



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 151(N) OF 2008
(Before Hon. Lady Justice Hellen S. Wasilwa on 8th October, 2015)
COMMUNICATION WORKERS UNION OF KENYA....APPLICANTS/CLAIMANTS
VERSUS
TELKOM KENYA LIMITED RESPONDENT

RULING

1. The application before court is the one dated 12/1/2015 and filed in court on 19/1/2015. The Application was filed by the firm of J. N. Namasake & Company Advocates through a Notice of Motion brought under Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act, Provisions of the Employment Act, Section 57 of the Labour Relations Act and Section 12 of the Industrial Court Act and all the enabling provisions of law.

2. The Applicant sought orders as follows:

- 1. That this Application be heard exparte in the first instance.***
- 2. That a declaration be made that this Honourable Court is properly moved subject to the judgment delivered on 25/07/2014 by Justice Mumbi Ngugi in High Court Petition No. 269 of 2009 at paragraph 61.***
- 3. That the Applicants were not paid the proper accrued benefits at the time of leaving employment.***
- 4. That the Applicants are entitled to severance pay to be calculated on the last salary earned by the terminated employees.***
- 5. That cost of this application be provided for.***

3. The application was supported by the annexed affidavit of Jeremiah Eshitubi Kutswa and on the following grounds:

- (a) That the Claimant filed an application dated 12/11/2008 under a certificate of urgency under section 12 of the Labour Institutions Act No. 12 of 2007 (now repealed) and replaced by the Industrial Court Act No. 20 of 2011 and sought the following prayers;***

(i) An order of injunction restraining the Respondent from closing their Voluntary Early Retirement (VER) offer on 14/11/2008.

(ii) That the court package under the Voluntary Early Retirement (VER) ought to be determined after consultation between the Claimant and the Respondent as provided for in the recognition of the Collective Bargaining Agreement between them.

(b) That the parties were heard on 25/11/2008 and the court rendered its ruling as below:

(i) A temporary injunction hereby issued restraining the Respondent from closing offer for Voluntary Early Retirement on the 14/11/2008 or any other day thereafter until the employees intended pay package is determined.

(ii) The dispute on the salary base to be applied under the scheme is referred by the parties Central Joint Council for further consideration.

(c) That the Respondent being aggrieved by the ruling of the Industrial Court, petitioned the High Court at Nairobi (Petition No. 269 of 2009 under Section 84(1) of the old constitution of Kenya alleging contravention of its fundamental rights and freedom under Section 70(b), 71, 73, 75, 76, 77(a), 78, 79(1) 3 and 65. It prayed among other things, for the grant of a conservatory order staying the proceedings including execution of all ruling and orders issued at the Industrial Court Cause No. 151N of 2008 involving the Communication Workers Union of Kenya Limited pending before the Industrial Court of Kenya pending the hearing and determination of the Petition. Filed contemporaneously with the Petition is the Chamber Summons dated 5/5/2009 in which via a ruling delivered on 21/08/2009 the court granted conservatory orders as prayed.

(d) That the High Court in rendering the judgment delivered on 25/7/2012 to Petition No. 269 of 2009 restricted itself to the issues of constitutional rights and freedoms such that it gave the followings orders:

(i) That the rulings dated 12/11/2008, 5/12/2008 and 28/04/2009 issued by the Industrial Court violated the Petitioner's fundamental constitutional rights to a fair trial under Section 77(9) of the former constitution and are therefore null and void.

(ii) That the rulings dated 12/11/2008, 5/12/2008 and 28/04/2009 issued by the Industrial Court violated the Petitioner's fundamental constitutional right to protection against servitude under Section 73 of the former constitution and are therefore null and void.

(iii) That the rulings dated 12/11/2008, 5/12/2008 and 28/04/2009 issued by the Industrial Court violated the Petitioner's fundamental constitutional right against entry into its premises under Section 76 of the former constitution and are therefore null and void.

(e) That the judgment further stated that should any issue still be outstanding between the parties in Industrial Court Cause No. 151(N) of 23008, then the same can be addressed appropriately by the Industrial Court that has been newly constituted under Article 162 of the Constitution of Kenya.

(f) That it is on this basis that this motion is premised upon, the High Court in Petition No, 269 of 2009 did not deal with the substantive issues at hand more so if the Voluntary Early Retirement package was a fair scheme to the employees or whether the Applicants were entitled to further benefits and the employees being unionisable employees were entitled to consultations with their union Voluntary Early Retirement.

(g) That the terms of the Voluntary Early Retirement package were unfair and skewed in the circumstances and the employees are entitled to accrued benefits which the Respondent has

refused to pay.

4. The Applicants now want the merits of the case determined which they submit is the salary to be used in calculating the retirement package.
5. The Respondents filed their response to this application opposing it through the firm of Oraro & Company Advocates. They contend that they filed a constitutional Petition in relation to the ruling of Justice Rika as he then was in this matter in 2008.
6. The High Court Division ruled in their favour and directed that parties to come back to this court and ventilate any outstanding issues left on the merits of the case.
7. The Respondents submitted that the effect of the High Court's ruling was that the Respondents were no longer stopped from proceeding with the retirement scheme. That what was remaining was the merits of the previous claim being terms applicable to that scheme.
8. The Respondents have submitted that it has however taken so long time i.e. 6 years before the Claimants moved the court to continue the litigation that had begun. They submitted that the Respondents continued with the Voluntary Retirement Scheme and closed it up. They therefore submit that it will be unfair to subject the Respondents to litigation that commenced 6 years ago concerning a matter that is already closed and where records may no longer be available to ensure fair trial.
9. On merits of the case the Respondents have submitted that the relationship between an employer and employee is governed by either a letter of contract or Collective Bargaining Agreement. That redundancy is one option of separation and that Voluntary Retirement Scheme (VRS) was also allowed to determine terms of the separation.
10. The Respondents have submitted that the whole issue was voluntary based on offer and acceptance, and there is nothing new to handle. They contend that there is no merit in the application and want it rejected.
11. The Applicants further submitted that the Voluntary Retirement Scheme had not been stopped and consultations were not complete and so merits of the Voluntary Retirement Scheme had not been agreed upon. They submitted that they are not bringing up anything new.
12. Having heard the submissions of the parties and considered authorities cited, I notice that this case was indeed filed in 2008. The only portion of the case that was handled was an Interim application whether to stop the Voluntary Retirement Scheme. Justice Rika (as he then was) stopped the Voluntary Retirement Scheme and this caused the Respondents to seek redress at the High Court Constitutional Division.
13. The High Court agreed with the Respondents that their rights had been infringed upon and ordered the order by Justice Rika null and void. The High Court however directed that any pending issues be dealt with by this court. The Applicants now want the substantive issue of the claim handled.
14. It is true that the Applicants have taken 3 years to come and complete their case since the ruling by Justice Mumbi Ngugi of Constitutional Division was made in 2012. However that delay is not a bar to having the Applicants being heard as any outstanding issues if so proved. To bar them from being heard is to condemn them unheard. The Respondents had not filed any application to strike out the main claim for lack of presentation.
15. It is therefore this court's finding that the Applicants application has merit and the issues pending in the main claim should be dispensed of urgently.
16. I therefore direct that the Applicants do move this court within 90 days to determine any pending issues in the main case.

Read in open Court this 8th day of October, 2015.

HON. LADY JUSTICE HELLEN WASILWA
JUDGE

In the presence of:

Namasake for Claimant

Amele for Respondent