



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**ELRC APPEAL NO. 18 OF 2018**

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

**OGEMBO TEA FACTORY CO. LTD.....APPELLANT**

**VERSUS**

**OSEKO PATRICK BUNDI.....RESPONDENT**

**JUDGMENT**

1. The Appeal is from judgment of the Principal Magistrate at Ogembo Hon. Naomi Wairimu delivered on 20<sup>th</sup> December 2017.

2. The grounds of Appeal may be summarized as follows:

(i) The learned trial magistrate erred in law and fact in failing to dismiss and/or struck out the Respondent's claim on grounds that the suit was time barred by *dint of Section 90 of the Employment Act, 2007 and the Limitations of Actions Act Cap 22 Laws of Kenya*.

(ii) That the trial magistrate erred in law and fact in failing to hold that the respondent did not prove his case on a balance of probabilities.

(iii) That the trial court erred in failing to hold that the respondent was not injured while on duty at the Appellant's place of work.

(iv) That the trial court erred in law and fact by relying on the wrong principles hence arrived at a wrong decision in view of the evidence on record and

(v) The trial court erred in law and fact in awarding damages which were manifestly excessive.

3. This being a first appeal, the court's primary role is to re-evaluate the evidence on record and draw its own conclusion based on the applicable law to the facts of the case. **See *Selle vs Associated Motor Boat Co. Limited (1968) EA 123.***

4. The issues for determination are:

(i) Whether the Respondent's suit was time barred.

(ii) Whether the trial court erred in fact and law in the manner stated in the memorandum of Appeal and

(iii) What reliefs ought the court to grant upon a proper and careful consideration of the record?

**Issue I**

5. According to the plaint dated 13<sup>th</sup> February 2012 and filed on 12<sup>th</sup> February 2012, the respondent suffered injury in the cause of employment with the Appellant on 2<sup>nd</sup> February 2007. The said injury was said to have been caused and/or significantly contributed to by the negligent conduct of the Appellant.

6. The suit was filed four years and eleven (11) days from the date the cause of action arose. The suit is founded on tort and therefore *Section 4(2) of the Limitation of Actions Act, Cap 22 laws of Kenya* applies.

7. The section reads as follows:

*“An action founded on tort may not be brought after the end of three years from the date on which the cause of action occurred provided that an action for libel or slander may not be brought after the end of twelve months from such date”.*

8. The Appellant pleaded under paragraph 11 of the statement of defence dated 30<sup>th</sup> April 2012 that the suit is time barred in law and prayed for the striking of the suit

9. The issue was not canvassed when the matter first proceeded for hearing on 27<sup>th</sup> August 2013. The issue was however canvassed in the written submissions by the Appellant filed on 1<sup>st</sup> August 2017 and the Appellant relied on the decision by Mustafa J.A in ***Iga vs Makerere University*** and submitted that since the respondent did not seek leave to file the suit out of time and did not show any ground on which he could claim exemption from the limitation provisions, the plaint was time barred by *dint of Limitation of Actions Act, Cap 22 laws of Kenya*.

10. The learned trial magistrate did not consider the issue of limitation at all in her judgment delivered in favour of the respondent on 20<sup>th</sup> December 2017.

11. From the facts not in dispute at all before the magistrate, the trial court erred in failing to consider the issue of limitation period.

12. We rely on the ***Court of Appeal Ruling in Civil Application No. NRB. 100 of 2015 (UR 81/2014) between Mr. and Mrs. Justice E. Tongbor and Ladislaus Odongo Ojuok*** in which the Court of Appeal per G.B.M Kariuki, J. Mohammed and Otieno Odek JJA stayed further proceedings of a suit before ELRC court pending the hearing and determination of the issue whether or not the suit was filed out of time by the Court of Appeal. The Court of Appeal stated:

*“We concur that the intended appeal shall not only be rendered nugatory but there shall be waste of valuable judicial time if it turns out the Employment and Labour Relations Court had no jurisdiction to hear and determine statute barred claims”*

13. The learned trial magistrate therefore erred in failing to determine the issue of time bar in the first instance.

14. Secondly, we find that from the facts on the record not in dispute the suit was filed outside the limitation period of three years set under *Section 4(1) of the limitation of Action Act, Cap 22 laws of Kenya* and the trial court lacked jurisdiction to entertain the same. ***See Samuel Kamau Macharia and another vs Kenya Commercial Bank Limited and 2 others S.C Application No. 2 of 2012; (2012)*** in which the Supreme Court held;

*“A court’s jurisdiction flows from either the constitution or legislation or both. Such a court may not arrogate itself. Jurisdiction through the craft of interpretation or by way of evideavours to discern or interpret the intentions of parliament where the wording of legislation is clear and there is no ambiguity”.*

15. Accordingly, the Appeal succeeds on this point alone. The suit is struck off and the decision by the trial court on the merits set aside in its entirety.

16. Since the omission to determine the issue of limitation was by the court, I find this an appropriate case for the parties to bear their own costs of the suit and the Appeal.

**Judgment Dated, Signed and delivered this 9<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Onyinkwa for the Appellant.

Mr. Mbeche for the Respondent

Chrispo – Court Clerk