



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

APPEAL NO.2 OF 2015

(Formerly High Court Civil Appeal No.22 of 2011 at Meru)

Being an appeal from the judgment of the Honourable Mr. B. Ochieng, Principal Magistrate delivered on 20.01.2011 in Civil Case No.438 at Meru

TELKOM KENYA LIMITED.....APPELLANT

VERSUS

JOSEPH M'RUGONGO M'AMAI.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th November, 2015)

JUDGMENT

The honourable trial court entered judgment for the respondent against the appellant on 20.01.2011 in the sum of Kshs. 221, 987.00 together with interest on the said amount at court rates calculated from 01.09.1994 till payment in full together with costs of the suit.

The appellant being dissatisfied with the judgment appealed against it in its entirety on the following grounds, thus, that the learned magistrate erred in law and in fact:

- 1) by holding that the respondent was entitled to leave to file the suit out of time contrary to the facts admitted by the respondent during the hearing;
- 2) by holding that the issue of the propriety of the leave granted to the respondent to file his suit out of time was not addressed during the hearing of the matter despite the respondent having been questioned in detail regarding the delay in filing his case and his having failed to offer any satisfactory reasons for the delay;
- 3) in holding that the appellant ought not to have submitted in its written submissions on the propriety of the leave granted to the respondent to file his suit out of time yet the issue of limitation was a point of law which can be raised at any time before judgment; and
- 4) in attaching undue reliance on the evidence adduced by the respondent in support of his claim as opposed to the evidence adduced by the appellant disproving the respondent's claim.

The appellant prayed for:

- a) The appeal to be allowed.

b) The judgment of the learned magistrate be quashed and set aside and be substituted with a finding of this honourable court dismissing the respondent's claim against the appellant.

c) The costs of the appeal and of the proceedings in the subordinate court be granted in favour of the appellant.

The **1st and main issue** for determination in this suit is whether the honourable trial court could and validly extended the time for the respondent to file the suit. The trial court rendered itself in the judgment as follows on that issue of extension of the limitation period:

“It is the defence contention that the cause of action arose in August 1994 and period would have lapsed in August 2009 under S 4(1) of the Limitation of Actions Act (Cap.22) as it arises out of contract of employment and this suit was filed in 2006 after the period of limitation had lapsed. The plaintiff was granted leave *exparte* to lodge this suit beyond the limitation period and as submitted by defence counsel, issue of challenge to the granting of leave to file suit out of time can only arise at the trial. Counsel's sentiments is in line with the holding in the case C.A No. 244 of 2000 – Mary Osundwa –Versus Nzoia Sugar Company Limited and the High Court Decision in M'Ringera M'Mbwiria –Versus- Rintangu M'Inoti[2005]eKLR. S. 27 Cap.22 (Supra) sets out conditions to be met by a plaintiff to be granted extension of time within which to file a suit. It is submitted that the plaintiff has failed to satisfy the criteria set out. However, I am persuaded to find that the plaintiff cause of action was based both on tort and in contract by virtue of the fact that it is also based on the breach of duty by the defendant in delaying to issue him with the cheque as required of them thereby creating an element of negligence on the part of the defendant.”

The court has perused the plaint. The respondent as the plaintiff prayed for Kshs. 221, 987.00 being the retirement benefits plus costs and interest following his optional decision to retire from the appellant's employment effective sometimes in August 1994. There was no claim or prayer founded on the tort of negligence or breach of duty on the part of the appellant. Thus, as submitted for the appellant, the honourable trial court walked outside the respondent's pleadings and case in finding that the case had an element of negligence and breach of duty on the part of the appellant. Accordingly, the court returns that the trial court lacked jurisdiction to extend the time for the respondent to file the suit in purported application of the provisions of section 27 of the Limitation of Actions Act, Cap. 22 Laws of Kenya and whose scope is restricted to extension of limitation period in case of ignorance of the material facts in actions for negligence, nuisance or breach of duty.

As was submitted for the appellant and as was held in the cases as cited in the honourable trial court's judgment, the appellant was entitled to question the orders of leave to file the suit out of time at the full hearing of the suit.

Accordingly, the court finds that the respondent's suit was based on the contract of employment, the respondent left employment in August 1994 and the suit was filed out of time on 19.10.2006. The 6 years for suits based on contract under section 4 (1) (a) of the Limitation of Actions Act, Cap. 22 Laws of Kenya had long lapsed and the extension of time on the considerations given by the honourable trial court was not justified.

In view of the findings, the appeal will succeed.

In conclusion judgment on the appeal is made in favour of the appellant against the respondent with orders as follows:

a) The appeal is hereby allowed.

b) The judgment of the learned magistrate is hereby set aside and is substituted with a finding of this honourable court dismissing the respondent's claim against the appellant.

c) The costs of the appeal and of the proceedings in the subordinate court are granted in favour of the appellant.

Signed, dated and delivered in court at **Nyeri** this **Friday, 20th November, 2015.**

BYRAM ONGAYA

JUDGE