



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT MOMBASA
CAUSE NUMBER 522 OF 2014

BETWEEN

MOROWA FUMO CLAIMANT

VERSUS

BAMBURI CEMENT LIMITED RESPONDENT

RULING

1. The Claimant filed his Statement of Claim on 22nd October 2014. He worked for the Respondent Cement Manufacturer from 1989. He was retired on medical grounds through an order of the Court, upon his own application, in a Ruling delivered on the 18th December 2014. He was paid approximately Kshs. 8 million in terminal benefits. The Court directed the balance of his Claim, which consists prayers for damages against the Respondent for Occupational Injury /Disease, is heard in full. Before the full hearing slated for 30th September 2015, the Respondent applied under Article 159 [2] of the Constitution of Kenya; Section 12 and 15 of the Employment and Labour Relations Court Act; and Rules 27 [g] and 36 of the Industrial Court [Procedure] Rules 2010, to have:

- a) The remainder of the dispute referred to medical arbitration by the Director of Occupational Safety and Health- Ministry of Labour.
- b) In the alternative, the Court orders the Directorate of Occupational Safety and Health, to furnish it with a comprehensive Expert Report on the Claimant's alleged loss of hearing.
- c) The Court makes a finding whether it has jurisdiction to hear and determine the Claim for injuries at the workplace which is based on the tort of negligence.
- d) Any other suitable relief.

2. The Application is supported by the Affidavit of Respondent's General Counsel, sworn on the 27th July 2015. The Respondent relies also on the grounds stated on the face of the Motion. Its position is that the dispute would best be resolved by a Medical Expert from the Directorate of Occupational Safety and Health Services. Secondly, the Respondent alleges to have confidential medical evidence on the Claimant's condition, which cannot practicably be disclosed in Court without breaching the Respondent's Workplace Policies and Procedures on confidentiality. The use of medical arbitration would assist the

Respondent's Insurance in determining whether the injury or disease suffered by the Claimant is occupational and compensable.

3. The Claimant filed a Replying Affidavit which he swore on the 31st July 2015. He is opposed to the proposed medical arbitration. He states this is a Labour and Employment Dispute, which the Court is constitutionally and properly seized of. The Court has jurisdiction. The Respondent has the liberty to call medical evidence in Court. Any confidential evidence the Respondent purports to have can be brought before the Court, and the Court can determine how this is handled. The Ministry of Labour has no capacity to deal with the dispute. The Court has the power to determine if the Claim is Occupational. There is no need for referring the Claim to the Ministry to determine if the Claim is Occupational.

4. Parties agreed on the 4th September 2015 to have the Application determined on the basis of their Affidavits and Submissions on record, under Rule 21 of the Industrial Court [Procedure] Rules 2010.

The Court Finds: -

5. Section 15 of the Labour and Employment Relations Court Act, allows this Court on the Application of a Party, or on its Motion, to refer a dispute for resolution under the Alternative Dispute Resolution Mechanisms referred to under Article 159 [2] of the Constitution. Section 15 [2] of the Act states that if it is the view of the Court that a dispute ought to have been referred to the Alternative Dispute Resolution Mechanisms, the Court shall stay its proceedings and make such referral.

6. The question whether the Claimant sustained loss of hearing through occupational exposure, or whether the condition pre-existed has been the subject matter of disputation between the Parties, even prior to coming to this Court. Medical Practitioners, including those certified by the Directorate of Occupational Safety and Health Services, have rendered their various opinions. What has not featured as far as the Court is able to glean from the record, is the confidential medical records the Respondent alleges to have. This is a new issue.

7. The Employment and Labour Relations Court has jurisdiction to deal with all employment and labour relations disputes under Article 162 [2] of the Constitution. This jurisdiction encompasses contractual and tortious Claims. There is no basis for the Respondent's position suggesting want of jurisdiction on claims based on negligence. Occupational Safety and Health disputes are a central feature of the jurisdiction of this Court.

8. Whereas the Parties would be at liberty to call Medical Experts in the Court adjudication; and whereas the Court has the option to call the aid of Medical Experts under Section 20 [2] of the Employment and Labour Relations Court Act; the recourse which best commends itself to this Court is the Alternative Dispute Resolution Mechanism. Occupational Safety and Health Services Department in the Ministry of Labour, jointly with the County Labour Office, are well equipped to answer the questions Parties have asked the Court to help them resolve. It would be the proper forum for now, considering the history of the dispute; the Parties' allusion to use of confidential medical material; the Respondent's workplace restrictions on disclosure of Employee's confidential medical information; and the Parties' suggestion for informal and confidential acceptance by the Court of such material.

9. Medical arbitration nonetheless is not the mechanism that would fit well with the Directorate of Occupational Safety and Health or the County Labour Office. This form of arbitration involves a dispute between a Doctor and a Patient, normally with regard to medical malpractice. Rather than have a Claim filed in Court, the Doctor and the Patient may agree to have the dispute resolved by a 3rd Party, in a private and binding arbitration. The dispute in this case is not between a Doctor and a Patient, but between an Employer and an Employee. The Ministry of Labour is not a forum for private arbitration; it is a Public Office. This Public Office however, is better suited in guaranteeing the Parties the privacy they seek, and could also offer the Parties a faster end to their remaining dispute, than a Court hearing offers.

IT IS ORDERED:-

a) The proceedings of the Court are hereby stayed.

b) The dispute is referred to the Conciliation of a Panel comprising the Principal County Labour Officer Mombasa and 2 Certified Occupational Safety and Health Medical Practitioners, designated by the Directorate of Occupational Safety and Health Services Mombasa, with the concurrence of the Parties herein.

c) The Panel to address the following issues: whether the Claimant's loss of hearing is attributable to occupational exposure or other underlying causes; and if occupational, what remedies are available to him?

d) The Panel shall receive such evidence as is necessary to determine the issues in dispute in confidence; keep minutes of the conciliation meetings; and keep a proper record of all the evidence presented at conciliation.

e) The County Labour Officer shall avail the Panel's Report to the Parties and the Court confidentially, within 120 days of receiving this Order.

f) Parties shall, if necessary, move the Court at any stage of the conciliation process for further orders.

Dated and delivered at Mombasa this 9th day of December 2015

James Rika

Judge