



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRCA NO. 16 OF 2018

(Before Hon. Justice Mathews N. Nduma)

OGEMBO TEA FACTORY COMPANY LTD.....APPELLANT

VERSUS

JOHN ONTOMWA OGEMBO.....RESPONDENT

JUDGMENT

1. The Appeal is from the judgment by Principal Magistrate at Ogembo, Naomi Wairimu delivered on 12th July 2017.
2. The grounds of Appeal may be summarised as follows:
 - (i) Learned trial magistrate erred in law and fact in failing to hold that the suit was time barred by *dint of Section 90 of the Employment Act and Section 4(2) of the limitation of Actions Act Cap 22 laws of Kenya.*
 - (ii) The trial magistrate erred in not finding that the respondent was not an employee of the claimant.
 - (iii) The learned magistrate erred in law and fact in holding that the respondent sustained injuries in the course of employment with the Appellant and
 - (iv) The learned magistrate erred in law and fact in awarding excessive damages in the circumstances of the case.
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 conclusion based on the applicable law to the facts of the case. See *Selle vs Associated Motor Boat Co. Ltd (1968) EA 123.*
4. The issues for determination are:
 - (a) Whether the Respondent's suit was time barred.
 - (b) Whether the trial court erred in holding the Appellant 60% liable or at all.
 - (c) Whether the Respondent is entitled to general damages and/or special damages.

Issue I

5. According to the record of Appeal and in particular the plaint dated 8th December 2010 and filed on 8th December 2010, the respondent suffered injury on or about 10th February 2006 whilst collecting withered Tea and feeding it into the discharge hole at the Appellant's premises.
6. The suit was filed 4 years and 1 month from the time 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 7 of the statement of defence that the suit was already time barred by *dint of limitation of Actions Act, Cap 22 laws of Kenya* and prayed that the suit be struck out.

9. In the written submissions by the Appellant, the issue of time bar was canvassed extensively 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 limitation and therefore was a plaint barred by law.

10. The Appellant further relied on the decision in **Dhanesras Mehta vs Mamilah M. Shali** to buttress the issue of limitation.

11. The learned trial Principal Magistrate Naomi Wairimu in her judgment delivered on 12th July 2017 did not consider the issue of limitation at all. The trial court simply delved on the issues of merit and delivered a judgment in favour of the respondent which is impugned.

12. In **owners of the motor vessel “lillian ‘s’ vs Caltex Oil (Kenya) Ltd (1989) KLR** it was held that the issue of limitation goes to jurisdiction of the court to hear and determine a case in the first place and it must be dealt with first before the court gets to the merits of the case.

13. In **Samuel Kamau Macharia and another vs Kenya Commercial Bank Limited and 2 others, S.C Application No. 2 of 2012; (2012),**

The court held:

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

14. The learned magistrate clearly failed to appreciate that the issue of limitation goes into the jurisdiction of the court to hear and determine the suit before it, ignored the same and proceeded to determine the merits of the suit.

15. From the facts before the trial court and the record before this court the suit was clearly filed out of the three (3) years limitation period provided under *Section 4 (2) of the limitations Act*. There was no application seeking leave to file the matter out of time and no justification is apparent from the record that would have entitled the court to extend limitation period placed by statute.

16. Accordingly, the suit stood to be struck off by the trial magistrate. This court finds the suit was time barred and allows the Appeal on that point alone.

17. The suit is struck off and the determination by the trial magistrate on the merits of the suit set aside in its entirety.

18. The omission to determine the preliminary objection was by the trial court. This court cannot visit costs of the trial and this appeal on the respondent. Each party to bear their own costs of the trial and appeal.

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

Mathews N. Nduma

Judge

Appearances

Mr. Onyinkwa for Appellant

Mr. Mbeche for Respondent

Chrispo – Court Clerk