



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, 30th September, 2016)

JUDGMENT

Following an application for review, the judgment by the court in this matter delivered on 13.05.2016 was set aside so as to take into account the respondent's submissions.

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:

The appeal herein is allowed.

The plaintiff's suit is struck out.

The costs of the appeal and those in the lower court be granted to the appellants.

The respondent filed submissions to oppose the appeal on 09.05.2016 through Wangari & Company Advocates. The respondent's case is that the cause of action accrued on 31.12.2004 when the respondent retired. The Employment Act, 2007 came into operation on 02.06.2008 so that section 90 of the Act does not apply. It is submitted for the respondent that the Act cannot be applied retrospectively.

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 court finds that section 4 of the Limitation of Actions Act, Cap 22 governed the period of limitation and not section 90 of the Employment Act, 2007.

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 considers that the suit related the parties' employment contract and it was extraneous for the trial court to find that the Industrial Court as then constituted lacked jurisdiction because the respondent was "a former employee". It is clear that the suit was not about a relationship between the parties after the contract of employment had lapsed but rights and obligations of the parties in the employment relationship; it was an employer-employee relationship in which the respondent was an employee that triggered the suit. The court returns that the appeal will therefore succeed on account of the 1st and 3rd grounds of appeal. In view of the legal issues raised and the complexity of the case as well as the parties' marginal success in their arguments, there will be no orders on costs both in this court and the trial court.

In conclusion the appeal is allowed with orders as follows:

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.

There are no orders on costs of the appeal and the suit before the trial court.

Signed, dated and delivered in court at Nyeri this **Friday, 30th September, 2016.**

BYRAM ONGAYA

JUDGE