



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
MISCELLANEOUS APPLICATION NO. 10 OF 2014

BENEDICT ODHIAMBO.....APPLICANT

- VERSUS -

ELDORET WATER AND SANITATION COMPANY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th July, 2014)

RULING

The Applicant filed a notice of motion on 20.05.2014 through Andambi & Company Advocates. The application was brought under Order 37 Rule 6(1) and (2), Order 50 Rule 6, presumably of the Civil Procedure Rules, and all enabling laws. The applicant prayed for orders:

- a. That the time within which the claimant was expected to file claim against the respondent be and is hereby enlarged.
- b. That the claim filed herein be regularized and be deemed as properly filed and the claimant be allowed to serve the claim and the summons against the respondent.
- c. That cost of the application is provided for.

The application was based on the supporting affidavit of the applicant and upon the grounds as follows:

- a. The claimant's contract of employment was terminated in 2008 and the claimant had failed to file the suit within 3 years as provided for in section 90 of the Employment Act, 2007.
- b. The reason for delay in filing the suit was that the applicant was attempting a settlement out of court through the Labour office at Eldoret.
- c. The delay in filing the suit was not intentional because the applicant believed that the respondent was genuine in seeking to settle the claim out of court.

The respondent opposed the application by filing on 30.06.2014, the replying affidavit of Peris Cheruto, the respondent's Human Resource Manager. The respondent appointed Loice Chepchirchir Advocate to act in the proceedings.

The respondent stated that the applicant was employed by the respondent in 2002 and the employment was terminated in February, 2008 because the applicant had absented himself from duty. That the claimant's termination involved discussions before the Labour officer where the respondent offered the

claimant Kshs.66,758.40 but the claimant disappeared. The Kshs.66,758.40 was offered as the agreed total terminal payment. The affidavit at paragraphs 8 and 9 stated that the parties agreed that the applicant be paid a sum of Kshs.66,758.40.

Under section 47(1) of the Employment Act, 2007, a complaint of summary dismissal or unfair termination may be presented to a Labour officer within three months of the date of dismissal. Such right of the employee to complain to the Labour officer is in addition to the employee's right to complain to this court as provided for in section 47 (3) of the Act. Thus, the court finds that the fact that the applicant had complained to the Labour officer at Eldoret was no bar to the applicant moving to complain to the court by filing the relevant suit within the three years prescribed under section 90 of the Employment Act, 2007.

While making that finding, the court holds that under section 31 of the Limitation of Actions Act Cap. 22 Laws of Kenya, the court has jurisdiction to extend or enlarge the time for filing suits as provided for in section 90 of the Employment Act but subject to satisfaction of the provisions for such enlargement of time or leave to file out of time as provided for in the Limitation of Actions Act. In the opinion of the court, section 22 of the Limitation of Actions Act on extension of the period of limitation in cases of disability or death is particularly relevant.

The respondent has acknowledged at paragraph 8 and 9 of the replying affidavit that it was agreed between the parties that the claimant be paid a sum of **Kshs.66,758.40**. It is the court's considered opinion that the respondent's acknowledgement confers the applicant a rejuvenated cause of action and it will serve ends of justice that the respondent pays that acknowledged sum of money without the applicant having to file a fresh suit based on the acknowledgement as made in the affidavit. In making that finding, the court is guided that the principal objective of this court under section 3 of the Industrial Court Act, 2011 is the expeditious, proportionate and just resolution of the disputes that are presented before the court. Further, the court has considered that under Article 159 (2) (b) and (d) of the Constitution, in exercising judicial authority, this court is guided that justice shall not be delayed; and justice shall be administered without undue regard to procedural technicalities.

In conclusion, the application is determined with orders:

- 1. That the applicant has not established justification for extension of time for filing the suit outside the 3 years of limitation as prescribed in section 90 of the Employment Act, 2007.**
- 2. The respondent to pay the applicant the agreed Kshs.66,758.40, as acknowledged in the respondent's replying affidavit, by 1.09.2014 and failing, interest to be payable at court rates from the date of this ruling till full payment.**
- 3. Parties to bear own costs of the application.**

Signed, dated and delivered in court at Nakuru this Friday 11th July, 2014.

BYRAM ONGAYA

JUDGE