



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 13 OF 2018

(Before Hon. Justice Mathews N. Nduma)

DAVID MIREGWA NYANCHONGI.....APPELLANT

VERSUS

CHEMELIL SUGAR COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Principal Magistrate Nyando, Patrick Olengo delivered a ruling on 7th December 2017 in which the court struck off the suit in that it was statute barred by *dint of Section 90 of the Employment Act, 2007*. The learned trial magistrate found that the cause of action arose on 20th July 2011 and the suit was filed on 9th October 2015, four years from the time the cause of action arose.

2. Aggrieved by the ruling the plaintiff, filed a notice of motion application dated 9th February 2018 under *051 Rule 1 of the CPR 2010 and Sections 3, 3A and 63(e) of the Civil Procedure Act* seeking orders that the trial court grant the plaintiff leave to file appeal out of time. The application was opposed. However the trial magistrate granted the applicant leave to appeal against the ruling that struck off the suit. The learned trial magistrate also granted stay of execution of the ruling and order granted on 7th December 2017. This ruling was delivered on 31st May 2018.

3. The Appellant filed memorandum of Appeal on 14th June 2018 pursuant to the leave granted by the trial court.

4. The issue for determination before me is whether the trial magistrate erred in law and fact by finding that the suit was time barred and struck it off. The parties filed their respective submissions.

Determination

5. The trial court did not delve on the merit of the suit and this court cannot consider the merits of the suit at all. The only issue before the court is whether the suit before the trial court was time barred by *dint of Section 90 of the Employment Act, 2007* or any other law applicable.

6. From the certified record of proceedings before the trial court, the suit was first filed by a plaint dated 5th October 2015 on 9th October 2015. Amended plaint was later filed in November 2015.

7. The plaint pleaded in unequivocal terms that the cause of action arose on 20th July 2011, when the plaintiff/appellant was knocked down by a crane in the cause of employment of the defendant/respondent and suffered injuries in respect of which he claimed damages arising from the negligence of the defendant/respondent.

8. These facts were not placed in dispute at all before the trial magistrate.

9. The defendant/respondent filed statement of defence on 23rd October 2015 and also filed notice of preliminary objection dated 1st August 2017 that the suit was time barred by *dint of Section 90 of the Employment Act*.

10. The trial magistrate in our view properly granted leave to the plaintiff/appellant to file this appeal out of time. The appeal arose from a ruling of the court on a preliminary point and therefore, the trial court properly exercised its discretion to grant leave to the plaintiff/appellant to file an appeal out of time.

11. This court sitting as a first appeal has the mandate to evaluate the facts of the case and the law applicable and reach its own independent conclusion of law and facts. See case of **Selles vs Associated Motor Boat Company Limited 1968, EA.**

Section 90 of the Employment Act, 2009 provides:

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act Cap 22, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cause of action thereof”

12. The cause of action in this suit is based on injury suffered in course of work. The plaintiff/appellant claims damages arising from alleged negligent conduct and breach of statutory duty by the defendant set out under paragraph 6 of the amended plaint.

13. In other words, the cause of action is based on tort and breach of statutory duty and not breach of contract. The remedies sought are not provided for in the Employment Act either but are sought under Work Injury Benefits Act. The time limits for actions based on tort is provided for under *Section 4(1) of the Limitation of Actions Act, Cap 22 Laws of Kenya*. The limitation period applicable to actions arising from tort is three years. The plaintiff/appellant did not apply for extension of time in which to file the suit before the magistrate court. From the record of proceedings therefore, no grounds are advanced at all, the basis of which extension of time to file the suit may be granted.

14. The trial court did not err in hearing and determining the preliminary objection at the outset. This approach is the correct one as guided by the case of ***Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited (1969) EA 699*** as follows:

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit”

Such was the issue raised by the defendant in this suit though premised in my view on the wrong provision of the law. The point is properly founded on *Section 4(1) of the Limitation of Actions Act*, and not *Section 90 of the Employment Act, 2007*.

15. That error does not derogate from the mandate of the court to determine the issue of time bar at the outset.

16. This court upon a careful consideration of the appeal record is of the view that the pleadings before court clearly shows that the suit was filed after expiry of the three (3) years limitation period provided under *Section 4(1) of the Limitation of Actions Act, Cap 22 laws of Kenya*. The trial court therefore lacked jurisdiction to entertain the suit on the merits and correctly found that the suit was time barred and struck it off for want of jurisdiction.

17. It need not be over emphasized that the issue of time limit goes to the jurisdiction of the trial court to hear and determine the suit. In terms of the doctrine in ***Lilian ‘S’*** case the trial court was bound to drop its tools the moment it found it had no jurisdiction.

18. Accordingly, the Appeal lacks merit and is dismissed. This court finds that the suit was time barred by *dint of Section 4(1) of the Limitation of Actions Act, Cap 22 laws of Kenya*.

19. The court makes no order as to costs.

Judgment Dated, Signed and delivered this 4th day of November, 2019

Mathews N. Nduma

Judge

Appearances

Appellant in person.

Okongo Wandago and Company Advocates for the Respondent.

Chrispo – Court Clerk