



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 1 OF 2015

(Formerly Civil Appeal No. 37 of 2011 in the High Court at Nyeri then 83 of 2013 in the High Court at Murang'a and being an Appeal from the Ruling of the Hon. L. Mbugua, Principal Magistrate at Karatina in Civil Case No. 130 of 2010)

KENYA TEA DEVELOPMENT AGENCY.....1ST APPELLANT

RAGATI TEA FACTORY LIMITED.....2ND APPELLANT

VERSUS

ELVIS NDUATI NGURE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 13th May, 2016)

JUDGMENT

The grounds of appeal are three. It is the appellants' case, **first**, that the learned trial magistrate erred in law by failing to uphold the appellants' preliminary objection that the Magistrate's Court lacked the jurisdiction to determine matters governed by the Employment Act, 2007 and the Labour Institutions Act as the Industrial Court was at all material time seized of exclusive jurisdiction in determining employer-employee disputes. **Second**, that the honourable trial court erred in law by failing to uphold the appellants' preliminary objection that the respondent's case founded upon the collective bargaining agreement was time barred under the provisions of section 90 of the Employment Act, 2007. **Third**, the learned Trial Magistrate misdirected herself both in law and fact by finding that the dispute between the parties was not one between an employer and employee under the Employment Act, 2007 and the Labour Institutions Act, 2007 on account that the respondent was a retired former employee of the 2nd appellant.

The appellants in the memorandum of appeal filed on 05.04.2011 through J.K.Kibicho & Company Advocates prayed for orders that:

- a. The appeal herein is allowed.
- b. The plaintiff's suit is struck out.
- c. The costs of the appeal and those in the lower court be granted to the appellants.

The suit was filed on 05.08.2010 through Wangari & Company Advocates and the claim in paragraph 6 of the plaint was for arrears under the collective bargaining agreement for 2001 to 2004 amounting to a sum of Kshs. 422, 580.00. Under paragraph 4 of the plaint the respondent had retired on 31.12.2004. Thus the suit was filed before lapsing of 6 years as the time of limitation for contracts under section 4 of the Limitation of Actions Act, Cap 22. The cause of action was before the Employment Act, 2007 and section 90 prescribing 3 years as the period of limitation did not apply to the case and the **2nd ground** of appeal

will therefore fail; the suit was not time barred.

The suit was filed on 05.08.2010 at a time when the Employment Act, 2007 was in operation. Under section 87 (2) of the Act, no court other than the Industrial Court would determine a dispute about or relating a contract of service. The court finds that the honourable trial court erred in finding that it had jurisdiction to determine the suit. The court returns that the appeal will therefore succeed on account of the 1st and 3rd grounds of appeal.

The court has considered that the respondent, despite service, failed to attend to take directions on the appeal and failed to file submissions to oppose the appeal. It is the opinion of the court that the respondent has since lost interest in the matter. The court has further considered that this court would, under the Constitution of Kenya, 2010 and the Employment and Labour Relations Court Act, 2011, have jurisdiction to hear and determine the suit. In the interest of justice, the respondent would be at liberty to apply for transfer of the suit to this court for final disposal but such submission or application has not been made.

In conclusion the appeal is allowed with orders as follows:

- a. The plaintiff's suit filed on 05.08.2010 in the Resident Magistrate's Court at Karatina being Civil Case No. 130 of 2010 is hereby struck out for want of jurisdiction.
- b. The costs of the appeal and the suit are hereby granted to the appellants.

Signed, dated and delivered in court at Nyeri this Friday, 13th May, 2016.

BYRAM ONGAYA

JUDGE