



East Africa Portland Cement Limited v Maina (Employment and Labour Relations Appeal 16 of 2020) [2024] KEELRC 2339 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2339 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 16 OF 2020
MN NDUMA, J
SEPTEMBER 26, 2024**

BETWEEN
EAST AFRICA PORTLAND CEMENT LIMITED APPLICANT
AND
BENARD TINDI MAINA RESPONDENT

JUDGMENT

1. The appeal arises from a ruling by Hon. Ms. C. Oluoch CM given on 29/1/2020 pursuant to an originating summons filed by the respondent on 28/1/2020 requesting the court for leave to file a suit out of time.
2. The application was heard ex-parte and the learned trial magistrate granted the respondent leave to file his suit out of time.
3. The suit was filed pursuant to the leave granted and was commenced by the plaint dated 26/4/19. The cause of action in the suit arose from injuries allegedly sustained by the respondent on 2nd June 2012 while in the course of his employment at the appellant's premises.
4. The respondent filed a statement of defence dated 24/5/2018 and also filed a notice of motion application dated 19/9/2018, seeking to have the suit struck out for being statute barred by dint of section 90 of the *Employment Act*, 2007.
5. The respondent opposed the appellant's application by a replying affidavit dated 25/9/2019. The lower court rendered its ruling on 29/1/2020. This appeal is brought against that ruling of the court.
6. The parties have filed written submissions. The issue for determination is whether the learned trial magistrate erred in granting leave to the respondent to file the suit out of time as alleged by the appellant.



7. From the record of appeal, the plaint dated 26/4/2018 was filed on the instant date, a period of over six (6) years from the date the cause of action arose.
8. In terms of paragraph 5 of the plaint, the suit arose from an injury caused by a metallic object which hit the respondent's left hand and forehead in the course of his employment at the appellant's premises on 2/6/2012.
9. The suit is premised on the alleged negligence of the appellant by failing to provide a safe working place and/or system of work and thus exposing the respondent to the risk of sustaining an injury as happened. That the appellant knew or ought to have known that the respondent was exposed to the risk of harm as happened on 2/6/2012. The respondent accused the appellant of failing to provide the respondent with protective wear and as a result the respondent suffered soft tissue injuries to the left forearm, fractured left distal humerus bone and fractured distal left to radius.
10. The respondent sought the following reliefs:
 - a. Special damages in respect of a medical report in the sum of Kshs. 3,000/=
 - b. General damages for pain and suffering for breach of contract.
 - c. Costs of the suit and interest.
11. The suit is apparently premised on tort and breach of contract.
12. Section 90 of the *Employment Act*, 2007, which provides limitation in respect of matters arising from employment contract provides as follows:

“Notwithstanding the provision of section 4(1) of the limitations of Actions Act, no civil action or proceeding based on or arising out of the Act on contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, negligent or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
13. Section 4(1) of the *Limitation of Actions Act*, cap 22 laws of Kenya on the other hand provides: -

“The following actions may not be brought after the end of six years from the date of which the cause of action occurred:

 - a. Actions founded on contract”
14. The appellant submits that the cause of action which arose on 2/6/2012 became statute barred upon expiry of 3 years on 2 /6/ 2015 but the suit was filed more than 6 years later on 24/5/2018.
15. In the ruling of the court dated 29/1/2020, the trial magistrate found:

“In my understanding the claim herein is for compensation in relation to personal injuries arising from a work place under the *Work Injury benefits Act* 2007 that now fall within the jurisdiction of the Director of Work Injury Benefits for fresh claim. It is not a claim for breach of conditions and terms of employment under the *Employment Act*, commonly known as labour disputes that are handled by an Employment and Labour Relations Court and/or a Labour Officer.”
16. The trial magistrate relied on a decision in *Mary Osundwa v Sugar Company Limited* 2002 eKLR in finding that this case was founded on negligence and breach of duty and the court had jurisdiction to



extend time for filing the suit where the action is founded on tort and relates to the tort of negligence, nuisance and breach of duty and the damages sought are in respect of personal injury to the plaintiff as a result of the tort.

17. Accordingly, the magistrate distinguished this matter from the case relied upon by the appellant of *Marie Machando v Total Kenya Limited* [2013] eKLR where extension of time was denied since the claim was based on unlawful termination and breach of employment contract.
18. The preliminary objection was therefore dismissed and the trial court found that this matter was not statute barred by dint of section 90 of the *Employment Act* 2007.
19. The issue that arises is whether section 90 of the *Employment Act*, 2007 is applicable in this matter. If so, the matter is at an end since the respondent could not file the suit upon expiry of 3 year period by dint of numerous authorities of this court and the Court of Appeal.
20. In terms of section 4(2) of the *Limitation of Actions Act*,

"An action founded on tort may not be brought after the end of three years from the date on which the cause of action occurred."
21. This suit therefore whether based on contract of employment or purely on tort must be filed within 3 years from the date the cause of action arose.
22. The court also found that it had granted leave to the respondent to file the suit out of time by an order dated 25/4/2018 and that decision had not been appealed against before this court in time or at all. Notwithstanding that finding, the trial court went ahead to consider the application brought by the appellant and delivered the impugned ruling.
23. The court notes that section 90 of the *Employment Act* makes no reference at all to section 4(2) of *Limitation of Actions Act* Cap 22 Laws of Kenya.
24. This matter arises from negligent conduct arising from employment and the cause of action is therefore a tort covered under section 4(2) of the aforesaid Act.
25. Section 90 of the *Employment Act* 2007 is not applicable to this matter as regards limitation of filing the suit.
26. It follows that the suit had to be filed within 3 years from the date the injury occurred. In any event the primary jurisdiction with regards to the injury is covered by the *Work Injury Benefits Act* of 2007 and the claim ought to have been filed before the Director of Occupational Health and Safety in terms of section 52 within 3 years as guided by the Supreme Court in *Petition No 4 of 2019, Law Society of Kenya v the Hon. Attorney General and Another* 2019 KESC 16 where the Court held that;

‘In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid’



27. Section 27 of Cap 22 allows for extension of time of limitation in case of ignorance of material facts in action for negligence and provides that:-

“(1) Section 4(2) does not afford a defence for an action founded on tort where: -

- a. The action is for damage as for negligence, nuisance or breach of duty whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law; and
- b. The damages claimed by the plaintiff for negligence, nuisance or breach of duty consists of or include damages in respect of personal injuries of any person; and
- c. The court has, whether before or after the commencement of the action, granted leave for the purposes of this section and
- d. The requirements of subsection (2) are fulfilled in relation to the cause of action.”

28. In the present matter, the trial magistrate relied on the provisions of section 27 of *Limitation of Actions Act* Cap 22 Laws of Kenya to extend time within which the suit was to be filed. This extension was granted before the suit was filed and no appeal was filed at all against that order of the court. The case of *Mary Osundwa v Sugar Company Limited* [2002] eKLR cited by the trial magistrate was on point in this regard.

29. This court finds as the learned trial magistrate did, that section 90 of the *Employment Act* 2007 as read with section 4(1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya was not applicable to this case.

30. This appeal is misconceived having not been filed against the order of the court dated 25th April 2018 in which the trial court extended time before the suit was filed this being a matter in respect of which section 4(2) as read with section 27 and 28 of the *Limitation of Actions Act* Cap 22 Laws of Kenya applied as opposed to section 90 of the *Employment Act*, 2007 as read with section 4(1) of Cap 22.

31. Accordingly, the appeal lack merit and is dismissed with costs.

DATED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024

Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Eboso and Co. Advocates for the appellant

M/s. Ogutu & Co. Advocates for the respondent

Mr. Kemboi – Court Assistant

