



IN THE INDUSTRIAL COURT AT MOMBASA

MISC. CIVIL APPLICATION NUMBER 12 OF 2014

BETWEEN

DESIDERY TYSON OTIENO ONYANGO APPLICANT

VERSUS

RIFT VALLEY RAILWAYS [KENYA] LIMITED RESPONDENT

Ex-parte

RULING

The Applicant filed an ‘Originating Summons’ dated 22nd July 2014, seeking leave to file a Claim against his former Employer. The Application is made under Order 37 Rule 6 of the Civil Procedure Rules.

This procedure is wrong. The correct approach would have been for the *ex parte* Applicant to invoke the Industrial Court [Procedure] Rules 2010. There is no ‘Originating Summons’ under this Court’s Rules, and the importation of Civil Procedure Rules in seeking extension of time is technically flawed.

The Industrial Court however does not determine disputes based on technicalities. The substantive issue brought by the Applicant is that he worked for the Respondent as a Ticket Clerk, effective 1st November 2006. His contract was terminated by the Respondent on 15th January 2010. He holds termination was unfair and seeks terminal benefits and compensation.

Under the Section 90 of the Employment, he should have filled his Claim within 3 years of 15th January 2010. He has not, and by this Application, seeks the Court to extend time to allow him file the Claim.

He explains in his supporting affidavit, that his then Advocates Sherman Nyongesa & Company Advocates engaged the Employer in negotiations. This resulted in an agreement between the Applicant’s Advocates and the Employer, for the Respondent to pay to the Applicant Kshs. 35,000, and the Advocates’ fee of Kshs. 28,000. A Discharge Voucher was prepared along this mode of settlement.

The Applicant disagreed with the proposal. He wrote to his Advocates on 14th July 2014, withdrawing instructions, and accusing his Advocates of “*pushing me to take what is peanuts.*” He then instructed his current Advocates to file the Claim.

The Court Finds:-

1. Section 90 of the Employment Act 2007 grants this Court temporal jurisdiction in hearing and determining employment disputes. Material and personal jurisdiction under the Act is created through

Section 87. Section 90 is there a jurisdictional law, not a matter of procedure. It should not be interpreted liberally. The limitation of 3 years cannot be extended by the Court. The Court would be creating for itself a temporal jurisdiction which it is deprived of, under Section 90.

2. The Court, however, looks at the running of time with a lot of care in employment disputes. As stated in a catena of the decisions of this Court on the subject matter, employment matters are often the subject of time consuming non-adjudicatory dispute settlement mechanisms. Employment disputes go through negotiation, consultation, conciliation, good offices, mediation- all mechanisms which have been endorsed as primary tools in dispute resolution under Article 159 of the Constitution of Kenya. The Industrial Court under both the Employment Act 2007 and the Labour Relations Act 2007 is in fact 'the Alternative Dispute Resolution Mechanism,' primacy of dispute resolution, being with the Parties under the facilitation of Labour Officers. Adjudication is seen as the 'other dispute resolution mechanism.' Primarily it is the Employers and Employees, with the facilitation of the Labour Office, who have the responsibility of resolving their disputes and differences. Where Advocates, rather than the Labour Office are involved, the same principles should apply, and the running of time frozen during negotiations.

3. Time stands still while other dispute resolution mechanisms are engaged. It re-starts when the negotiation or other mechanisms break down. If a Party can demonstrate that there was resort to these mechanisms, it would be unjust and unreasonable of the Court to view time as running, while Parties are engaged in primary dispute resolution mechanisms recognized under the Constitution. Dispute resolution is not confined to adjudication. Parties in this dispute were engaged in negotiation. They concluded those negotiations. They came up with figures and even a discharge voucher. The only problem was that the Applicant and his Advocates appear not to have moved together in the same direction, and the outcome of negotiations was not acceptable to the Applicant. This breakdown in negotiations occurred in 2014. It was the event that made it necessary for the Claimant to seek adjudication. It restarted the clock. If the Court were to find that the clock was running during the negotiation, the result would be to punish the Claimant for engaging in negotiation, and compel him to accept an out-of-court settlement which he feels is unjust.

4. The Court does not therefore think the Claim is time-barred. There would be no need to extend time. It is ordered:

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

Dated and delivered at Mombasa this 14th day of November 2014

James Rika

Judge

