



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
APPEAL NO. 23 OF 2015
J.B. MAINA & CO.ADVOCATES.....CLAIMANT
VS
PETER MUOKI MUNYAO.....RESPONDENT
(Being an Appeal from the Judgment of Honourable Kitagwa
Senior Resident Magistrate delivered on 7th November 2013
in Civil Suit No. 1813 of 2012, Mombasa)

JUDGMENT

Introduction

1. The appellant herein was the defendant in CMCC case number 1813 of 2012 and being dissatisfied with the whole judgment of the trial court dated 7.11.2013 brought this Appeal seeking for the setting aside of the said decision on the following grounds:

- a. The learned Magistrate erred in fact and in law by presiding over the case since the court did not have jurisdiction to handle employment matters.
- b. The learned Magistrate erred both in law and in fact by allowing the case to proceed even when the Plaintiffs had not obtained leave to file a skeleton file when the original file had reportedly gone missing.
- c. The learned Magistrate erred both in law and fact by allowing the Plaintiff to proceed to file a skeleton file under authority of the Executive Officer indicating that the file was missing when the said Executive Officer did not have such mandate to grant leave.
- d. The learned Magistrate erred both in law and fact by entertaining the suit when it is clear on the face of it that the fresh suit was time barred.
- e. The learned Magistrate erred both in law and fact by failing to consider the Defendants written submissions concerning the facts in issue in this case, which submissions would have substantially changed the finding of the Honourable court.

Background

2. On 17.8.1993, the respondent was involved in a road traffic accident while driving Motor Vehicle Registration No. KXZ 766 Mitsubishi Lorry and sustained severe bodily injuries. According to the respondent the said Lorry belonged to the appellant, and as such the accident and the injuries occurred while he was in the course of his employment by the appellant.

3. After accident, the respondent instructed a lawyer to demand for compensation and the appellant dismissed him from employment. The respondent filed Suit No. CMCC 638 of 1993 at Mombasa seeking compensation for injuries suffered plus terminal dues but the court file disappeared. Thereafter he brought the suit number CMCC 1813 of 2012 after obtaining leave to sue as a pauper.

4. The appellant objected to the suit on ground that it was statute barred and also denied liability to compensate the respondent because he was not his employee.

5. When the suit came for hearing the respondent maintained that he was employed by the appellant on the fateful day as the driver of KXZ 766. That he suffered injuries while on duty and as such he was entitled to compensation by the appellant.

6. The appellant called Mr. Gilbert Bwire Wanyama as the only defence witness. The witness denied that the respondent was employed by the appellant and contended that the respondent was employed by Gama Warehouse Ltd, a sister company to the appellant. He produced documents (Exh.D1) to prove that the respondent was indeed being paid by Huma Warehousing Ltd. He also produced a Notice of Intended prosecution (Exh.D2) to prove that the respondent is the one who caused the accident through careless driving.

7. After the hearing the appellant filed written submission urging the court to dismiss the suit on grounds that it was statute barred; the court lacked jurisdiction to determine employment related disputes; and finally that the suit lacked merits because she was not the owner of the Lorry in issue and no particulars of negligence had been pleaded and proved against him.

8. The trial court then delivered the impugned judgment on 7.11.2013 whereby she awarded the respondent kshs.700,000 as general damages for fracture of the pelvic, kshs.120,000 as compensation for unfair dismissal and kshs.80,000 for “the rest of the claims”. Before making the said award, the trial court formed the opinion that the respondent was employed by the appellant; suffered bodily injuries while in the course of the said employment on 17.8.1993; and that he was subsequently dismissed from the employment by the appellant after suing for compensation.

Appellant’s submissions herein

9. On the first ground of appeal, the appellant submitted that one of the reliefs sought by the claimant was compensation for unfair dismissal and employment benefits. That under section 12 of the Labour Institutions Act, the court with jurisdiction to entertain such dispute was the Industrial Court. Consequently the appellant maintained that the trial Court erred in Law by entertaining a Suit that she did not have jurisdiction over.

10. The appellant never argued the second, third and fifth grounds of appeal are therefore dismissed.

11. As regards the fourth ground of appeal the appellant submitted that the trial court erred in law by entertaining a statute barred suit. She contended that, if at all the court file for the initial Suit No. CMCC 638 of 1993 got lost, the remedy lied in reconstruction of the court file for the same suit and not to bring fresh suit out of time and without the leave of the court. She therefore prayed for the appeal to be allowed, the impugned judgment be set aside and the suit below be dismissed.

Respondent’s submissions

12. On the first ground of appeal, the respondent submitted that the trial court had the jurisdiction to determine the suit within the provision of section 29(3) and (4) of the Industrial Court Act. That under the said provision, the Chief Justice is empowered to designate Magistrates to determine claims under the Work Injury Benefits Act (WIBA). That he exercise of the said power by Gazette Notice No.9243 of 2011.

13. On the fourth ground of appeal, the respondent submitted that, he filed the initial suit in 1993, within the statutory period, but the court file disappeared in 1998 before determination and as such the second suit filed in 2012 was not statute barred. That he suffered serious injuries and for two decades he did not get justice. He therefore urged the court not to allow legal technicalities to deny him justice.

Analysis and Determination

Jurisdiction

14. The dispute before the trial court was compensation for injuries suffered by the respondent while in his line of duty as a driver and also for employment dues on termination. The reliefs sought in the plaint were:

“(a) Compensation for the injury suffered while in line of duty and the employment benefits”.

15. On 27.6.2011, the Chief Justice designated by Gazette Notice No.9243, certain ranks of Magistrates to determine work injuries claims brought under the WIBA. The power to designate the Magistrates is donated under section 29(3) of the ELRCA. The Gazette Notice by the Chief Justice dated 27.6.2011 stated as follows:

“...The Chief Justice designates all Courts in the 47 Counties presided over by Magistrates of the rank of Senior Resident Magistrate and above as Special Courts to hear and determine Employment and Labour relations cases within their respective areas of jurisdiction.

The matters relate to the following specific arears:

1. Work injury related matters...”

16. The Constitutionality of the said Gazette Notice by the Chief Justice has not yet been unanimously settled by the Superior courts. Never the less, it is clear that the Magistrated designated to determine claims under WIBA are those in the rank of Senior Resident Magistrate and above. My careful perusal of the typed proceedings in the trial court record, it is clear that the trial Magistrate, Madam Kitangwa was a Resident Magistrate and not a Senior Resident Magistrate. Consequently she lacked jurisdiction to entertain the suit because she was not designated by the Chief Justice vide the Gazette Notice number 9243 of 2011 as a Special Court to determine the suit. A judgment made by a tribunal without jurisdiction from the Constitution or statute is a nullity and must therefore be set aside.

17. In addition to the foregoing, the court lacked jurisdiction under section 12 of the ELRCA which gives this court the exclusive jurisdiction over employment disputes subject to section 29(3) of the Act.

Statute Barred suit

18. The respondent filed suit number CMCC 638 of 1993 seeking the same reliefs as in the suit number 1813 of 2012. The court file for the initial suit disappeared in 1998 before determination and allegedly the respondent was advised by the Court Executive Officer to file a skeleton file. Instead he brought a fresh suit. The second suit was brought in 2012 while the cause of action arose in 1993. The second suit was therefore brought almost 20 years after the time when the cause of action arose. That suit is obviously statute barred dint of by section 4(1) of the Limitation of actions Act which bars any party from commencing suits founded on tort after the lapse of 3 years next from the time when the cause of action

arose.

19. The said suit was brought without the leave of the court, and even after filing, the respondent never sought the leave to continue with the statute barred suit. In my opinion it was immaterial that the respondent had filed another suit in time and the court file disappeared. Such submission would be proper in an application to reconstruct the lost court file or in an application for leave to bring the second suit out of time. It is therefore too late and improper for the respondent to submit on appeal that his suit be deemed as competent.

20. Although the respondent mistakes the issue of statute bar for a mere legal technicality, the truth of the matter is that, it is a substantive matter that goes to the mandate of the court to preside over any dispute. What is meant by statute bar under section 4 of the Limitation of Actions Act is not that the cause of action is extinguished, but that the jurisdiction of the court to determine the suit has been taken away.

21. Once this jurisdiction is taken away the court must down its tools unless it is moved appropriately under section 27 of the said Act. In this case the respondent never moved the trial court for leave to file suit out of time and therefore the court had no jurisdiction to preside over a dispute of which the law expressly barred her from doing so on account of time Limitation.

Disposition

22. For the reasons stated above that the trial court lacked jurisdiction over the primary suit, and that the suit was filed out of time and without the leave the court, I allow the appeal and make the following orders:

- a. The judgment by the trial court delivered on 7.11.2013 be and is hereby set aside.
- b. The claimant is at liberty to reconstruct Court file No. CMCC 638 of 1993 and pursue his claim, or in the alternative he is at liberty to seek leave to continue with CMCC 1813 of 2012 out of time.
- c. Each party shall bear his own costs of this Appeal and the Court below.

Signed, dated and delivered at Mombasa this 27th day of January,

2017.

O.N. MAKAU

JUDGE