Case Number:	Civil Appeal 44 of 2014
Date Delivered:	18 Jul 2014
Case Class:	Civil
Court:	High Court at Mombasa
Case Action:	Judgment
Judge:	Hannah Magondi Okwengu, Milton Stephen Asike-Makhandia, Fatuma sichale
Citation:	Office Restaurant v Kenya Hotels & Allied Workers Union [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	Cause No. 98 of 2012
Case Outcome:	Preliminary objection dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A)

CIVIL APPEAL NO. 44 OF 2014

BETWEEN

OFFICE RESTAURANT ……APPELLANT

AND

KENYA HOTELS & ALLIED WORKERS UNION ……..…RESPONDENT

(An appeal against the Ruling of the Industrial Court by (Makau J)

dated 26th July,2013

In

Cause No. 98 of 2012 formerly Cause No. 1026 of 2011 Nairobi)

Digest:

JUDGMENT OF THE COURT

[1] This is an appeal arising from a ruling delivered by the Industrial Court ***(Makau, J.)*** on a preliminary objection raised by ***Office Restaurant*** (*herein the "appellant"*) to a suit filed against it by ***Kenya Hotels & Allied Workers Union*** (*herein the "respondent").* The respondent's suit was a representative suit in which it sought to have the appellant's declaration of redundancy of ***Douglas Konga*** (*herein the "grievant"*), deemed unfair, unlawful, wrongful and invalid.

[2] The background to the appeal as is evident from the record before us is as follows: the grievant was employed by the appellant as a bar man on 22nd October 2001. He worked until 28th July 2006 when the appellant declared him redundant after reporting back on duty having been away on one-week leave attending a funeral. The grievant reported the matter to his union, the respondent herein, who unsuccessfully engaged the appellant in an attempt to resolve the dispute. On 5th October 2006, the respondent reported a dispute to the Minister for Labour.

[3] In accordance with ***Section 4*** of the Trade Disputes Act, Cap 234, the Minister for Labour appointed an investigator on 28th November 2006. Subsequently, the investigator compiled a report dated 17th December 2008. In the report, the investigator found the appellant's action declaring the grievant redundant unlawful, and made a recommendation for payment to the grievant of compensation equivalent to 10 months' salary. The respondent accepted the report and recommendations, but the appellant disputed the report. On 22nd January 2009, the appellant issued a notification of a dispute in

accordance with ***Section 14(7)*** of the Trade Disputes Act which notice was referred to the Court for action under ***Section 14(9)*** of the Trade Disputes Act. The Minister under Section 8 of the Trade Disputes Act also referred the dispute to the Industrial Court. It was registered as ***Cause No. 1026 of 2011***, but was subsequently transferred to Mombasa and registered as ***Cause No. 98 of 2012***.

[4] On 7th December 2011, the Industrial Court, issued directions that the respondent files his statement of claim on or before 9th January 2011, and the appellant to file his response on or before 19th January 2011. For some reason the respondent dragged its feet in filing the statement of claim as none had been filed by 9th March 2013 despite extension of time having been given. The court therefore directed that the grievant be enjoined in the proceedings and that he be granted leave to file his memorandum of claim as the 2nd claimant.

[5] Following the filing of pleadings by the respective parties, the appellant raised his preliminary objection, contending that the respondent's claim was filed out of time as it was filed more than six years from the time the cause of action arose and therefore contravenes ***Section 90*** of the Employment Act as read with ***Section 4*** of the Limitation of Actions Act.

[6] In his ruling the learned judge overruled the appellant's preliminary objection on the ground that the respondent's claim being one arising out of redundancy, it could not be time barred under the Trade Disputes Act; that the claim was commenced under ***section 4(b)*** of the former Trade Disputes Act; and that the transitional provisions provided under ***Rule 4*** of the 5th schedule of the Labour Relations Act 2007 provided that such claims were to be determined under the repealed law.

[7] Being dissatisfied, the appellant lodged his appeal before us citing eight grounds. In a nutshell, the appellant contended that the learned judge erred in failing to find that the respondent had filed the claim out of time; failing to find that the respondent instituted the claim under the provisions of the Employment Act No. 11 of 2007 and ***Sections 40*** or ***41*** of the Employment Act 2007; that the respondent was bound by its pleadings; that the judge misdirected himself in appreciating the facts laid before him and in advising the parties to amend their pleadings.

[8] In arguing the appeal before us, ***Mr. Nyamboye*** counsel for the appellant, submitted that the respondent's cause of action arose on 26th July 2006 when the grievant was declared redundant; that the appellant's claim which was filed in 2011 was filed seven years after the cause of action arose; that the claim being one based on contract of employment under ***Section 4(1)(a)*** of the Limitation of Actions Act it was statute barred after six years; that the respondent specifically brought the claim under ***Section 40*** and ***41*** of the Employment Act 2007, under which ***Section 90*** provides for a limitation period of three years; and that the judge had no right to bring the claim under the provisions of the Industrial Disputes Act which was not pleaded by the respondent .

[9] ***Mr. Shariah*** learned counsel for the respondent opposed the appeal. He conceded that the dispute arose in 2006 when the respondent was declared redundant but maintained that the trade dispute was referred to the Minister for Labour in accordance with ***Section 4*** of the Trade Disputes Act; that time started running on 22nd January 2009 after the appellant rejected the recommendations of the investigator appointed by the Minister and a trade dispute was referred to the Industrial Court; that the trial judge had discretion to amend the pleadings to bring out the real issues for determination; that in any case the amendment of pleadings before the Industrial Court was done by consent; and that the claim having been brought under the repealed Employment Act, there was no right of appeal against the decision of the learned judge.

[10] The issue in this appeal is simple i.e. whether the respondent's claim is barred by virtue

of ***Sections 4(1)(a)*** of the Limitations of Actions Act and ***Section 90*** of the Employment Act. It is not disputed that the respondent's claim arose out of the redundancy, which was declared on 28th July 2006. It is also not disputed that the matter was referred to the Minister for Labour who dealt with the issue under the provisions of the Trade Disputes Act Cap 234 (*now repealed*) and that the matter was only referred to the Industrial Court after the settlement process provided under the Trade Dispute Act failed.

[11] ***Section 4*** of the transitional provisions provided in the 5th Schedule pursuant to ***Section 84*** of the Labour Relations Act states as follows:

*"**where any of the following matters commenced before the commencement of this act, the matters shall be determined in accordance with the provisions of the Trade Disputes Act (now repealed)-***

a. ***Any trade dispute that arose before the commencement of this Act;***

b. ***Any trade dispute referred to the Industrial Court before the commencement of this Act;***

c. ***Any revision or interpretation of an award by the Industrial Court; and***

d. ***Any summary dismissal that took place before the commencement of this Act."***

[12] It is clear that the grievant's redundancy resulted in a trade dispute which was referred to the Minister for Labour under the Trade Disputes Act (*now repealed*). Although the redundancy was declared in the year 2006, the settlement process provided under the Trade Disputes Act commenced immediately the reference was made to the Minister. This process continued and sustained the respondent's cause of action until the matter was referred to the Industrial Court in accordance with ***Section 14(7)*** of the Trade Disputes Act (*now repealed*). In accordance with that provision, the parties appeared in court on 7th December 2011 when directions were given for the respondent to file their statement of claim. The court extended time severally, until the respondent finally filed the statement of claim on 26th March 2013. Therefore, neither ***Section 4(1)*** of the Limitations of Actions Act nor ***Section 90*** of the Employment Act is applicable as time stopped to run from 5th October 2006 when the dispute settlement mechanisms under the Trade Disputes Act (*now repealed*) was initiated.

[13] Further, the dispute being before the court in accordance with the provisions of the Trade Disputes Act (*now repealed*), the court had powers to deal with the dispute or any matter connected therewith. In directing the parties to amend their pleadings the court merely exercised its discretion and power. The appellant has not demonstrated that the learned judge did not exercise this discretion properly or judiciously to justify our intervention nor has the appellant shown any prejudice that it has suffered from the amendment.

[14] In light of the above we find that there was no merit in the appellant's preliminary objection as the respondent cause of action was not statute barred. Accordingly, we find that the learned judge was right in overruling the preliminary objection and we dismiss this appeal with costs. Those shall be the orders of the Court

Dated and delivered at Malindi this 18th day of July, 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR