



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC APPEAL NO. 27 OF 2018

(Before Hon. Justice Mathews N. Nduma)

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

VERSUS

RICHARD NYARWATI MACHANA..... RESPONDENT

JUDGMENT

1. The Appeal is from judgment of the Principal Magistrate at Ogembo Hon. Naomi Wairimu delivered on 31st May 2017.
2. The appellant raises *interlia*, the following ground of Appeal:
 - (i) That the learned trial magistrate erred in law and fact in failing to hold that the Respondent's suit was time barred in line with the provisions of the employment Act, as read with Section 4(2) of limitation of Actions Act Cap 22 laws of Kenya
3. This being a first appeal the court's primary role is to re-evaluate and reconsider the evidence on record and draw its own conclusions. See the holding in **Selle vs Associated Motor Boat Company Limited (1968) EA 123.**
4. Following the decision of the court of Appeal in **owners of the motor vessel 'Lilian Selle' vs Caltex oil (Kenya) Limited (1989) KLR and the decision by the supreme court in Application No. 2 of 2012; (2012) Samuel Kamau Macharia and another vs Kenya Commercial Bank Limited and 2 others.** The learned trial magistrate was bound to consider the issue of limitation at the first instance especially because it was specifically pleaded under paragraph 7 of the statement of defence.
5. According to the plaint dated 8th December 2010 and filed on the even date the cause of action arose on 5th June 2007 when the plaintiff who was engaged in spreading withered tea leaves was cut at the left leg lower region by a metal bar which was under the tea bed.
6. From the facts not in dispute, the suit was filed 3 years and six months after cause of action arose. The testimony by the plaintiff before court confirmed the date of injury to be 5th June 2007. The issue of limitation was canvassed in the written submissions by the Appellant.
7. The learned trial magistrate did not discuss the issue of limitation at all in her judgment delivered on 31st May 2017.
8. It is the court's considered finding that the trial court erred in failing to consider this issue before proceeding to hear and determine the matter on the merits.
9. From the facts not in dispute discovered from the record of Appeal, the suit was filed out of time and no application was made to extend the time of filing nor was any justification from the delay in filing given from the record.
10. In terms of *Section 4(2)* aforesaid, the suit ought to have been filed before the expiry of three (3) years from the date the cause of action arose.
11. The trial magistrate therefore lacked jurisdiction to hear and determine the suit on the merits. The Appeal succeeds on this point alone and the suit is struck off in its entirety.
12. Since it was the omission by the trial court to consider this issue which would have curtailed proceedings, we find this an appropriate case for each party to bear their own costs of the suit.

Judgment Dated, Signed and delivered this 9th day of July, 2019

Mathews N. Nduma

Judge

Appearances

M/S. Onyinkwa for the Appellant.

M/S Sonye Ondari for the Respondents

Chrispo – Court Clerk