



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
CAUSE NO.147 OF 2012

PATRICK OTIENO ATEE

CLAIMANT

v

EXPORT TRADING COMPANY LIMITED

RESPONDENT

RULING

1. The Claimant filed a Claim against the Respondent on 14 December 2012 complaining of unfair termination. The Respondent was served and it filed a Reply to the Claim on 19 February 2013 through Siocha Okemwa & Co. Advocates. A Reply to the Defence was filed on 25 March 2013.
2. On 26 February 2013 the Respondent filed a Notice of Preliminary Objection and on 20 June 2013 I directed that the Preliminary Objection be heard on 10 July 2013. The hearing of the Preliminary Objection was fixed with agreement of all the Advocates on record.
3. On 10 July 2013 the Claimant's Advocate on record was nowhere to be seen and Mr. Nyange who held his brief informed me that Mr. Ojode was before the Environment and Land Court and would not be available to proceed. No particulars of the case he was involved in were given and I therefore directed the Respondent to prosecute the preliminary objection.
4. The Respondent's submissions in support of the preliminary objection were brief and to the point.
5. The Respondent stated that the preliminary objection was pursuant to rule 14(5) of the Industrial Court (Procedure) Rules, 2010 and the ground was that the dispute between the Claimant and the Respondent was reported to the Minister for Labour who appointed a Conciliator through a letter dated 27 September 2012. The letter was annexed to the Respondent's Reply filed in Court on 19 February 2013.
6. Mr. Okemwa submitted that the Claimant commenced the Cause without complying with the law in that no certificate as prescribed by section 69 of the Labour Relations Act had been annexed to the statement of Claim and further that no affidavit was sworn to depose to the fact that the Conciliator had not issued a certificate of conciliation as required by rule 6 of the Industrial Court (Procedure) Rules, 2010.
7. He therefore sought that the Claim should be dismissed.
8. It is true that the statement of Claim has not made any reference to the fact that the Claimant had

caused a report of the dispute to be made to the Minister and that the Minister had accepted the dispute and appointed Mr. P.M. Kanyotu to act as conciliator.

9. It was incumbent upon the Claimant to inform the Court that it had embarked on a conciliation process. It is clear to my mind that the Claimant failed to make material disclosure that the dispute was pending conciliation. The Claimant was under good legal guidance and cannot claim ignorance.

10. Section 15(2) and (3) of the Industrial Court Act provide that the Court may refuse to determine a dispute if it is satisfied that there has been no attempt to effect settlement through conciliation, mediation or other Alternative Dispute Resolution mechanisms, and that a Conciliator's certificate would be sufficient proof that conciliation has been attempted but the dispute remains unresolved.

11. The Claimant had opted to follow the path of conciliation which is all very good because part of the objectives for the establishment of the Court is to further good labour relations between employees and employers and or their respective unions.

12. However, to dismiss the Claim as submitted by the Respondent would be draconian. I say so because the section 69(b) of the Labour Relations Act deems any dispute unresolved thirty days after appointment of a Conciliator as unresolved unless the parties agree to extend time.

13. The order that commends itself to me is to stay these proceedings and let the conciliation process be finalized first. In the circumstances, I stay this Cause and order that this matter be mentioned after two months' to confirm whether the conciliation process has been concluded, and further that the Claimant do amend his pleadings to conform to the requirements of the law.

14. The Cause to be mentioned on 12 September 2013. The Claimant is directed to serve a copy of this ruling upon the Conciliator.

Delivered, dated and signed in open Court in Mombasa on this 19th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Okemwa for Respondent

No representation for Claimant at hearing of Preliminary Objection