



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

ELRC APPEAL NO. 3 OF 2017

(Before D. K. N. Marete)

WILLIAMSON TEA (K) LIMITED.....APPELLANT

VERSUS

GERSON OKECH AGINGARESPONDENT

JUDGMENT

This matter was originated by a Memorandum of Appeal dated 19th January, 2017. It comes out as follows;

1. *THAT the learned trial Magistrate erred in law and fact in failing to dismiss and/or strike out the respondent's suit with costs.*
2. *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 together with the Limitation of Actions Act cap 22 Laws of Kenya.*
3. *THAT the learned trial Magistrate erred in Law and fact in failing to analyse the issues that arose at the hearing and raised in the submissions as filed by the Appellant, and make a determination on the same.*
4. *THAT the learned trial magistrate erred in law and in fact by holding that the leave to file suit out of time as obtained by the respondent was absolute.*
5. *THAT the foregoing notwithstanding; the learned trial magistrate erred in law and fact in failing to make an analysis and determination on the issue of liability, between the Appellant and Respondent in line with the Provisions of Order 21 rule 4 of the Civil Procedure Rules 2010.*
6. *THAT on a without prejudice basis the learned trial magistrate erred in law and fact awarding damages which are excessive in the circumstance and in view of the injuries sustained.*

This appeal was consolidated with ELRC Appeal No.2/2017 with this as lead case.

The matter came to court variously until the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether the suit was time barred from the onset?
2. Whether the leave granted was absolute?
3. Whether the learned trial magistrate analyzed the issues at the hearing and submissions as filed and raised by the appellant?
4. Whether the learned magistrate properly addressed himself on the issue of liability and damages?

The appellant at the onset of her submissions put to the attention of the court its cardinal role and duty in a determination of a first appeal as has been set out in precedent and practice as follows;

2.1 This is a first Appeal. The duty of an Appellate court in a first Appeal were well established in the decisions of;-

a) *Selle vs Associated Motor Boat Company Limited (1986) EA 123.*

b) *Kenya Ports Authority vs Kusthan Kenya Limited (2009) 2 EA 212.*

2.2 Basically the principles to be kept in mind by a first Appellate court while dealing with Appeals are;-

- *There is no limitation on the part of the Appellate court to review the evidence upon which the Order appealed against is founded and come to its own conclusion.*
- *The first Appellate court can also review the trial's courts conclusion with respect to both facts and law.*
- *It is also the duty of the first Appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.*

I agree. This should be a primal consideration in such determinations.

The 1st issue for determination is whether the suit was time barred from the onset. The appellant in her written submissions dated 6th April, 2018 submits that at paragraph 5 of the plaint the respondent averred that on or about 3rd May, 2001, in the course of his employment with the defendant, he was involved in an accident with the company tractor where he suffered pain, loss and damages. He enlisted the particulars of breach of statutory duty and also particulars of negligence at paragraphs 6 and 7 of the plaint.

The plaint was filed on 19th November, 2014, a period of thirteen (13) years from the date of cause of action.

The appellant in defence raised the issue of time bar the suit having been instituted in violation of the provisions of Section 90 of the Employment Act, 2007 as well as Section 4 of the Limitations of Actions Act, Chapter 22, Laws of Kenya. The appellant further took issue with the leave that was granted to institute the suit out of time in Misc. Civil Application No.9/2013 and indicated that he would challenge this at the hearing.

The appellant's further submission is that this suit was hinged on tort as it was based on breach of statutory duty. Her further submission is that this being the case, the suit should have been commenced within three (3) years in tandem with the provisions of Section 4 (2) of the Limitations of Actions Act and Section 90 of the Employment Act, 2007.

The appellant submits that at the time of filing the suit, it was terribly time barred. Cognizant of this, the respondent sought to cure the same by seeking leave in Misc. Application No. 9/2013. This was granted.

The appellant challenged this grant of leave at the hearing. Her argument was that the respondent did not meet the threshold for grant of the orders sought and obtained under the provisions of Limitation of Actions Act aforesaid. The learned magistrates holding on this was;

“on the issue that the suit is time barred, the Defendant at paragraph 6 of its submissions states that leave was granted to the Petitioner to file this suit out of time vide Misc Application No. 9 of 2013. So the same shall stand discharged as such. The suit is proper before court.”

The appellant faults this reasoning on grounds that leave to file a suit out of time is not absolute as was held in the authority of **Yunes K. Oruta and another vs. Samuel Muge Nyamato CA No.96 of 1984 (1984) LLR 7223 CAK now reported in 1988 KLR 590.**

Extension of time would only be granted if the applicant fulfils the provisions of Section 27 (2) of the Limitation of Actions Act see **Divecon Limited vs. Samani (1995 – 1997)1 EA 48.** The testimony of the respondent at cross-examination during the trial was as follows;

- *That he signed an affidavit in support of an application to have suit filed out of time.*
- *That the application was allowed.*
- *That he worked with the Appellant for 4 years after the injury (Page 77 paragraph 6).*
- *That in total he worked with the Appellant for 4 year s after the injury (page 77 paragraph 13 of Record of Appeal).*
- *That he filed the suit late about 13 years later (Page 77 Paragraph 16 of the Record of Appeal).*

This is a demonstration that the respondent was not incapacitated after the injury. That he worked for the appellant for a further period of 5 years cast a shadow as to why he did not file suit within the prescribed period if he had any grievances or claims against the appellant.

The appellant further submits that during the proceedings, the learned magistrate made an order that Misc. Civil Application No. 9 of 2013 be placed before him for perusal and consideration in determining any issues raised by the parties. He did not address himself on this.

The appellant further submitted that in the miscellaneous application, the respondent advanced the reason for delay of filing the suit on time as due to the fact that he was undergoing treatment and also that he was negotiating with the appellant and that these were factors beyond its control. She sought to rely on the authority of **Mary Wambui Kabuga vs. Kenya Bus Services Ltd (1997) eKLR** where Akiwumi, J. observed as follows;

“It must be remembered that even when the Judge grants leave there is nothing final about it. It is merely provisional. The Defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The Judge who tries the case is the one who must rule finally whether the Plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by provisional views expressed by the Judge in chambers who gave leave”.

The appellant submits that the learned magistrate did not make a determination as to whether the respondent had satisfied the conditions for overcoming the time bar as provided in law. This is despite fervent prompting by the appellant.

This is further buttressed by the authority of **TM – AM Construction Group (K) Civil Engineering and Constructions and Another Vs Norah Nyambeki Ongweyi Nakuru CA No. 18 of 2017** where the court observed as follows;

“ Once the Respondent states that she was prevented from filing suit due to her ill health and medical treatment, she was mandated to prove it and once the Defendants raised the issue of Limitation in the Defence, the Respondent was put on notice.”

This is similar to the instant case.

It is the penultimate submission of the appellant that the reasons advanced by the respondent for grant of leave fell short of the threshold set out under Section 27 (2) of the Limitation of Actions Act, Chapter 22, Laws of Kenya. Further, the learned trial magistrate erred in failing to make a proper determination of the issue of limitation when the same was pleaded in the appellants defence. The suit is therefore time barred and should be dismissed with costs.

Section 27 (2) of the Limitation of Actions Act, provides as follows;

27(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –

a) Either was after the three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

b) In either case, was a date not earlier than one year before the date on which the action was brought.

The respondent's rejoinder and submissions on the subject was not substantial. He sought to rely on the authority of **Transworld Safaris Kenya Limited vs. Somak Travel Ltd, Appeal No. 261 of 1996** where Kwach, Shah & Pall, JJ.A. observed as follows;

1. The general rule of law is that courts will not make orders in legal proceedings affecting a party's rights without giving the party an opportunity to be heard.

2. That very clear words would be required to take away fundamental rights ordinary accorded by the law and indeed by natural justice.

3. In KENYA, the common law is of a lower standing than statute law &

4. A party who has obtained leave to file suit out of time as require by law that order for leave can only be queried at the trial and not by a different action to discharge it.

This again does not go out to address the issues raised by the appellant and is therefore irrelevant and inapplicable.

I entirely agree with the appellant. The suit before the learned trial magistrate was disastrably time barred from the onset. The leave granted in Misc. Application No.9 of 2013 was not a panacea for this. It did not meet the threshold spelt out by section 27 (2) of the Limitation of Actions Act above cited. The learned magistrate did not address this defect despite the issue being raised by the appellant during the trial.

Again, the reasons adduced by the respondent for issue of the leave to file the suit out of time are not compliant. They do not satiate the requirements of section 27 (2) of the Limitation of Actions, Act, Chapter 22, Laws of Kenya. This appeal must therefore succeed, even on this ground alone.

On a finding and determination of limitation of action on ground of time bar, this appeal succeeds. The other grounds of appeal therefore fall by the way side. They are not worthy of pursuance or determination.

I am therefore inclined to allow the appeal with orders that each party bears their own costs of the appeal.

On this note and finding, ELRC Appeal No. 2 of 2017 is dismissed with equal orders on costs.

Delivered, dated and signed this 12th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Ng'eno holding brief for Mr. Onyinkwa instructed by Onyinkwa & Company Advocates for the appellant
2. Mr. Meroka instructed by Meroka & Company Advocates for the respondent.