Aloo v Afribright Limited (Miscellaneous Application E293 of 2024)
[2025] KEELRC 565 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 565 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E293 OF 2024

BOM MANANI, J

FEBRUARY 27, 2025

BETWEEN

MIKE OMONDI ALOO ..... APPLICANT

AND

AFRIBRIGHT LIMITED ..... RESPONDENT

RULING

1. Through the instant application, the Applicant seeks an order enlarging the time within which he can lodge a work injury claim with the Director of Occupational Health and Safety (the Director) against the Respondent outside twelve (12) months from the date of the alleged injury. The application is brought under sections 21, 22 (1) (2) (5), 26 and 27 of the *Work Injury Benefits Act*.

2. The Applicant avers that he suffered the alleged injury on 22nd June 2022 whilst in the Respondent's employment. He blames the Respondent for the accident for alleged failure to provide him with a safe work environment.

3. He avers that the failure to present his claim to the Director within the timelines stipulated by law was due to inadvertence on the part of his previous lawyers. He alleges that the lawyers did not advise him on the timelines within which he was to lodge the claim with the Director.

4. The application is opposed by the Respondent. The Respondent asserts that the evidence on record shows that the Applicant instructed his previous lawyers on the matter more than twelve (12) months after the alleged accident had occurred. Therefore, it is mischievous and dishonest of him to lay blame on them (the lawyers) for the failure to lodge the claim with the Director within twelve (12) months of the occurrence of the accident as required by law.

5. The Respondent contends that the Applicant was working in a site which had a consortium of employers, a number of whom were foreigners. It contends that the site has since been closed after the assignment for which it was opened was completed.

6. It contends that the site having been closed and the foreign employers having left the country, it is difficult to access the Applicant's employment records. As such, it is difficult to establish who in the consortium his actual employer was. Consequently, it avers that should the court admit the claim this late, it will occasion it hardship in defending the matter.

7. In the replying affidavit, the Respondent did not object to this court's jurisdiction to entertain the application on account of there being no law that permits it (the court) to do so. However, its (the Respondent's) lawyers took up the issue in their written submissions.

8. In response to the averments in the replying affidavit, the Applicant insists that the Respondent was his employer. He alleges that it is because of the employment relation between the two that the Respondent paid his initial medical bills following the alleged accident.

Analysis

9. Although the Respondent did not flag the issue of the court's jurisdiction to entertain the application on account of there being no law that clothes it with such jurisdiction, it (the Respondent) was entitled to raise the matter at any stage of the proceedings and in whichever manner it deemed fit. As such, once it (the Respondent) raised the issue through its submissions, the court became obligated to address it. Indeed, the court is entitled to inquire into whether it has jurisdiction to entertain a matter suo moto (Aluochier v Independent Electoral and Boundaries Commission & 17 others (Petition 20 (E023) of 2022) [2022] KESC 77 (KLR) (Civ) (20 December 2022) (Judgment)).

10. It is perhaps important to point out at the very outset that the *Work Injury Benefits Act* has no express provision which empowers the Employment and Labour Relations Court (the ELRC) to extend the time for lodging a claim with the Director. Absent such provision, it is clear to me that the ELRC has no such jurisdiction.

11. It has been said time and again that jurisdiction of a court or tribunal to entertain a matter is donated by *the Constitution* or statute. Absent this, a court of law or tribunal has no right to confer jurisdiction on itself through judicial craft (Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR).

12. Part IV of the *Work Injury Benefits Act* sets out the procedure and timelines for reporting and processing work injury claims. Under section 21 of the Act, an employee or his representative bears the burden of reporting to the employer an injury that he incurs whilst at work. Such report, which may be oral or in writing, must be lodged with the employer within twenty four (24) hours of the occurrence of the accident.

13. Under section 22 of the Act, an employer who has been notified of an injury arising from an accident at the workplace is required to report the matter to the Director within seven (7) days of receipt of the notification from the employee. However and by virtue of section 22 (5) of the Act, if the employer fails to make the report to the Director, the employee may lodge the report directly with the Director at any time.

14. Despite the indication under section 22 (5) of the Act that an employee may report the accident at any time, section 26 thereof suggests that if the report is not lodged with the Director within twelve (12) months of the occurrence of the accident, the claim abates. The only time that such claim may be entertained outside the twelve (12) months aforesaid is if the employee has evidence that he reported the accident to the employer within the timelines set under section 21 as read with section 27(1) of the Act unless he (the employee) is able to demonstrate that the employer was aware of the accident despite his (the employee's) failure to report it.

15. The above provisions do not suggest that an employee who is desirous of lodging a claim outside twelve (12) months from the date of occurrence of the accident which gave rise to the claim may approach the ELRC for enlargement of time. In my view, he (the employee) is expected to approach the Director with the claim accompanied with evidence to demonstrate that he had either reported the accident to the employer as required under the law or that the employer was in any event aware of the accident. Taking into account such evidence, the Director (not the ELRC) will determine whether to admit the claim. As such, the ELRC has no jurisdiction over a request to enlarge time.

16. The fact that the ELRC has no such jurisdiction has been expressed in some decisions of the court (see Alpine Coolers Limited v Miheso (Appeal E240 of 2023) [2024] KEELRC 2386 (KLR) (27 September 2024) (Judgment)). Although the learned Judge's discussion of the matter in the above decision was rendered in the context of a ''trial court'', I understand him as having expressed the view (which I agree with) that courts, including the ELRC, have no statutory power to enlarge the timelines for lodging claims with the Director under the *Work Injury Benefits Act*.

17. The design of the *Work Injury Benefits Act* further removes any doubts in my mind regarding whether the ELRC is entitled to entertain such proceedings under the Act in purported exercise of its original jurisdiction. Section 52(2) of the Act vests appellate jurisdiction over decisions of the Director in the ELRC. It is to be noted that this is the only provision which extends civil jurisdiction in respect of claims under the Act to the ELRC. The fact that the ELRC has express civil appellate jurisdiction against the Director's decisions under the Act implies that a party who is aggrieved by a decision by the Director to admit a claim out of time under Part IV of the Act is entitled to challenge it (the decision) before the ELRC. As such, it is inconceivable that the ELRC is entitled to entertain an application for enlargement of time in a matter which is potentially meant to end up before it by way of appeal in purported exercise of its original jurisdiction.

18. However, assuming that I am wrong in what I have expressed above, it appears to me that if the court had any such jurisdiction, then it can only exercise it in favour of an Applicant who has demonstrated that he had reported the injury to the employer within twelve (12) months of its occurrence or that the employer had knowledge of the injury despite the Applicant's failure to report the matter. I have looked at the affidavits by the Applicant and I find no averment by him that he reported the alleged injury to the Respondent within the timelines that are set in law or that the Respondent was in any event aware of the injury despite the Applicant not having reported it.

19. In his further affidavit, the Applicant asserts that the Respondent paid for his medical bills, suggesting that the latter was perhaps aware of the accident. However, a cursory look at the receipts for payment of the Applicant's medical bills shows that the Applicant paid most of them. Only one payment was made by a third party by the name Douglas Mutale. However, there is no evidence to suggest that the said Douglas Mutale made the payment on behalf of the Respondent. As such, the court cannot rely on the receipts to come to the conclusion that notwithstanding the failure by the Applicant to report the accident, the Respondent was nevertheless aware of it.

20. Consequently, the orders for enlargement of time cannot, in any event issue in the Applicant's favour as the application does not meet the threshold set by Part IV of the *Work Injury Benefits Act*. The Applicant has not demonstrated that he reported the injury to the Respondent within the timelines provided in law or that if he did not report, the Respondent was nevertheless aware of it. Therefore and absent this evidence, he was bound to lodge his claim with the Director within the twelve (12) months window under the Act without the benefit of extension of time (Alpine Coolers Limited v Miheso (Appeal E240 of 2023) [2024] KEELRC 2386 (KLR) (27 September 2024) (Judgment)).

21. As I pen off, I would like to comment on two decisions which the parties have referred to in urging their respective positions. These are Wanyama v Danree Multihandling Services Limited (Miscellaneous Application E180 of 2023) [2024] KEELRC 765 (KLR) (8 April 2024) (Ruling) and Abdirahman Abdullahi Mohamed v Freedom Airline Express Limited [2022] eKLR. In both cases, similar applications as the instant one were considered by the court (differently constituted) with different outcomes.

22. In Wanyama v Danree Multihandling Services Limited (Miscellaneous Application E180 of 2023) [2024] KEELRC 765 (KLR) (8 April 2024) (Ruling), the learned Judge found (as I have done) that the *Work Injury Benefits Act* does not donate primary jurisdiction to the ELRC over matters under the Act. It (the Act) only grants the court appellate jurisdiction. The learned judge also found (as I have done) that the Act does not provide for extension of time for reporting work injuries to the Director.

23. However, the learned Judge was of the view that notwithstanding that the *Work Injury Benefits Act* is silent on extension of time for lodging claims with the Director, the court is nevertheless entitled to invoke maxims of equity to fill the gap and extend the time for presenting such claims. In his view, this is necessary in order to ensure that no wrong is left without a remedy. He observed that the *Work Injury Benefits Act* has not ousted application of the *Limitation of Actions Act* and that the court could rely on the latter Act to consider extending time.

24. I have considered the learned Judge's thought trail in the above decision and respectfully differ with it. To invoke maxims of equity to confer jurisdiction on the court to enlarge time where the *Work Injury Benefits Act* does not confer such jurisdiction amounts to conferring jurisdiction through innovation, a matter which the Supreme Court has advised against (Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling)).

25. Second, the learned Judge suggested that in the face of the silence in the *Work Injury Benefits Act* on the question of extension of time to lodge claims with the Director, the court could resort to the provisions of the *Limitation of Actions Act* to address the lacuna. I doubt that this is possible.

26. It is noteworthy that the claim by the Applicant is based both on contract and tort since it arises from an alleged employment relation between him and the Respondent and is founded on an alleged tort of negligence. Under section 4 (1) and (2) of the *Limitation of Actions Act*, cases founded on causes of action based on contract and tort ought to be filed within six (6) and three (3) years respectively. Therefore, the *Limitation of Actions Act* addresses extension of time outside the foresaid timelines.

27. Conversely and notwithstanding the above provision in the *Limitation of Actions Act*, sections 26 and 27 of the *Work Injury Benefits Act* delimit the timeframe for lodging a claim with the Director to twelve (12) months outside which, the claim abates. It is doubtful that one can invoke the provisions of the *Limitation of Actions Act* which are meant to address extension of time for claims which ought to have been filed within three (3) and six (6) years respectively to enlarge time for a claim which the *Work Injury Benefits Act* specifically decrees should be lodged within twelve (12) months.

28. However, assuming that the learned Judge was correct in his proposition that the court may invoke the provisions of the *Limitation of Actions Act* to enlarge the timelines under sections 26 and 27 of the *Work Injury Benefits Act*, I doubt that I would have been entitled to do so in this case. This is because the application before me was not brought under the provisions of the *Limitation of Actions Act*. It is apparent from the face of the application that it is founded on the provisions of the *Work Injury Benefits Act*.

29. In the case of Abdirahman Abdullahi Mohamed v Freedom Airline Express Limited [2022] eKLR, I note that the learned Judge did not bring her mind to bear on whether the provisions which the

Applicant relied on under the *Work Injury Benefits Act* conferred primary jurisdiction on the ELRC to entertain the application that was before her. Second, whilst it is true as expressed by the learned Judge that the timelines set under sections 26 and 27 of the *Work Injury Benefits Act* are not cast in stone, it is apparent from the provisions that a claim for compensation may only be entertained outside twelve (12) months if the Applicant is able to demonstrate that he had reported the injury under consideration within the timelines set in law or that if he did not report it, the employer was nevertheless aware of it. Absent the foregoing and as was observed in Alpine Coolers Limited v Miheso (Appeal E240 of 2023) [2024] KEELRC 2386 (KLR) (27 September 2024) (Judgment), such claim must be lodged within twelve (12) months without the benefit of extension of time.

Determination

30. The upshot is that the court finds that the instant application is devoid of merit not just for want of jurisdiction but for want of proof that the Applicant had reported the alleged injury to the Respondent within the timelines that are prescribed by law or if he (the Applicant) did not report the accident, that the Respondent was in any event aware of it.

31. As such, it (the application) is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF FEBRUARY, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI