claim damages in respect of work-related accident or disease resulting in the disablement or death of such employee. The recourse provided for such an employee or his dependant is to notify the Director, who under **section 23(1)** of the Act shall upon receipt of the notice of the accident;*

***“(1)..... or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.”***

*Section 16 as read with **section 23(1)** confers powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director and expressly bars institution of court proceedings by the aggrieved employee.*

*However by section **51(1)** any person aggrieved by a decision of the Director may lodge an objection with the Director himself against his own decision. The Director is required to give a written answer, either varying or upholding his decision and giving reasons for the decision. Upon receipt of the answer the “objector” may appeal to the Industrial Court (now Employment and Labour Relations Court) against the decision*

In this case, where the alleged cause of action arose on 23<sup>rd</sup> January, 2009 and suit filed on 4<sup>th</sup> February, 2013 and the questions of law posed by the appellant, though premised on the provisions of Limitation of Actions Act, the court thus invited to address a question of law had the mandate to make the necessary inquiry and the applicable law in its analysis and findings. It is not sufficient that the parties only addressed themselves to the provisions of claims filed in tort and on account of alleged negligence, the cause of action is attributed to a work injury and there is legislation addressing such matters.

All industrial accidents and disease are legally to be reported to the Director and not filed with the lower court. the shift created by the WIBA has been in place since 20<sup>th</sup> December, 2007 and no reasons is given as to why the respondent failed to adhere.

Time limitations under WIBA claims cannot be enlarged by the lower court.

Where a party has filed a claim/report or matter with the Director within the stipulated period and they are aggrieved, an appeal is to be filed by this court under section 51 of WIBA.

These findings are anchored under section 58 of WIBA and orders issued by the Court of Appeal as cited above in **Attorney General versus Law Society of Kenya & another [2017] eKLR;**

*... that at the commencement date of the Act there were before the courts, pending determination, several work- related accident claims brought under the repealed Workmen's Compensation Act (Cap. 236) or the common law.*

*With respect, we agree that claimants in those pending case have legitimate expectations that upon the passage of the Act their cases*

would be concluded under the judicial process which they had invoked. Indeed as a result of this concern, the learned Judge in a ruling on an interlocutory application directed that;

***“On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen’s Compensation Act .... or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the Work Injury Benefits Act, 2007....”***

The suit before the lower court was filed after 20<sup>th</sup> December, 2007 and as noted above, filed before the wrong forum. There was no jurisdiction to extend time or to hear the matter premised on work injury by the lower court.

**For the reasons above, the orders vide ruling dated 2<sup>nd</sup> November, 2013 are hereby set aside and the suit filed in Naivasha RMCC No.68 of 2013 is hereby struck out for want of jurisdiction.**

**As the appeal has addressed serious questions of law both parties directed, no orders on costs.**

**Delivered in open court at Nakuru this 29<sup>th</sup> day of April, 2019.**

**M. MBARU JUDGE**

In the presence of: .....