



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 17 OF 2016

(Being an appeal from the Ruling and Orders given on 29.06.2016 by Honourable J. Kituku, Principal Magistrate in Civil Case No. 31 of 2015 at Kiambu)

SASINI TEA & COFFEE LIMITED..... APPELLANT

- VERSUS -

JANE MUTHONI MWAURA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Tuesday 31st July, 2018)

JUDGMENT

The appellant filed the memorandum of appeal on 28.07.2016 through Eboso & Company Advocates. The appellant prayed for orders that:

- a) the appellant's appeal be allowed with costs; and
- b) the respondent's suit be struck out for being statute barred under section 90 of the Employment Act, 2007.

The appellant was dissatisfied with the ruling appealed against upon the following grounds:

- 1) That the learned Magistrate erred in law by holding that the trial Court would not entertain an application raising the issue of limitation notwithstanding that the Court lacked jurisdiction to grant extension of time under section 90 of the Employment Act, 2007; and the respondent had been irregularly granted conditional leave on 26.11.2014 to file suit within 60 days which period lapsed on 24.01.2015 whereas the material suit was filed on 20.02.2015.
- 2) The learned Magistrate erred in law in holding that he would not entertain the issue of limitation notwithstanding that limitation touches on the jurisdiction of the Court to entertain a claim that is statute barred.
- 3) The learned Magistrate showed extreme prejudice by ignoring the submissions of the appellant's advocates on issues of law and fact and thereby arrived at an erroneous decision.
- 4) The learned Magistrate erred in law and fact by finding that the application by the appellant was res judicata whereas no similar application had been previously brought before the same Court for adjudication.

The respondent filed her suit on 20.02.2015 seeking damages for an injury that she suffered on 24.06.2006 while working at the appellant's company. Prior to filing of the suit she sought and obtained the leave of the Court to file her suit out of time. The order for leave to file the suit out of time was given on 26.11.2014 by Hon. R.A. Oganyo, Chief Magistrate in Miscellaneous Application No. 989 of 2013 at Nairobi. The order stated as follows:

- 1) That leave is hereby granted for the plaintiff/ Applicant to file the suit out of time.
- 2) That suit be filed in the next 60 days of this order.
- 3) That costs be in the cause.

The 60 days as ordered lapsed on or about 26.01.2015 but it is not in dispute that the respondent filed the suit on 20.02.2015, clearly outside the time prescribed in the order.

By the notice of motion dated 06.01.2016 the appellant prayed that the suit be struck out for being statute barred under section 90 of the Employment Act, 2007. It was the appellant's case that the leave granted was irregular as there was no jurisdiction to extend the time as limited under section 90 of the Act. The section provides, "**Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings 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 cession thereof.**" At paragraph 6 of the defence the appellant stated thus, "**6) Sasini Limited avers that the purported cause of action having arisen on 24th June 2006 and the suit herein having been instituted on 20th February 2015 the Plaintiff's claim is statute-barred by dint of section 90 of the employment Act and at the appropriate stage, Sasini Limited shall move the Court to strike out the Plaintiff's Suit in its entirety.**"

The Hon. Magistrate delivered the ruling and cited **P.M.N –Versus- Kenyatta National Hospital & 6 Others [2015]eKLR** where the Court upheld Shah JA in **Mary Wambui Kabugu –Versus- Kenya Bus Services (1997)eKLR** thus, "**It will be upto the presiding Judge at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit to the plaintiff to be struck out is not encouraged by the Limitation of Actions Act. Particularly where leave to file an action against the defendant has been granted ex parte.**" The learned Magistrate then proceeded to find that the plaintiff having obtained leave to file the action as required by the law, that order can only be queried at the trial but not by application to discharge it otherwise the provision of the Act in providing for obtaining an ex parte leave would be rendered nugatory.

The Court has considered that finding and returns that the learned Magistrate, as urged for the appellant, failed to consider that the purported ex-parte leave had in fact lapsed when the respondent filed the suit long after the 60 days as ordered when the leave was granted. That being the case, the respondent had clearly filed the suit without leave. It was not said or shown that the respondent had sought and obtained expansion of the 60 days to validate the suit. Thus the Court returns that the suit had been filed without leave and it was therefore time barred. The Court considers that the cited authority did not therefore apply in the circumstances of the case. The appeal will succeed on that ground alone and the Court will not delve into the other grounds of appeal being whether the suit for injury claims were under section 90 of the Employment Act, 2009 or fell outside that section as a tort of negligence.

In conclusion judgment is hereby entered for the appellant against the respondent for the striking out of the plaint in civil case No. 31 of 2015 in the Chief Magistrate's Court at Kiambu, with costs; and the respondent to bear the costs of the appeal.

Signed, dated and delivered in court at Nairobi this Tuesday 31st July, 2018.

BYRAM ONGAYA

JUDGE