Wanyama v Danree Multihandling Services Limited (Miscellaneous Application E180 of 2023) [2024] KEELRC 765 (KLR) (8 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 765 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E180 OF 2023

K OCHARO, J

APRIL 8, 2024

BETWEEN

JACKLINE MUNANDI WANYAMA ..... APPLICANT

AND

DANREE MULTIHANDLING SERVICES LIMITED ..... RESPONDENT

RULING

Background

1. By a Notice of Motion dated 20th August 2023, the Applicant herein sought the following orders: -
    a. This Honourable Court be pleased to extend the time for reporting of the accident to the Director of Occupational Safety and Health Services.
    b. That costs of this Application be borne by the Respondent.
2. The Notice of Motion application is premised on the grounds set out on the face thereof and the Supporting Affidavit of the Applicant, Jackline Munandi Wanyama sworn on 20th August 2023.
3. Despite being duly served with the application, as evidenced by the Affidavit of Service sworn on 13th October 2023 filed before this Court, the Respondent did not file any response to the application.
4. Nonetheless, I must consider the merits of the application as a failure by a respondent to resist an application in any of those forms recognized by law never translates to an automatic success in the unchallenged application by the Applicant. In this view, I draw inspiration from the decision in *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR.
5. The Applicant's application is brought under Sections 21, 22 (1), (2) and (5); 26, and 27 of the *Work Injury Benefits Act*, and all other enabling provisions of law.

6. The Applicant anchors her application on the grounds that she suffered workplace injuries while in the Respondent, on 23rd March 2016. She reported the injury to the Respondent and the Respondent gave her some forms to fill and submit to the Directorate of Occupational Safety. After there was a delay in processing her compensation, the Applicant sought legal advice and filed a suit Thika CMCC Case No. 833 of 2017 between the same parties on 6th June 2017. She continued to follow up with her Advocates and all through she informed that the suit was yet to be set down for a hearing, as directions in relation to work injury benefit matters, were being awaited.

7. The Applicant further states that she later discovered that the suit was dismissed for want of prosecution following the non-attendance of her Advocates in Court.

8. She further states that at the time of filing her suit in Thika Law Courts on 6th September 2017, the matter as regards the correct forum for handling of work injury benefits was still pending at the Court of Appeal. The Court of Appeal rendered itself on the matter on 17th November 2017. The decision was later upheld by the Supreme Court.

9. The Supreme Court clarified that under the *Work Injury Benefits Act*, courts did not have jurisdiction to hear and determine matters emanating from workplace injury. Further, due to the long time that has passed since her case was dismissed for want of prosecution, she cannot viably approach the court that dismissed it. This has left her with no other option other than to approach this Court in the manner she has through the instant application, to enable her access redress.

10. Under Section 26 of the *Work Injury Benefits Act*, the claim should have been made within 1 year from the date of the injury. The Applicant avers that since the employer had knowledge of the injury and failed to report it to the Director as obligated under the Act, they will not be prejudiced if the orders sought are granted.

Analysis and Determination

11. The jurisdiction of this Court in relation to *WIBA* matters is now well established. The Court does not have primary jurisdiction over matters relating to Work Injury Benefits, but it certainly has appellate jurisdiction over them under Section 52 of the *Work Injury Benefits Act* Cap 236 of the Laws of Kenya. This position was affirmed in Supreme Court Petition No. 4 of 2019 *Law Society of Kenya v The Attorney General & COTU*, as follows:

> "(69) We have stated that Section 16 cannot be read in isolation because if read with Section 23 and 52 of the *Act*, the *Act* provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. It cannot, therefore, be the case that section 16 amounts to an ouster clause. It is in fact merely facilitative of what may eventually end up in Court.
>
> [70] Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed under Section 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers' compensation. When read in whole with Section 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to result to self-help mechanisms. What the section does, is that

it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court."

12. Further, the Court has jurisdiction to enforce awards of the Director of Occupational Health and Safety (DOSH) under Section 87 of the *Employment Act* 2007 as held in various decisions emanating from the court.

13. At this Juncture it is important to point out that the *Work Injury Benefits Act* does not specifically provide for the extension of time for reporting the workplace accident resultant injury to the Director. In my view, and employing the maxim, equity will not suffer a wrong without a remedy, those deserving of an order for an extension of time to lodge a claim under the *Work Injury Benefits Act*, cannot be left helpless and without recourse simply because the Act is silent on extension of time.

14. This Court is cognizant of the fact that under the provisions of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, the time for initiation of injury claims is extendable. The *Work Injury Benefits Act* hasn't ousted the applicability of the *Limitation of Actions Act*, there cannot be any reason to hold therefore that an application for an extension of time to approach the Director, cannot be properly brought under the former Act. However, the Applicant for the extension orders must put forth sufficient act reason [s] for the failure to act within the statutory timelines. Extension of time is a discretionary act by a court of law, only availed where the justice of a matter demands. In exercising the discretion, the Court cannot act capriciously, whimsically, or under the influence of sympathy, but judicially. See also *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & Others* [2014] eKLR.

15. Lastly, Applicants for orders like the Applicant herein has sought, cannot be deprived of the right to seek an extension of time to initiate proceedings for redress for injuries suffered at the workplace, while those who suffer injuries not associated with workplaces, for instance, road accidents have the right to approach courts under the provisions of Section 27 of the *Limitation of Actions Act*, for extension of time. To allow such a scenario, will be an affront to the constitutional right to equal benefit and protection of the law under Article 27 [1] of the Constitution of Kenya, 2010.

16. This Court notes that the application herein was filed almost six years after the dismissal of the Thika matter, and about 3 years after the decision of the Supreme Court, on 3rd December 2019. The Applicant has not explained reasonably and sufficiently, why the inaction on her part for the entire period. It is on this account that I find the Applicant's application lacking in merit and hereby dismiss it.

17. It is so ordered.

READ, DELIVERED AND SIGNED THIS 8th DAY OF APRIL, 2024.

OCHARO KEBIRA.

JUDGE

In the presence of:

Mr. Mwariri for the Applicant

No appearance for Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions

of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.