IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 39 OF 2016

CONSOLIDATED WITH

CIVIL APPEAL NO. 40 OF 2016

BETWEEN

RIFT VALLEY RAILWAYS (KENYA) LTD …….. APPELLANT

AND

HAWKINS WAGUNZA MUSONYE …….. 1ST RESPONDENT

DESIDERY TYSON OTIENO …….. 2ND RESPONDENT

(Being an appeal from the Ruling and Orders of the Employment & Labour Relations Court at Mombasa (Rika, J.) dated 16th June, 2015

in

E & L.R.C. MISC.No.12 of 2014)

****

JUDGMENT OF THE COURT

Hawkins Wagunza Musonye and Desidery Tyson Otieno, the respondents in this appeal, consolidating Civil Appeal Nos. 39 and 40 of 2016, were employees of Rift Valley Railways (K) Ltd, the appellant until 12th November, 2009 and 15th January, 2010, respectively when their services were terminated.

It is common ground that after that termination the parties engaged in some negotiations which culminated in the appellant making a proposal for payment of Kshs.63,000 in respect of Desidery Tyson Otieno Onyango and Kshs.65,000 for Hawkins Wagunza Musonye in final settlement and discharge vouchers on those terms issued. Those negotiations however fell through in July 2014 by which time the three years limitation period fixed under **section 90** of the Employment Act for commencing civil action based or arising under the Act had expired. In their wisdom the respondents applied to the Employment

and Labour Relations Court for leave to enlarge time within which they could bring their claim.

In separate *exparte* rulings rendered on the same date, **Rika, J.** appreciated that the 3 year limitation was a jurisdictional issue fixed by law and could not be extended by the court. However, he was of the view that the respondents were not yet out of time and that as such the application for time enlargement was unnecessary; that the period spent on negotiations by the parties would be excluded in computing time within which the cause of action could be said to have arisen; and that,

"3. Time stands still while other dispute resolution mechanisms are engaged. It re-starts when the negotiations or other mechanisms break down…. it would be unjust and unreasonable of the court to view time as running, while parties are engaged in primary dispute resolution mechanism recognized under the Constitution ….This breakdown in negotiations occurred in 2014. It was the event that made it necessary for the claimant to seek adjudication. It restarted the clock. If the court were to find that the clock was running during the negotiations, the result would be to punish the claimant for engaging in negotiations, and compel him to accept an out-of-court settlement which he feels is unjust."

With that conclusion the learned Judge ordered that the statement of claim which was annexed to the application for extension of time be deemed as duly filed upon payment of the requisite court fees and thereafter summons be issued. With dispatch the 1st respondent filed his claim being claim No. 589 of 2014. There is no evidence on record that the 2nd respondent, filed his claim, although the learned judge alluded to it.

The appellant, submitted that upon learning of the rulings and orders, which we reiterate were made *exparte,* they moved the court by a notice of motion to vary, review, set aside and/or vacate those orders. The application and the respondent's replying affidavit was once again placed before Rika, J. who, in dismissing it maintained that the impugned orders did not extend time, because it had no jurisdiction to do so; that as a matter of fact the respondents' claim was not barred since time was ***"frozen"*** during the period of negotiations. The dismissal of that application precipated this appeal which is brought on three grounds, which in our view can further be condensed into a single ground, that the learned Judge erred in finding that the respondents' claims were not statute barred.

The application for review was brought pursuant to several provisions of the Constitution, **section 90** of the Employment Act, 2007, **section 3, 12** and **20** of the Employment & Labour Relations Act erroneously cited as the Industrial Court Act and **Rules 16** and **33** of the Industrial Court (Procedure) Rules, 2010. The citing of **Rule 33** was clearly in error. That rule deals with correction of clerical mistakes and incidental errors or omission. It is **rule 32**, made pursuant to **section 16** of the Employment and Labour Relations Act, that provides for review of a decree or an order. It stipulates that:

"32 (1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling-

(a) if there is a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made: or

(b) on account of some mistake or error apparent on the face of the record, or

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award, the judgment or ruling requires clarification: or

(e) for any other sufficient reasons."

If the Court is persuaded that, for any of the above reasons, its order or decree ought to be reviewed, it will allow the application, otherwise it will dismiss it. See **sub-rule (5).** It may, further in terms of **sub-rule (6)**

"…review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again."

The learned Judge never made reference to any of these provisions, which are indeed the guiding principles in an application for review. Whereas under **order 45** a consideration of an application to review a decree or an order involves the questions whether there are new and important matters, mistake or error on the face of the record or any other sufficient reason, **rule 32** aforesaid has, in addition to these, two other considerations, namely, if the award, the judgment or ruling requires clarification, or on account of the award, judgment or ruling being in breach of any written law. The appellant did not allege that after the learned Judge's decision it had come by a new and important matter or evidence, or that there was a mistake or error on the face of the record, or that the decision of the learned Judge required clarification. We think the appellant was asking the Judge to find that his decision was in breach of a written law; and that for some other sufficient reasons he ought to have reviewed the decision. It is not an easy thing to persuade a judge and for a judge to actually find that his or her decision was wrong and in breach of the law. We are therefore not surprised at the outcome of that application. It is easier and less vexing for another Judge, if the one who made the order is no longer at the station, to find that the decision was contrary to the law. But even then questions abound as to whether that would not amount to sitting on appeal over a decision of another judge of co-ordinate jurisdiction. **Section 90** of the Employment act stipulates that;

"Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."

For us it is clear from our reading of **section 90** aforesaid that there are no exceptions to the three year limitation period, save for cases of continuing injury or damage where action or proceedings must be brought within twelve months after the cessation thereof. This was not a case of a continuing injury or damage but one of a single act of termination. In any case the respondents have not specified when the injury or damage ceased for time to have began to run. Secondly the learned Judge did not rely on the continuing injury or damage but on the fact that the parties engaged in negotiations. Those negotiations began when time had began to run following the termination of the respondents' services.

While there is no doubt that section 15 of the Employment and Industrial Relations Act encourages alternative dispute resolution, it must be court-based and conducted within the law. Time does not stop running merely because parties are engaged in an out of court negotiations. It was incumbent upon the respondents to bear in mind the provisions of **section 90** of the Employment Act even as they engaged in the negotiations. The claim went stale three years from the date of the termination of the respondents' contracts of service.

By craft and innovation the learned Judge, in grave error extended time by relying on negotiations by the

parties and suspending time for this period. Where a statute limits time for bringing an action, no court has the power to extend that time, unless the statute itself allows extension of time. That is what the court stated in **Divecon v Samani (1995 – 1998) l EA *48 at p. 54***

"No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract."

Despite **section 4 (1) (a)** of the Limitation of Actions Act, which sets the limitation of actions in respect of contracts to six years, **section 90** of the Employment Act, which is a latter statute limits actions on employment contracts or contracts of service in general to three years.

We therefore come to the conclusion that the learned Judge failed to apply the principles for review of an order under **rule 32** of the Industrial Court (Procedure) Rules, 2010; and that had he done so dispassionately he would have come to the inevitable conclusion that his decision was clearly against the law and therefore ought to have allowed the appellant's application.

Accordingly we allow this appeal, set aside the order of the Employment and Labour Relations Court in Misc. Civil Application Numbers 11 and 12 of 2014, respectively made on 16th June 2015. The effect of this is that the respondents' suit Nos. 588 and 589 of 2014 are found to have been filed out of time and are struck out. We make no orders as to costs.

Dated and delivered at Malindi this 30th day of September, 2016

ASIKE-MAKHANDIA

……

JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR