



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRC APPEAL NO. 34 OF 2018

(Before Hon. Justice Mathews N. Nduma)

OGEMBO TEA FACTORY COMPANY LTD.....APPELLANT

VERSUS

JOHN MOSERA OBIERO..... RESPONDENT

JUDGMENT

1. This is an Appeal against the judgment and decree of Hon. N. Wairimu SRM delivered on 29th June 2016 in which the court awarded the respondent general damages in the sum of Kshs. 150,000 for injuries sustained in the course of employment and Kshs. 3,000 special damages.
2. The Appellant faults the judgment of the learned magistrate for firstly failing to determine that the suit was time barred. The Appellant further challenged the finding of the magistrate on the issue of liability and quantum.
3. Following the case of *Selles vs Motor Boat and Company Limited*, this being a first appeal the court is bound to re-evaluate the evidence afresh, bearing in mind that it did not have the opportunity to hear direct evidence of the witness and assess their credibility. The court is further aware that it should not merely substitute the decision of the trial court because it would have arrived at a different decision on the facts of the case. It must be demonstrated that the trial court made errors of law and fact as to amount to a miscarriage of justice.
4. In the present case, the court is first bound to determine the question whether the suit was time barred as this goes to the jurisdiction of the case. *See Iga vs Makerere University Court of Appeal at Kampala Civil Appeal 51 of 1997 in which Law, Lutta, and Mustaffa J. J.* held on Appeal
 - “(i) A plaint barred by limitation is barred by law and must be rejected;
 - (ii) Such a plaint should be rejected even though an interlocutory judgment has been entered;
 - (iii) The judge should not have dismissed the claim but rejected the plaint”
5. In the present case, the suit was filed vide a plaint dated 19th February 2010 on the even date.
6. The cause of action is evident on the face of the plaint in that it was pleaded that the plaintiff sustained a serious injury on his right leg in the course of his employment on 6th April 2005. This was the cause of action determined by the trial court in this matter.
7. Simple calculation shows that the suit was filed about 4 years and 10 months from the date the cause of action arose.
8. This is a suit founded on tort and arising in the cause of employment. It follows that *Section 4(1) of Limitation of Actions Act, Cap 22 laws of Kenya Act* is the relevant provision for the purpose of determining whether or not the suit was time barred.
9. In this respect, *Section 4(a)* provides:

“(2) 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”.

10. The Appellant specifically pleaded in the statement of defence dated 9th March 2010 and filed on the even date at paragraph 7 thus

“The defendant avers that the claim herein is statute barred under the limitation of Actions Act and shall apply at the first instance to have the same struck out with costs”

11. The respondent did not address the issue of limitation in the reply to the statement of defence filed on 28th May 2010.

12. The matter proceeded to trial and the learned magistrate did not consider the issue of limitation at the first instance. PW1 in his testimony confirmed that he was injured in the course of duty on 6th April 2005.

13. In her judgment, the trial magistrate did not consider the issue of limitation at all and went ahead to find the case in favour of the respondent and awarded general and special damages as earlier stated in the judgment.

14. It is the court's considered view and finding that the learned magistrate was bound to consider the issue of limitation at the first instance. ***See case of Owners of Motor Vessel "Lilian S" eKLR (1989)*** where the court held that the issue of jurisdiction goes to the jurisdiction of the court to entertain the suit and it must be considered in the first instance. This is the case whether or not the issue has been raised by either party to the suit. The court of Appeal further held that once the court finds that it has no jurisdiction to entertain the suit, it must down its tools and go no further.

15. In the present case, no extension of time was sought by the respondent and therefore no grounds exist on the record of proceedings to warrant consideration of extension of time at all.

16. Accordingly, the court finds that the trial magistrate erred in not finding that the suit was time barred and that the trial court lacked jurisdiction to entertain the same.

17. The court allows the Appeal on this ground alone and strike out the plaint, the proceedings and set aside the judgment of the trial court and the awards made therein.

18. Since it was not the fault of the respondent that the trial court did not consider and determine the issue of limitation, the court finds this an appropriate case for each party to bear the costs of the case before the trial court and this court.

19. It is so ordered.

Judgment Dated, Signed and delivered this 7th day of October, 2019

Mathews N. Nduma

Judge

Appearances

M/S Onyinkwa for Appellant

M/S Moerwa Omwoyo for Respondent.

Chrispo – Court Clerk