



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. E387 OF 2021**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**DR. PARU RAJAN PARIKH.....CLAIMANT**

**VERSUS**

**AMKEN LIMITED.....RESPONDENT**

**RULING**

1. By a notice of motion application dated 20<sup>th</sup> January 2022 filed under certificate of urgency the Claimant/Applicant seeks the following orders, **THAT**:

*(1).. This application be certified urgent and be heard on parity basis.*

*(2).. This suit be fixed for hearing of the main suit on a priority basis.*

*(3).. Appropriate direction be issued by the Court as it may deem fit to facilitate the full hearing an expeditious disposal of this suit.*

*(4).. The costs of this application be in the cause.*

2. The application is expressed under Article 48 of the Constitution, Sections 12(3)(viii) of the Employment and Labour Relations Court Act, Rules 17 and 24 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and the inherent powers of the Court.

3. The application is based on the grounds that the suit was filed on 12<sup>th</sup> May 2021 seeking various orders against the Respondent, service was effected and a defence has been filed. That the suit is ready for hearing but cannot without a specific order of the Court since the Court is currently fixing for hearing suits filed in 2018 and before.

4. It is alleged that the Claimant was rendered destitute upon termination of her employment and is currently in a very poor financial position coupled with her advanced age and poor health and has a constitutional right to access justice.

5. That the Claimant is apprehensive that if the application is not allowed, she will not be in a position to ventilate her claim in a court of law as the suit is likely to be heard in three years' time in view of the backlog.

6. Finally, that no prejudice will be occasioned to the Respondent if the application is allowed.

7. The notice of motion application is supported by the affidavit of Dr. Paru Parikh, the Claimant, sworn on 20<sup>th</sup> January 2022. The affidavit rehearses the grounds relied upon above.

8. The matter came up for directions on 21<sup>st</sup> January 2022 and Justice Stella Ruto certified the application urgent, ordered service and the same be placed before any Judge on 2<sup>nd</sup> February 2022 by which date the Respondent had been served but had not responded.

9. The Respondent prayed for 10 days to file a replying affidavit and the same was granted. The application was slated for hearing on 21<sup>st</sup> February 2022 but again the Respondent had not filed a replying affidavit stating that he was awaiting mapping by the ICT to facilitate the filing and sought a day or two to do so.

10. Counsel for the Respondent was opposed to an oral hearing and proposed that the application be disposed of by way of written submissions.

11. Counsel for the Applicant expressed surprise that Counsel for the Respondent had not obeyed Court directions on service and had not written to the Applicant on the issue. Counsel submitted that the matter before the Court was a simple application for an early hearing date and no submissions were necessary and suggested that the Respondent send the affidavit by email. The Court placed the file aside for 15 minutes and hearing resumed at 10.47 am.

12. Counsel for the Respondent indicated that he would rely on the replying affidavit exclusively in opposition to the application.

13. The Applicant's Counsel submitted that the Claimant/Applicant's application for an early hearing of the suit was grounded on the fact that the Applicant is advanced in age and her health is not so good. That she is 75 and the necessary medical records had been availed in support of the averments.

14. Counsel submitted that they were asking the Court to exercise discretion in favour of the Applicant to jump the queue for an expedited hearing based on the cogent grounds relied upon. That all the documents have been filed and only one witness would be called to testify and no prejudice will be occasioned on the Respondent.

15. Counsel for the Respondent submitted that he was not persuaded that the Claimant's/Applicant's condition was sufficient to warrant an expedited hearing. That the Claimant/Applicant had two other cases against the Respondent and a director in an insolvency matter pending before the High Court which have not been fast tracked her condition notwithstanding.

16. It was further submitted that the medical condition of the Claimant/Applicant was not of a severe nature to warrant fast tracking of the main suit as they are associated with old age since she is 76 years old.

17. That the Claimant/Applicant was well off, living in a five bedroomed house and had a house help, kitchen assistant and was not destitute as alleged.

18. The Respondent prayed for dismissal of the application.

19. In its relying affidavit dated 18<sup>th</sup> February 2022 and sworn by Dr. Rajan Madhukar Parikh, the Respondent denies the contents of paragraph 1, 2, 5, 6 and 7 of the supporting affidavit, stating that the fact the Claimant deposes that she is of sound mind is contradicted by the averment of the alleged "*poor health*".

20. That the Claimant/Applicant had instituted two other cases against the Respondent being **Insolvency Petition No. E045 of 2021 – Matter of Amiken Limited** and **HCCC No. E575 of 2021** against the deponent Dr. Rajan Parikh.

21. It is deposed that the Claimant/Applicant had travelled to Mumbai, India at least four times in the recent past with two in the last six months and had two cars at her disposal which she drove.

22. It is further deposed that email communication reveals that the Claimant/Applicant had two (2) apartments in India and monies in fixed deposit accounts. That the report by Dr. Rohit Raida does not disclose the nature of the Claimant's illness or sickness that would impair her ability to prosecute the claim. That spondylosis was a condition associated with old age and does not require surgery.

23. That none of the medical reports on record show that the Claimant/Applicant was gravely or terminally ill to justify the Court's intervention.

24. Finally, the deponent states that notwithstanding the fact that the individual conditions were different, he was 76 years old and is on medication for hypertension, diabetes and cholesterol.

25. The Claimant/Applicant did not respond to the replying affidavit.

### **Analysis and Determination**

26. The only issue for determination is whether the Claimant's/Applicant's notice of motion application dated 20<sup>th</sup> January 2022 is merited.

27. Although the notice of motion application herein is expressed under Article 48 of the Constitution on the right of access to justice as well as Section 29(1) of the Employment and Labour Relations Court, Act which is generally similar, a more relevant provision is Article 159(2) (b) of the Constitution which provides that:

**(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**(a) ...;**

**(b) justice shall not be delayed;**

28. Relatedly, Section 3(1) of the Employment and Labour Relations Court Act, 2011 provides that:

**(1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.**

29. Finally, the *proviso* to Rule 28(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provide that:

**Provided that, subject to these Rules and to any other written law, the Court may at any time in the conduct of its proceedings issue**

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(a) ...;

(b) ...;

(c) ...;

(d) ...;

(e) ...;

(f) ...;

(g) **any other order to meet the ends of justice.**

30. Having demonstrated that the Claimant/Applicant has the constitutional and statutory backing to make the notice of motion application herein, I now proceed to examine whether the same is merited based on the material laid before the Court.

31. The application is grounded on three grounds, namely the Claimant/Applicants advanced age, poor health and destitution. I will deal with each ground separately.

32. As regards age, a copy of the identity card on record shows that the Applicant was born in India, 10<sup>th</sup> November 1947 and is about 75 years of age. The Court is alive to the fact that advanced age is generally associated with other life challenges.

33. In response to this argument, Dr. Rajan Parikh depones that he is 76 years and had challenges too and is on medication, evidence the Applicant did to counter. To reinforce the position, Dr. Rajan Parikh states that he is still active in defending the three cases filed by the Applicant against him.

34. The Court is unconvinced that age alone is a sufficient ground to fast track the hearing of this case.

35. As regards poor health, the Applicant has attached two references from Dr. Rohit G. Radia and Professor Timothy Kagoda Byakika dated 20<sup>th</sup> January 2022. The letter states that the Applicant was 74 years old and had multiple orthopaedic conditions and had a knee replacement in 2015 and could not stand for long and had neck pains occasioned by spondylosis, attended physiotherapy and took medication regularly. The doctor states that the Applicant had informed him that she may undergo cervical spine surgery in India in due course and recommends that the Court case be brought forward.

36. Dr. Rohit on the other hand states that the Applicant, a medical doctor was 75 years old and had been his patient for 30 years and had multiple issues including hypertension, hypothyroidism and knee replacement surgery and was mentally stressed and recommends that her cases be resolved rapidly.

37. It is clear that these references were purposely procured for the instant application.

38. As Dr. Rajan Parikh depones that none of the references provide clear details of the Applicant's current condition, including prescribed drugs, hospital visitations or when the surgery mentioned could take place. Relatedly, spondylosis as Dr. Rajan depones is a condition related to old age and in particular for persons over the age of 70.

39. Is the Applicant's health condition so dire as to justify the orders sought? The Court is not satisfied that it is.

40. As regards destitution, the Claimant/Applicant depones that the termination of employment by the Respondent rendered her destitute. That she was in a very poor financial health. No material evidence is provided in support of the allegation. However, copies of email communication on record reveal that the Claimant/Applicant receives maintenance from Dr. Rajan Parikh, owns two flats in India and has fixed cash deposits in India too. Moreover, she has travelled to India in the recent past.

41. Finally, the Applicant lives in a five bedrooomed town house in Nairobi, has a house help and a kitchen assistant who prepare her meals. The Respondent pays for the service charge, water and electricity bills of the house.

42. From the evidence on record, the Court is not persuaded that the Claimant/Applicant is a destitute.

43. Puzzlingly, the Claimant/Applicant has filed two other cases against the Respondent and Dr. Rajan Parikh respectively. The first case is a petition for the winding up of the Respondent. In the second case against Dr. Rajan Parikh, the Applicant herein is claiming Kshs.34,504,098.00 among other reliefs.

44. The Court is in agreement with Dr. Rajan Parikh's evidence that the Claimant/Applicant was not sought the fast-tracking of the other

cases before the High Court, her advanced age, poor health and destitution notwithstanding.

45. The Court will not speculate why the Applicant herein sought to fast track one case when she has two others pending. In the Court's view, she would have had a more cogent case if similar applications had been made in the other cases to underscore the urgency to have them heard on a priority basis.

46. Regrettably this is not the case.

47. **In sum, the Court finds no material upon which to grant the orders sought in the motion dated 20<sup>th</sup> January 2022. The application is not merited and is hereby dismissed with no orders as to costs.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF APRIL 2022**

**DR. JACOB GAKERI**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

**DR. JACOB GAKERI**

**JUDGE**