



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 10 OF 2012

(Originally Nairobi Cause No.703 of 2011)

JOSEPH ASHIOYA & 165 OTHERS

CLAIMANTS'

v

KENYA UNITED STEEL CO (2006) LTD

1ST RESPONDENT

PRICE WATERHOUSE COOPERS

2ND RESPONDENT

RULING

1. The Claimants' filed a Memorandum of Claim against the Respondents' on 9 May 2011 and the issue in dispute was stated as unpaid dues of Joseph Ashioya & 165 others.
2. The 1st Respondent filed its Memorandum of Response on 8 February 2012. One of the issues raised in the Response was the legal question of limitation. It was pleaded that the Cause had not been filed within 6 years as stipulated in the Limitation of Actions Act.
3. The Claimants' filed a Reply to the 1st Respondent's Memorandum of Response on 18 June 2012 and reiterated that the Cause was filed in compliance with the law.
4. On 5 September 2012 the Claimants' filed an application to amend the Statement of Claim. The application was allowed by Lady Justice Wasilwa on 27 September 2012.
5. On 22 April 2013 the Cause was listed before me and Mr. Noorani who appeared on behalf of the 2nd Respondent informed me that the 2nd Respondent had not been served with any pleadings. I ordered the Claimants' to serve the 2nd Respondent.
6. On 25 April 2013 the 2nd Respondent filed a Notice of Appointment of Advocates. On 20 May 2013 the 2nd Respondent filed its Memorandum of Response and List of Documents. On the same day it also filed a Notice of Preliminary Objection.
7. The Response raised issues of law to the effect that the cause is bad, time barred and scandalous, frivolous and or vexatious. The Notice of Preliminary Objection mirrored the objections in the Response. I heard the parties on the Preliminary Objection on 13 June 2013.

The Preliminary Objection

8. The Preliminary Objection raised 3 grounds in objecting to the Claim and seeking its dismissal. These were in brief that
 - i. the Cause was bad in law, misconceived and did not disclose a cause of action against the Respondent,
 - ii. that the cause of action was time barred by virtue of the Limitation of Actions Act and

iii. that the cause was scandalous, frivolous and or vexatious.

9. I will discuss each ground in turn.

The Cause was bad in law, misconceived and did not disclose a cause of action against the 2nd Respondent

10. Mr. Noorani's submissions on this point were that the legal status of a Receiver/Manager is that of an agent for a disclosed principal and that where there is a disclosed principal, the agent cannot be sued in a personal capacity. It is the Principal to be sued.
11. It was further submitted that it is not open to a Receiver/Manager to bring proceedings in his own name. A Receiver Manager cannot and has no right of action by his appointment. In effect the legal principles applicable to suing a Receiver Manager and his capacity to sue were equally applicable.
12. For these submissions, Mr. Noorani relied on *Palmer's Company Law* 20th edition at page 384, *Kerr on the Law and Practice of Receivers* at page 321, Civil Appeal Nos. 5 and 48 of 2002 *Wareham & 2 others v Kenya Post Office Savings Bank Ltd* at page 9 and *Kenya Planters Co-Op Union Ltd v Minister for Cooperative Development and Marketing*.
13. In reply to the first ground, Ms. Mbogo for the Claimants' submitted that a reasonable cause of action had been raised and that not only the agent (2nd Respondent) had been sued but also that the Principal (the 1st Respondent) had been joined. According to Ms. Mbogo, the 1st Respondent had formerly been known as Kenya United Steel Co Ltd before it changed its name to Kenya United Steel Co. (2006) Ltd. Ms. Mbogo asserted that no new company was incorporated or registered.
14. In any case, according to Ms. Mbogo the true status of the 1st Respondent was in dispute and could only be unlocked through evidence. In this regard, Ms Mbogo submitted that this ground could not constitute a true preliminary objection based on pure points of law.
15. Further, Ms Mbogo contended that the 2nd Respondent could not be separated from the individuals who performed the functions of Receiver. A director of a company, according to Ms. Mbogo acts as an agent of the company and has ostensible authority and that Mr. Dearing who had been appointed as the Receiver was a director of the 2nd Respondent.
16. And in any case it was open to the Claimants' to seek to amend the Claim at any stage.
17. Ms. Mbogo cited *Treatise of Palmer's Company Law* at page 627 and the cases of *Kenya Plantation & Agricultural Workers Union v Mununga Leaf Base* (2013) eKLR, *Mehta Electricals Ltd & 4 others v N.K. Brothers (2005) Ltd*, Nairobi HCCC No. 37 of 2005, *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd & Another* (1964) 1 All ER 630 and *Ferguson v Wilson* (1866) LR 2 Ch 77.
18. The ratio in the Mehta case was on jurisdiction and arbitration proceedings and it does not help me in resolving the point under discussion.
19. I have considered the rival submissions by the parties on the first ground and has come to the conclusion that the correct and sound legal principle as far as the capacity of Receivers to sue and be sued is concerned is as stated in *Lochab Brothers v Kenya Furfural Co Ltd & Ar* (1976-1985) EALR 257, that receivers were authorized to take proceedings only in the name of the company whose agents they were...and that a receiver cannot sue in his own name as a receiver...In my view a similar principle applies where it is intended to sue a receiver.
20. The Receiver becomes on appointment, not the agent of any other company such as the 2nd Respondent but the company placed under receivership. For our purposes the Receivers who were appointed by the debenture holders became agents of Kenya United Steel Co. Ltd. Whether the said company changed its name or transferred ownership to the 1st Respondent is a matter of evidence. At this juncture the relationship between the 1st Respondent and that other company is not known.
21. The Claimants' case in the present Cause is against a person or entity who was their employer at one time. It is a case concerning their livelihoods. The letter responding to the legal counsel before action was on the letter head of the 2nd Respondent. But it was signed by one Adrian Dearing as Receiver and Manager.

22. The law on suits against and by Receiver/Managers is clear. It was therefore not competent for the Claimants' to join Price Water Coopers as a Respondent in this Cause. The claim against the 2nd Respondent is incompetent because of capacity and improper joinder. I would dismiss the claim against it and allow the Cause to proceed as against the 1st Respondent.

That the Cause was time barred by virtue of the Limitation of Actions Act

23. On this second ground, it was the submission of Mr. Noorani that the basis of the Claimants' claims was unpaid salaries from September to December 2003 and terminal/retirement benefits from the same period.
24. Counsel submitted that the claims arose from employment contracts which are contractual in nature and that at the material time the applicable statutes were the repealed Employment Act which did not have a specific limitation clause and therefore the Limitation of Actions Act was applicable. This Act had set a limitation of 6 years for causes of action based on contract and the Claimants' should have filed their claims by December 2009.
25. Mr. Noorani relied on the cases of *Maria Machocho v Total Kenya Ltd* (2013) eKLR and *Sila Onyango Maugo & Ors v Kaluworks Ltd*, Mombasa Industrial Cause No. 85 of 2012 (unreported).
26. On the ground of limitation, Ms. Mbogo submitted that the Claim was brought in time and that the Claimants' were sent on unpaid leave in December 2003 and were to report back in March 2004. She further submitted that the Claimants' were notified on 13 February 2004 to await further communication.
27. Ms. Mbogo further submitted that the Claimants' are still technically employees because no formal communication of termination of employment has been made.
28. Attempts by the Ministry of Labour to have the employer address the issue of the Claimants' bore no fruit by the time there was a change of management in July 2005.
29. According to Ms. Mbogo it is the Trade Disputes Act (now repealed) that was applicable and the Claimants' lodged a dispute with the Minister for Labour through their union, the Kenya Engineering Workers Union. An Investigator was appointed but he did not finalise investigations and a second one was appointed who eventually sent a confidential report to the Minister. The report was not released and the matter was left hanging forcing the Claimants' to approach the Court and in the interests of justice the dispute should be heard and not dismissed at the preliminary stage.
30. The Statement of Claim was filed on 9 May 2011. And it outlined two main prayers, one up to 4 months wages and benefits covering the period immediately prior to the Claimants' being sent on unpaid leave and two, benefits including severance pay, outstanding pay in lieu of accrued leave, housing and other allowances as per the Collective Bargaining Agreement in place.
31. Ms. Mbogo was right that the Trade Disputes Act (now repealed) was the applicable law. My dilemma is that the parties did not really address me on the interplay between the sui generis nature of dispute resolution provided under the Trade Disputes Act and the Limitation of Actions Act.
32. The real question is whether under the Trade Disputes Act, trade disputes had to be brought before the then Industrial Court within 6 years, assuming that some trade disputes such as the one under discussion were contractual in nature.
33. The Trade Disputes Act (now repealed) is not one of the statutes expressly excluded from the purview of the Limitation of Actions Act under Part V of the Act. The Limitation of Actions Act is a statute of general application unlike the Trade Disputes Act (now repealed).
34. The Trade Disputes Act had its own timelines. Under section 4(4), disputes concerning dismissal or termination of an employee had to be reported to the Minister within 28 days. But the Minister could accept a report after 28 days. The Minister had a wide array of options of dealing with the reported trade dispute including reference to the Industrial Court.
35. Under the Trade Disputes Act, a party could not move directly to the Industrial Court. Section 14(9)(b) and (c) of the Trade Disputes Act provided that

9. The Court shall not take cognizance of any trade dispute or deal with any matter connected therewith-

(a).....

(b) unless the trade dispute has been reported to the Minister and twenty-one days have elapsed since the date on which the dispute was so reported;

(c) while such dispute or matter is in the process of being settled, investigated or otherwise determined by means of any other proceedings under the provisions of this Act or of any written;...

36. Section 14(9)(b) and (c) of the repealed Trade Disputes Act was explicit that the Industrial court could not take cognizance or deal with a trade dispute which was in the process of settlement, investigations or determination by other lawful means. This section holds the key to unraveling the issue of limitation raised by Mr. Noorani.

37. The dispute currently before the Court was reported to the Minister. The Minister appointed an Investigator(s) who allegedly prepared a confidential report. It is stated that the Minister has never released this report. The statute under which the dispute will stand to be determined has now been repealed.

38. In my considered view therefore, the Limitation of Actions Act is/was not applicable to trade disputes as envisaged under the repealed Trade Disputes Act. However where an employee predicates his claim on the ordinary law of contract before the commencement of the Employment Act, 2007, the claim would be subject to the Limitation of Actions Act and if after the commencement, to the limitation set out in section 90 of the Employment Act.

39. My ruling in Mombasa Cause No. 85 of 2012, *Sila Onyango Maugo v Kaluworks Ltd* was on the basis of the ordinary law of contract and not as a trade dispute under the repealed Trade Disputes Act and, is not helpful in the case under discussion. I may need to state that ordinary employees did not have access to the Industrial Court. The access was restricted to unions with recognition agreements and collective bargaining agreements with employers. But the Employment Act, 2007 has now significantly changed the position.

40. This ground of objection in my view must also fail.

Cause is scandalous, frivolous or vexatious

41. On this last ground Mr. Noorani submitted that under section 345 of the Companies Act, a corporate body is not capable or qualified to act as a Receiver and therefore the 2nd Respondent was the wrong party to sue.

42. Because of my finding above it will be merely academic to deal with this ground and such an exercise will not serve any useful purpose. In any case the Cause has raised serious legal and employment right issues which need to be determined by the Court on merit should the Cause eventually proceed to hearing.

Conclusion and Order

43. In conclusion I do find and hold that it was incompetent for the Claimants' to bring proceedings against the 2nd Respondent and do dismiss the claim against and further hold the Industrial Court could not take cognizance of a trade dispute which was under settlement or investigations and therefore the Limitation of Actions Act is/was inapplicable.

44. I do order that this ruling be served upon the Minister/Cabinet Secretary for Labour and the Investigator by the Claimants' Advocate on record and that this Cause be stayed pending/until the release of the Investigations report as envisaged under the Trade Disputes Act.

45. There be liberty to apply.

46. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 26th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Ms Mbogo

for Claimants'

Mr. Nduna

for 1st Respondent

Mr. Noorani

for 2nd Respondent