



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

MISC. APPL. NO. 13 of 2018

[Formerly Kericho High Court MISC APPL. NO.413 OF 2017]

STEPHEN NJIHIA KIMANIAPPLICANT

VERSUS

GEORGE GITONGA T/A GACHAGUA SAW MILLS.....RESPONDENT

RULING

The applicant, in application and Notice of Motion dated 27th September, 2018 is seeking for orders that;

1. The court be pleaded to grant leave to the plaintiff/applicant to file suit against the defendant for compensation out of time.

The application is supported by the applicant's affidavit and on the grounds that the cause is based on negligence and arose on 8th January, 2013 and the statutory period within which suits based on negligence should be instituted has since lapsed. The applicant has a good reason for not instituting this suit earlier and he is still desirous of prosecuting it and obtaining justice.

In his affidavit the applicant avers that on 8th January, 2013 he was invoked in an industrial accident occasioned by negligence on the part of the respondent herein. The statutory limitation period within which to file suit has since lapsed. The delay in filing suit was not deliberate as the applicant was suffering from a stroke and during the period of illness he was not in a position to instruct advocate to pursue the claim on his behalf. There is a good case against the respondent and where time is extended the applicant will be able to prosecute his case.

The applicant made oral submissions.

The applicant submitted that Section 4 of the Limitation of Actions Act and section 22 allow for the extension of time where there is a disability. This is a work injury claim and the court has jurisdiction to extend time. There shall be no prejudice on the respondent.

Determination

Ordinarily an application of this nature should be heard ex parte and with abundance of caution the court directed the applicant to serve the respondent for their response and submissions. Despite service the respondent failed to attend or file any responses.

The facts leading to the application are that on 8th January, 2013 the applicant was injured while at work, he was diagnosed with hypertension and then got a stroke. He only recovered in July, 2015 by which time the limitation period to file claims on negligence had lapsed.

Work injury is a matter regulated under the provisions of the Work Injuries Benefits Act, 2007.

Where an employee is injured out of the negligence of the employer, section 10 requires that;

10(4). For the purposes of this Act, an occupational accident or disease resulting in serious disablement or death of an employee is deemed to have arisen out of and in the course of employment if the accident was due to an act done by the employee for the purpose of, in the interests of or in connection with, the business of the employer despite the fact that the employee was, at the time of the accident acting—

(a) In contravention of any law or any instructions by or on behalf of his employer; or

(b) Without any instructions from his employer

The employer is liable in negligence. However, the employee is required to submit any claim(s) as under section 16 with the Director of Occupational health and Safety and the Act provides at section 16 that;

No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death

A notice must issue to the Director who is required to comply with section 23(1) he is required;

23(1) After having received notice of an accident or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act

In **Attorney General versus Law Society of Kenya & another [2017] eKLR** the Court of Appeal held that The recourse provided for an employee who has suffered a work injury or his dependant is to notify the Director, who under **section 23(1)** of the Act shall upon receipt of the notice of the accident;

“(1)..... or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.

In this regard, Section 16 as read with **section 23(1)** confer powers of adjudication of any claim for compensation arising from injury in the workplace upon the Director and expressly bars institution of court proceedings by the aggrieved employee. This is to ensure the Director makes the necessary enquiries and is able to address the work injury at the shop floor where the best evidence can be sourced from.

However under section 51(1) where any person is aggrieved by a decision of the Director, he may lodge an objection with the Director himself against such a decision. The Director is required to give a written answer, either varying or upholding his decision and giving reasons for the decision. Upon receipt of the answer the aggrieved persons may appeal to this court, Employment and Labour Relations Court against the decision of the Director.

Such is the procedure to apply in work injury claim(s) even where such relates to any alleged negligence of the employer.

Such procedure is not unique. It applies to matters addressed under the Labour Relations Act, 2007. Matters between trade unions are regulated by the Registrar of Trade Unions. Where there is a dispute, parties must first file claim or dispute or complaints with the Registrar before filing an appeal with the court.

Equally in work injury claims, the Director must first address any complaints before parties can lodge an appeal with the court. that is the primary statutory forum for an employee to urge his case.

It is therefore not necessary for the court to extend time to a litigant to file suit with the court claiming negligence as this court can only be seized of the matter at appeal. Such appeal must relate to the orders and decision of the Director.

The above put into account,

Accordingly, the application for time extension is pre-mature before this court. the applicant must apply the requisite procedure under the Work Injury Benefit Act, 2007 by reference to the Director Occupational Health and Safety within the statutory stipulated time period.

Dated and delivered in open court at Nakuru this 18th day of October, 2018.

M. MBARU JUDGE

In the presence of:.....