



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1461 OF 2015

NAA.....CLAIMANT

VERSUS

SEVEN FOUR EIGHT AIR SERVICES (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th July, 2019)

RULING

The claimant filed the application on 08.11.2018 seeking that his sister KRW is appointed as the next friend or guardian of the applicant in the suit. The application was filed through Walker Kontos Advocates and supported with the affidavit of KRW. It invokes Articles 48 and 159 of the Constitution of Kenya 2010; Order 32 rule 15, Order 32 Rule 1, Order 50 rule 1 of the Civil procedure Rules and all enabling provisions of the law.

The applicant's case is that the applicant was the captain flying a Hawker Siddeley HS xxx with Rolls-Royce Dart xxx-x engines, tail No. Y-xxx which was involved in an accident on 17.02.2014. By reason of the accident the claimant sustained serious head and brain injuries and despite counselling sessions since July 2014 he has not been able to recollect events before and after the accident and, he shows no improvement in that regard. Due to that mental infirmity the claimant is unable to recollect the events and follow proceedings or prosecute the suit hence the present application.

The exhibited medical report dated 12.03.2014 by Dr. Carnjini Yogeswaran of the Aga Khan University Hospital shows that the claimant remained at the ICU on conservative management and on a ventilator. The medical report dated 16.07.2014 by Mohamoud Merali, Consulting Counseling Psychologist at the Aga Khan University Hospital shows that the claimant is unable on his own to recollect events prior to and immediately after the accident. A medical report on the supplementary affidavit dated 21.03.2019 by Dr. D. Oluoch Olunya, Consulting Neurosurgeon at the Aga Khan University Hospital concludes, "**N had a severe traumatic brain injury which was a diffuse axonal injury as seen clinically and on imaging. His grasp of current situations, ability to converse, and recollection of recent events is normal. However, he has significant pre-traumatic amnesia due to the extent of his brain injury.**"

It is my opinion, therefore, he cannot comment on the events leading to the crash and or speak coherently about the then plane crash."

The respondent opposed the application by filing grounds of opposition dated 04.12.2018 and filed on 05.12.2018 through Hamilton Harrison & Mathews Advocates. It is urged for the respondent as follows:

- a) The claimant filed suit in person and signed a verifying affidavit in person confirming the pleadings in the statement of claim filed for him as true.
- b) The application has been made by the same claimant who is said to be infirm.
- c) The claimant filed a witness statement and confirmed he was seized of the facts leading to the suit and he was fit to give evidence.
- d) Order 32 rule 15 of the Civil Procedure Rules states, "**The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.**" It is submitted for the respondent that the applicant has not been adjudged to be of unsound mind, the Court has not made an inquiry as to whether the claimant is of unsound mind or mentally infirm; and the claimant having sued in person, he cannot turn around and alleged he was unable to do so.
- e) In **MMM –Versus- AMK [2016] eKLR**, Mativo J held that in an inquiry under Order 32 rule 15 of the Civil Procedure Rules two stages must be complied with to satisfy the rule (a) questioning the person by the Court and (b) medical evidence.

f) The medical report of 21.03.2019 shows the claimant can recollect current events and no evidence of mental infirmity or unsound mind has been provided.

The Court has considered the application and the material on record. It is clear from the medical report of 21.03.2019 that the claimant can follow and recollect current events. Further he had filed the application and the suit. It is also true that the Court has not carried out an inquiry to determine the mental infirmity of the claimant. Taking those considerations into account and that the medical reports show that the claimant suffers some amnesia with respect to the events surrounding the accident, and in view of section 3 of the Employment and Labour Relations Court Act, 2011 on efficient and expeditious determination of the dispute, it would be proper that the claimant appears in Court for the necessary inquiry to determine if by reason of mental infirmity he is incapable of protecting his interests in the present suit.

In conclusion the application is hereby determined with orders:

a) that the parties fix a convenient date for attendance of the claimant for the necessary inquiry to determine if by reason of mental infirmity he is incapable of protecting his interests in the present suit and for appropriate orders in view of the present application;

b) and costs of the application in the cause.

Signed, dated and delivered in court at Nairobi this Friday 5th July, 2019.

BYRAM ONGAYA

JUDGE