



REPUBLIC OF KENYA

IN THE EMPLOYEMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 80 of 2017

BETWEEN

BENSON AMWOGA JUMA.....CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Cootow & Associates, Advocates for the Claimant

Robson Harris & Company, Advocates for the Respondent

RULING

1. On 1st December 2017, the Court ruled that this Claim was brought to the Court prematurely. The Claimant, alongside 7 other former Employees of the Respondent, had through their Trade Union, KPOWU, reported a Trade Dispute to the Ministry of Labour under Section 62 of the Labour Relations Act, on 8th September 2016.

2. The Claim was filed in Court on 30th January 2017, while Conciliation Process at the Labour Office was ongoing. On 1st December 2017, the Court therefore stayed its proceedings and referred back the Parties to the Conciliator. The decision of the Court followed an Application dated 29th June 2017, made by the Respondent.

3. On 20th September 2018, the Conciliator prepared a Conciliation Report. He states that he received Submissions from Claimant's Advocates, but none from the Respondent. He scheduled conciliation meeting for 19th September 2018, when the Claimant, his Colleagues and their Advocate were present. The Respondent did not attend. Its Advocate called the Conciliator saying she was in an emergency.

4. The Conciliator concluded:

“Following the failure of Robson Harris Advocates to present either written or verbal statement despite having been given a reasonable chance to do so, I recommend that Cootow & Associates demands be granted.

Should either Party fail to agree with my recommendation, then a Certificate of Unresolved Dispute is deemed issued.”

5. The Claimant has filed an Application dated 22nd February 2019, supported by the Affidavit of Claimant's Advocate Augustus Wafula, sworn on 22nd February 2019, asking the Court to adopt *“the decision and/or recommendation of the Conciliator, J.N.Nyaga, dated 20th September 2018 as the decision of the Honourable Court.”*

6. The Respondent is opposed to the Application and filed a Replying Affidavit sworn by its Advocate Sheila Michira on 15th March 2019. The Respondent also filed its own Application dated 18th March 2019, asking the Court to *“set aside Conciliator's Report dated 20th*

September 2018.’’

7. The Parties filed Submissions on both Applications, which they highlighted on 20th June 2019. The Applications raise the same issue-whether Judgment should be entered in terms proposed by the Conciliator.

The Court Finds:-

8. The Report of the Conciliator dated 20th September 2018 does not contain recommendation capable of being adopted as the decision of the Court.

9. It is not known, or readable from the Report, what were the demands of Cootow & Associates, which the Conciliator recommended are granted.

10. The specific dispute reported to the Ministry of Labour on 8th September 2016, stated the issue to be wrongful and unfair dismissal of 8 former Employees of the Respondent.

11. The Report of the Conciliator, even in the absence of Respondent’s Memoranda, does not make any analysis of the issues in dispute. It does not make consideration of Statements of Facts, filed by the Claimants, before the Conciliator, and give reasons for the recommendation, based on the issues in dispute. It is difficult for the Court to adopt a recommendation which results in a decree to the effect that ‘ ‘ it is ordered that Cootow & Associates demands be and are hereby granted.’ ’ This would not be an executable decree.

12. Contrary to the correspondence exchanged between the Advocates, the Parties were not to initiate any new conciliation process. Proceedings of the Court were stayed because there was already a dispute reported to the Ministry by the Claimant’s Union way back in 2016. The Parties were to proceed with the conciliation process under that report.

13. The order of this Court issued on 1st December 2017. The Conciliator was appointed on 24th July 2018. It is not clear from the record whether a Conciliator was appointed initially in 2016 when the dispute was reported by the Union. Having been appointed, after the intervention of the Court, the Conciliator called for the 1st meeting on 19th September 2018. It is this meeting that the Respondent and its Advocate failed to attend leading to adverse, albeit ambiguous recommendation of the Conciliator. There was no other meeting. There is evidence, through a letter from the Respondent’s Advocates dated 20th September 2018, showing Respondent’s Advocates had communicated inability to attend the meeting to the Conciliator. The Respondent similarly wrote on 21st September 2018, forwarding to the Conciliator, its Memoranda of Facts in all files. Should not the Conciliator have given the Respondent a chance to be heard, by receiving Respondent’s Memoranda and rescheduling conciliation meeting?

14. The Court does not think the Conciliator was strictly shackled by time limits, in discharging his mandate. Reference to him, was made by the Court under Section 15 of the Employment and Labour Relations Court Act, having taken into account the incomplete process commenced earlier under Section 62 of the Labour Relations Act. If there was need to extend time, the Conciliator should have reverted to Court for extension under Section 15 of the Employment and Labour Relations Court Act. The Court is mandated to stay its proceedings at any stage, to allow exhaustion of conciliation.

14. The Court is satisfied that conciliation process has not been exhausted. As stated above, the Court is mandated to stay its proceedings and refer disputes to alternative dispute resolution mechanisms, at any stage of the proceedings. There is no recommendation capable of being acted upon by the Court and the Parties. The Conciliator did not give the Respondent sufficient opportunity to present its case. Memoranda filed by the Respondent are already with the Conciliator. There was only one conciliation meeting held, leading to the recommendation of the Conciliator. Essentially, the order of the Court was based on the premise that conciliation process had not been exhausted. It still is not exhausted. The Claimant and 7 others seek reinstatement to a Public Utility. There must be some clear legal justification, based on a clear process and evidence, justifying reinstatement or any alternative remedies.

IT IS ORDERED: -

- a) The Report by the Conciliator dated 20th September 2018 is rejected.***
- b) The dispute is referred back to the Conciliator, who shall take into account all Statements of Facts presented by the Parties, and reschedule conciliation meeting [s] within the next 60 days.***
- c) Report of the Conciliator, accompanied by the record or evidence of the minutes of the conciliation meeting [s], an analyses of issues in dispute, the facts, recommendations and reasons for the recommendations, shall be filed at the end of the 60 days.***
- d) If the Conciliator needs more time, he is free to move the Court for extension of the orders staying court proceedings, to allow for exhaustion of conciliation.***
- e) Parties shall give the Conciliator their unequivocal cooperation.***
- f) For now there shall be a further stay of the proceedings of the Court.***

Dated and delivered at Mombasa this 26th day of July 2019.

James Rika

Judge