



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AN NAKURU
CIVIL APEAL NO.46 OF 2017
[Formerly High Court Civil Appeal No.39 of 2016]

OSERIAN DEVELOPMENT COMPANY LIMITEDAPPELLANT

VERSUS

JACKSON OTEYO SILARESPONDENT

(An appeal from the judgement of Ho. P N Gesora, Chief Magistrate at Naivasha in Civil Case No 106 of 2015)

JUDGEMENT

1. The Appellant was the Defendant before the Lower Court in **Civil Case No.106 of 2015** where judgement was delivered on 9th May, 2016.
2. The facts leading to this appeal are that the respondent (the plaintiff before the lower court) was employed by the respondent company. While on duty on the 13th October, 1999 the respondent fell down from a height green house and sustained injuries. Such injuries were attributed to the appellant (the employer) on the grounds that they were negligent.
3. The appellant's case before the lower court was that the respondent had filed two (2) similar cases before the lower court being Naivasha SPMCC No.168 of 2002 which was dismissed and Naivasha SPMCC No.275 of 2004 which was then pending ruling on an application for dismissal. That the cause of action was statute barred and the claimant had committed perjury in the Verifying Affidavit.
4. The appellant also defended the claims made on the grounds there was no employment between the parties and where the respondent was at the premises of the appellant he was not injured on the 13th October, 1999 as alleged and the acts of negligence attributed to the appellant have no proof. Where the respondent suffered any injuries such were out of his own negligence
5. The lower court heard the evidence and made a finding that the respondent was liable in negligence and made an award of Kshs.3, 000,000.00 in compensation and dismissed the claims for special damages.
6. Being aggrieved by the judgement of the lower court, the appellant has filed the appeal and on the grounds that;
 - 1) *The learned Magistrate erred in law and in fact by holding that the Appellant was 80% liable for the accident while negligence against the Appellant had not been properly established.*
 - 2) *The learned Magistrate erred in law and in fact in failing to apply proper legal principles regarding negligence and thus arriving at a bad decision.*
 - 3) *The learned Magistrate erred in law and in fact by making an award on general damages which was manifestly excessive and inordinately high.*
 - 4) *The learned Magistrate erred in law and in fact by failing to take into account the Appellant's submissions given on behalf of the appellant while considering judgement.*
7. For these reasons and grounds the appellant is seeking the court at appeal to reverse the judgment to the lower court and dismiss the matter, reverse liability as apportioned and the general damages be re-assessed.
8. This being the first appeal the court is obligated to reconsider the lower Court evidence assess it make my own conclusion remembering that I neither saw nor heard the witnesses. See the case **Selle versus Associated Motor Boat Company Ltd [1968] E.A. 123.**

9. Both parties filed written submissions.

10. The appellant has largely made submission with regard to the issues of liability apportioned and the general damages assessed.

11. The appellant has also introduced the issue that this lower court failed to address the fact of the suit being statute barred. This was not a matter set out in the Grounds of Appeal. But this is a matter addressed before the lower court.

Submissions

12. The appellant in the written submissions states the trial court erred in law by failing to hold that the suit was statute barred. Under paragraph 5 of the Plea the case was that the respondent was injured on 13th October, 1999 while constructing a green house. The alleged breach of duty and claims for negligence ought to have been addressed within three (3) years as held in the case of **Kiamokama Tea Factory Co. Ltd versus Joshua Nyakoni [2015] eKLR**. In a case for breach of contract the limitation period is addressed under the Limitation of Actions Act. Where the relationship relates to employment, the duty remains a tort which should be addressed within the limitation period. Such are matters which can be raised during an appeal as they relate to questions of law as held in the case of **Barclays Bank of Kenya Ltd versus Patriotic Guards Ltd [2015] eKLR**. The lower court ought to have addressed the issue of time and the fact that the respondent had not applied for leave to file the suit out of time.

13. The appellant also submits that the findings on liability at 80% was without basis. The nature of injuries the respondent alleged to have suffered and the medical report submitted are contradictory and on this basis, to apportion such liability was without justification.

14. The appellant also submits that the general damages awarded were manifestly excessive and inordinately high.

15. The respondent on his part submits that the lower court based on pleadings, evidence and supporting documents apportioned liability at 80:20% on good basis and should not be disturbed. The appellant was not found wholly to blame and therefore the shared liability. The court relied on various authorities in arriving at the judgement. The damages awarded are lawful and should be confirmed as held in the case of **Butt versus Khan [1982-1988] 1 KLR**.

16. With regard to the submissions that the suit is time barred, the respondent submits that this is an industrial claim based on tort and contract and sections 87 and 90 of the Employment Act, 2007 do not apply. The cause of action arose in 1999 before the provisions of section 90 of the Employment Act, 2007 came into force. The suit was filed in September, 2005 within the time limits.

17. On the appellant's submission that the suit below the lower court was *sub judice* the respondent submits that these matters and facts were not addressed until in this appeal. That it is true the respondent had filed two (2) suits at the Naivasha Chief Magistrate's Court and such were done without the knowledge of the respondent. When he learnt of the suits in CMCC No.275 of 2004 and CMCC No.168 of 2002 one was withdrawn and the other was struck out as the verifying affidavit was found not signed. Such suits are not in existence.

18. The respondent has also relied on Rule 104 (a) of the Court of Appeal Rules that where an appellant fails to raise any matter in the grounds of appeal, such cannot form the substantive basis for consideration by the court.

Determination

19. The issues addressed in the appeal relates to questions of liability, the amounts awarded in damages, and as noted above, the issue of time limitations.

20. In addressing the question as to when a party should address preliminary questions on point of law, the Court of Appeal in the case of **Grace Mwenda Munjuri versus Trustees of the Agricultural Society of Kenya [2017] eKLR** and in Court of Appeal judgement in the case of **Mwangi versus Wambugu (1984) KLR 453**, in which that court pronounced itself as follows;

A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

21. Appeals to this court in terms of section 17 of the Employment and Labour Relations Court Act, 2011 are ordinarily on points of law. However, This court sitting as a first appeal court over the decision of the Magistrate's court is required according to **Peters versus Sunday Post Ltd (1958) EA 424**, to re-assess the entire evidence tendered at trial and make its own independent findings. If the finding of the trial court is supported by evidence and the law, then such a finding may not be interfered with.

22. Preliminary questions of law once raised must be addressed by the court instantly. Once addressed the court then have a firm basis to proceed as appropriate. In matters where a claim is found to be statute barred, once raised by either party or the court on its own motion based on the matters pleaded by the party must be addressed instantaneously. For the court to proceed on a matter that is statute barred and make a judgement on liability and award damages, such erodes the rule of law and justice to the parties.

23. On record before the lower court is a Defence dated 3rd January, 2006. Paragraph 2 raises fundamental questions of law with regard to multiplicity of suits and the cause of action being statute barred. The appellant thus brought to the notice of the respondent and the court these matters of law.

24. In court on 2nd November, 2015 the respondent testified that;

... I was employed as a Carpenter in the green house. I had worked for the defendant for 8 years before I was injured. I was expected to be careful in my duties. I knew the risks that were there. This is the only suit that I have filed against the defendant save for one in the year 2002 i.e. (168/02) Naivasha.

I am not aware of the outcome. I also know CC 275/04 Naivasha which I filed against the defendant over similar injuries. ...

25. On record of appeal is the plaint filed in **Naivasha Chief Magistrate's Court Civil Case No.275 of 2004 – JACKSON OTEYO SILA V OSERIAN DEVELOPMENT CO. LIMITED.**

26. The cause of action therein at paragraph 5 is that;

On 13th October, 1999 or thereabout while the plaintiff was lawfully on duty with the defendant doing his authorised work in the circumstance, he fell down from a height of a greenhouse and sustained serious injuries.

27. The respondent then proceeds to set out the acts and ground of negligence by the appellant.

28. In the record of appeal is also Naivasha Magistrate's Court Civil Suit No.168 of 2002 – JACKSON OTEYO SILA V SHER AGENCIES LIMITED. The cause of action therein is set out under paragraph 5 that;

On 13th October, 1999 or thereabout while the plaintiff was lawfully on duty with the defendant doing his authorised work in the circumstance, he fell down from a height of a greenhouse and sustained serious injuries.

29. This is a replica of CMCC No.275 of 2004, Naivasha.

30. Similarly in the matter subject of appeal herein in CMCC No.243 of 2005 at paragraph 5 therein the cause of action is set out as follows;

On 13th October, 1999 or thereabout while the plaintiff was lawfully going about his duties, constructing the green house he fell down from the roof of the green house and was severely injured. The said accident was occasioned to the plaintiff by the reasons of negligence and/or breach of duty of the said contract of employment and of terms thereof on part of the defendant its servants and/or agents.

31. Save for few changes here and there, the cause of action is the same as set out in suits addressed above.

32. Faced with these facts, the lower court ought to have stopped all else and addressed itself to the same.

33. Part of the judgement at page 14 is a finding that;

I have carefully considered the pleadings filed herein... there is admission that there were suits filed pertaining to the same cause of action but I note that a notice of withdrawal was filed in CMCC 275/04 and Suit No CMCC 168/04 was struck out. This in my view is a proper explanation as regards the locus standi of the plaintiff pursuing this suit. The same is not sub judice as there is no other pending cases [case] in any court save [save] for the one herein.

34. Other than the multiplicity of suit, the defence had raised the issue of the suit being statute barred. This was not gone into by the lower court.

35. The case of action arose on 13th October, 1999 when the respondent avers he was injured while at work with the respondent. I take it he first filed CMCC No.168 of 2002, Naivasha. Such suit was struck out.

36. The respondent then filed CMCC No.275 of 2004 and there is Notice of Withdrawal of Suit filed on 15th February, 2016 before the Chief Magistrate's Court, Naivasha. Such notice is part of the record of appeal.

37. CMCC No.275 of 2004 was therefore in existence at 27th September, 2005 when the suit subject of this appeal, CMCC 243 of 2005, Naivasha was filed. The Notice to withdrawal was only filed just before judgement in CMCC No. 275 of 2004 on 9th May, 2016. At such time parties had concluded evidence and were awaiting judgement.

38. A matter which has which has been struck out effectively cannot be revived in a new suit. Such cause of action is dealt by the court. to file any other suit based on the same facts and cause of action, the new matter is *sub judice* as held in **DT Dobie & Company (K) Ltd versus Muchina (1982) KLR** and further the court reading of **Order 2 Rule 15 of the Civil Procedure Rules** which provides;

(1) *At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*

a) It discloses no reasonable cause of action or defence in law; or

b) *It is scandalous, frivolous or vexatious; or*

c) *It may prejudice, embarrass or delay the fair trial of the action; or*

d) *It is otherwise an abuse of the process of the court;*

And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

39. Where the first suit in time CMCC 168 of 2002, Naivasha was struck out, there existed no legal basis for the respondent as the plaintiff to file any other claim(s) with the court or at any other forum based on the same cause of action and on similar facts. These are not matters the parties could address by consent for the lower court to proceed and sanction. Effectively the cause of action was dealt by the order of striking out.

40. The matters between the parties should have ended as at that point.

41. But this was not the case. CMCC 275 of 2004 was filed. It was withdrawn on 15th February, 2016. CMCC No243 of 2005 was filed, proceeded to conclusion and judgement delivered on 9th May, 2016.

42. This is in abuse of the court process.

43. Further to the above findings, where the cause of action arose on 13th October, 1999 and based on provisions of the Limitation of Actions Act and the claims being based on injuries at work and claims for negligence, to file a fresh suit dated 27th September, 2005 with the court on 3rd October, 2005 without leave is a claim barred in time as held in the case of **Kenya Power & Lighting Company Limited versus Collins Agumba Aboje [2016] eKLR**. Respondent's suit was filed **over 6 years** since the cause of action arose. As noted above, the matter was already subject of the court in CMCC No.168 of 2002 and in CMCC No.275 of 2004.

44. Had the lower court addressed the defence at paragraph two (2) these matters would have been apparent and addressed instantly to save judicial time.

45. The result of the findings in the lower court judgement and without proper procedure. Such judgement cannot stand based on the subject suit being *sub judice*. The appeal filed is found with merit and the same hereby allowed.

The upshot of the appeal is the judgement of the lower court is hereby set aside in its entirety. Costs to the appellant.

Dated and delivered in open court at Nakuru this 18th day of October, 2018.

M. MBARU JUDGE

In the presence of:.....