REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION NUMBER 12 OF 2014

BETWEEN

DESIDERY TYSON OTIENO……...…….……………….. APPLICANT

VERSUS

RIFT VALLEY RAILWAYS KENYA LIMITED…….…… RESPONDENT

RULING

1. On 14th November 2014, the Court made a Ruling in favour of the ex parte Applicant Desidery Tyson Otieno, finding that his intended Claim against the Respondent, his former Employer was not time barred, and there was no need to extend time as applied for by the ex parte Applicant. It was ordered:

a. *The Statement of Claim attached to the Application shall be deemed as duly filed upon the payment of the requisite Court fees.*
b. *The Claim be registered and summons issued upon the payment of the requisite fees.*

2. The Applicant subsequently filed his Substantive Claim. The Respondent filed a Response to that Claim, and it is scheduled for full hearing this month. The Respondent has filed an Application dated 9th April 2015, seeking to review and set aside the ex parte Orders of 14th November 2014.

3. Supported by the Affidavit of the Respondent's Advocate sworn on the 9th April 2015, the Application argues that Section 90 of the Employment Act does not clothe the Court with the jurisdiction to extend time. Relying on a recent decision of the Court of Appeal of Kenya at Malindi, the Respondent submits the Orders of 14th November 2014 flowed from judicial craft and innovation, and should therefore be reviewed and set aside.

4. The Applicant in the main Application, that is to say Mr. Desidery Tyson Otieno opposes the present Application for review. He relies on the Affidavit of his Advocate, sworn on the 8th May 2015. He submits the Respondent has conceded jurisdiction in the substantive Claim; the ex parte Orders were not in violation of the law; there is no justification for review; and the Respondent's Application is aimed at stalling the hearing and disposal of the substantive Claim.

5. The Learned Counsel made their arguments before the Court on 15th May 2015. Upon consideration of those Submissions, Pleadings, Affidavits and the Authorities supplied to the Court, it is the view of the Court that:

a. *The orders of 14th November 2014 were not in the nature of extension of time. The Court did not enlarge the 3 year period given under Section 90. Far from it. As quoted in the Affidavit of the*

Learned Counsel for the Respondent, the Court observed Section 90 is not discretionary, and is a jurisdictional law.

b. *What the Court did was to advise the Applicant that his Claim was still within the 3 years granted by Statute. It was explained that where Parties are engaged in conciliation, negotiation and other non- adjudicatory dispute settlement mechanisms before coming to Court, the clock stops. These non-adjudicatory mechanisms are commonplace in labour disputes and anchored on Article 159 of the Constitution.*

c. *In the case of the Applicant Employee, he demonstrated he was engaged in formal negotiation with his Employer. The Parties reached a tentative settlement, where discharge voucher was even prepared for the Applicant to append his signature. The negotiations broke down due to a misunderstanding on the terms of settlement between the Applicant and his then Counsel who represented him in engaging the Employer.*

d. *The Court therefore concluded the breakdown in negotiation, restarted the clock.*

e. *This is not judicial craft or innovation, but a conscious and deliberate decision on the part of the Court, to do justice. Parties should avoid legal jargon-mongering and look at the human face of the law. Labour and employment disputes are resolved through a multiplicity of adjudicatory and non-adjudicatory mechanisms. The Labour Relations Act 2007 Section 62[3] for instance limits the formal report of termination disputes to the Labour Minister to 90 days from the date of dismissal, or any longer period the Minister on good cause, permits. It is recognized labour and employment disputes go through a multiplicity of dispute resolution mechanisms, during which time may be deemed to be frozen. The Respondent has not said anything of the negotiations it held with the Applicant Employee, which culminated in a lopsided and therefore abortive settlement. All the Respondent is doing is looking at the law and the clock impersonally. The result in event the Court endorses such an approach would be this: the Employee is forced into accepting the abysmally low amount of money offered as an out- of- court settlement; or reject that amount and leave employment after years of service, with nothing.*

f. *The Court is satisfied it did not grant orders extending time. There was no need to extend time. The Court merely declared the Claimant was within time, removing his apprehension, that he was time-barred. When the clock stops, time ceases to run. Time is frozen. It does not require enlargement after the clock restarts. There is nothing to warrant the Court revisiting the orders made on 14th November 2014. The Respondent has correctly, in the Statement of Response to the Claim, conceded the Court has jurisdiction.*

IT IS ORDERED:-

a. ***The Respondent's Application seeking review and setting aside of the ex parte Orders of 14th November 2014 is refused.***

b. ***Hearing of the substantive Claim between the Parties to proceed as scheduled.***

c. ***No order on the costs.***

Dated and delivered at Mombasa this 16th day of June 2015

James Rika

Judge