



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

MISCELLANEOUS APPLICATION NO. 4 OF 2015

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....APPLICANT

VERSUS

KISIMA FARM LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 31st July, 2015)

RULING

The applicant filed the notice of motion on 26.03.2015 brought under section 10(1) of the Work Injury Benefit Act, Chapter 236 of the Laws of Kenya, Sections 4(2) of the Limitation of Actions Act, Cap 22, Article 159 (2) (d) of the Constitution, section 12 of the Employment and Labour Relations Court Act, Cap. 234B, and all the enabling provisions of the law. The applicant prayed that the honourable court be pleased to extend time for the applicant to file a cause against the respondent herein for its failure to pay injury compensation to Isabelle Kajuju ; and costs to be in the cause.

The grounds in support of the application are as follows:

1. The said Isabelle is a member of the applicant trade union and an employee of the respondent.
2. She was employed by the respondent on 02.03.2007 as a general worker and confirmed in permanent service on 14.05.2007.
3. On 17.05.2010 while on duty she stepped on slippery floor, slid and hit the rear part of a motor vehicle thereby sustaining injuries.
4. The provincial Occupational Safety and health Office carried out investigations about the accident and directed the respondent to pay the grievant Kshs. 77, 453.45 as compensation for injuries sustained.
5. The respondent redirected the claimant to an insurance company which demanded a second medical examination by a designated doctor and the claimant complied.
6. Parties engaged in conciliation before the conciliator appointed by the minister for labour including on 22.05.2014 when the respondent said the employee needed to go to the insurer and a further medical examination.

The application was supported by the affidavit of Thomas Kipkemboi, the applicant's deputy general secretary filed together with the application.

The respondent filed on 12. 06.2015, the replying affidavit of Antony Kariuki to oppose the application. The respondent further filed on 23.06.2015 the notice of preliminary objection stating that the court lacked jurisdiction to hear and determine the present application in view of section 90 of the Employment

Act, 2007 as the application was null *ab-initio*.

In this case it is not disputed that the parties instituted conciliation proceedings. It is the respondent's case that the dispute was resolved by reason of the letter dated 8.01.2015 being exhibit AK1 on the replying affidavit. The letter stated that the dispute was resolved by reason of the conciliator's letter dated 22.05.2014 indicating that the dispute was resolved at conciliation level. The said letter of 22.05.2014 is exhibit TK7 on the supporting affidavit. The letter states that during the conciliation meeting held on 22.05.2014 the management requested the employee in the dispute to be referred to its insurance company which wished to send her for a 2nd medical opinion and assessment and the parties agreed to grant the management's request. The union had reported the dispute on 23.12.2013 and a conciliator was appointed on 21.03.2014.

The 1st issue for determination is whether the dispute was resolved. Under section 68(1) of the Labour Relations Act, 2007 if the trade dispute is resolved in conciliation, the terms of the agreement shall be recorded in writing and signed by the parties and the conciliator. The court finds that such agreement has not been filed or exhibited in court and the dispute was not resolved.

Under section 69 of the Act a dispute is deemed not resolved if the conciliator issues a certificate that the dispute has not been resolved by conciliation or if 30 day period from appointment of the conciliator, or any other longer period agreed to by the parties, expires. It has not been said that the parties agreed to extend the 30 day period and no such agreement has been exhibited and the court finds that the dispute stood unresolved on or about 21.04.2014, the conciliator having been appointed on 21.03.2014. The court finds that dispute is deemed unresolved as per the section.

The 2nd issue for determination is whether the time for referring the industrial dispute to the court has since lapsed. Section 73 of the Act provides that if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the court in accordance with the rules of the court. Section 73(3) provides that a trade dispute may only be referred to the court by the authorised representative of an employer, group of employers, employers' organisation or trade union. For purposes of section 73 of the Act, the court has perused the rules and there is no time of limitation prescribed in the rules for referring the dispute to the court. In absence of a specific prescription, the court holds that the time of limitation for referring the unresolved industrial dispute to this court would generally be 3 years or 12 months based on the nature of the claim in the dispute as per the time of limitation in section 90 of the Employment Act, 2007; the time running from the date the dispute stands as unresolved. Otherwise, a future legislative agenda would be to prescribe the time in the rules as anticipated under section 73 of the Act.

In this case the court has found that the dispute stood as unresolved on or about 21.04.2014 so that the referral to the court would be instituted within 3 years (the dispute being one where the injury or damage is not of a continuing nature) which will lapse on or about 21.04.2014.

In view of the findings made in this ruling the court finds that the application for extension of time was misconceived as time for referring the unresolved dispute to this court had not lapsed. Further, the court finds that the preliminary objection was equally misconceived as the suit was not time barred and even if it was so time barred, that would not originate a ground for a finding that the court lacked jurisdiction.

In conclusion, the application filed on 26.03.2015 and the preliminary objection filed on 23.06.2015 are dismissed with orders that each party shall bear own costs of the proceedings.

Signed, dated and delivered in court at Nyeri this Friday, 31st July, 2015.

BYRAM ONGAYA

JUDGE