REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1523 of 2012

JOSEPH KAMAU THUO…….....…….……Claimant

Vs

KENOL KOBIL LTD…….…….Respondent

RULING

The matter before court is a Notice of Motion dated 28thAugust, 2012 and brought under a certificate of urgency on 30th August, 2012.

This application was heard on the said 30th August, 2012 and an interim order of injunction issued as prayed under prayer 3 of the application.

The matter was listened and heard on 13th August, 2012 when both counsels for the parties gave long oral submissions before this court.

Mr. Juma, counsel for the Applicant submitted that he grounds of opposition are a non starter and are not properly before court and therefore should be struck out. This was based on the fact that this was filed four days out of time and therefore offended rule 16(6) of the Industrial Court (Procedure) Rules, 2010. His argument was that the Respondent was served with the pleadings and application and also the interim orders of court on 31st August, 2012 but did not file his response until the 11th August, 2012 four days out of the seven days time line provided by the rules. This is not denied or rebutted but is explained by the Respondent in his submissions.

The other ground in support of this submission by the counsel for the Applicant/Claimant is that the grounds of opposition filed in court are defective to the extent that they are not in compliance with rule 13(3) of the same Industrial Court (Procedure) Rules, 2010 which rule requires that these grounds of opposition should be verified by an affidavit.

He submits that this is mandatory and non compliance renders the entire grounds of opposition defective and untenable. He prays that on these two grounds, the grounds of opposition should be struck out and the matter considered on its merits.

Mr. Oyatsi, counsel for the Respondent submitted that the Applicant counsel's line of argument above is not sustainable on the basis that the right to be heard before any court is a fundamental right that cannot be denied as espoused under Article 50 of the Constitution of Kenya, 2010. He further submitted that this right is so fundamental that it cannot be taken away on any ground or technicalities unless there is misconduct on deliberate delay by a party. He also posited that Section 20 of the Industrial Court Act, 2011 on the general powers of this court that oust the use and application of technicalities to defeat its action or proceedings before the court. Further, he pleads with the court to use its discretionary powers and disallow the application of the issues of law and procedure proffered against his position by counsel

for the Applicant. He also request the court to extend time for filing in the circumstances.

Both counsels further make elongated and substantial submissions for their positions as per the record of this court. I choose to open this dialogue by a disposal of these opening remarks and submissions by counsel for the Applicant. This is due to the fact that these are fundamental in the determination of the direction this application is likely to take.

Counsel for the Respondents *inter alia* invoked the provisions of Article 50 of the constitution to highlight the essence of a fair hearing. That the right to be heard is so fundamental in the administration of justice that it should and cannot be denied or taken away on grounds of technicalities. He also gets out to explain and justify the grounds for the delay in the reply to the Notice of Motion as served on him on 31st August, 2012.

I find it safe to thrash and determine the issues in dispute from the submissions on the issue of technicality or its absence and the relevance of the same to the instant case.

The issue for determination in the instant case is whether submissions by counsel for the Claimant/Applicant outweigh the submissions of his adversary counsel and therefore the decision of the court. The issues raised by counsel for the Claimant are that failure to observe the provisions of rule 16(6) of the Industrial Court (Procedure) Rules, 2010 renders the grounds of opposition by the Respondent incompetent on grounds of having been filed out of time by four days. He further seeks to rubbish the grounds of opposition by pointing out that the said grounds were not verified by an affidavit contrary to the provisions of rule 13(3) of the aforesaid rules. He submits that compliance with these rules of procedure is mandatory and the absence of the same renders the pleadings totally defective and irredeemable and therefore prays that these grounds of opposition should be struck out.

The Respondents counsel in response invokes Articles 50 of the Constitution of Kenya, 2010 and submits that this is a critical facet to a fair hearing. A fair hearing cannot therefore be denied. He also relies and emphasize the provisions of Section 20 of the Industrial Court Act, 2011 and implores the court to utilize these provisions to oust the use of technicalities as a ground for striking out the grounds of opposition.

Section 20 of the Industrial Court provides as follows:-

S 20(1) In any proceedings to which this Act applies, the court shall act without undue regard to technicalities and shall not be strictly be bound by rules of evidence except in criminal matters

Provided that the court…….

(2)……
(3)……..
(4)…….
(5)……
(6)……..
(7)…….
(8)…….
(9)…….

Counsel for the Respondent must have intended to apply Section 20(1) to his submissions is inasmuch as this was not expressed in his submissions.

What then is the acceptable of these conflicting arguments and therefore the finding of this court? I accept and find in favour of the Claimant and therefore strike out the grounds of opposition filed by the Respondent on 11th August, 2012. The Respondents argument as based on Article 50 of the constitution and Section 20 of the Industrial Court Act, 2011 aforesaid fails *in toto.* These cannot be a remedy for defective pleadings that defy and abrogate the rules of procedure. The rules of procedure are intended to

imbue a proficient system and process by which matters and pleadings would be brought to court. These are mandatory and cannot be wished away in the civil process as this would cause confusion and confrontation and entirely disrupt the administration of justice.

Further, it would never have been the intention of parliament to take away the requirements of astute procedural rules on grounds of technicality or fair hearing. Article 50 (1) of the Constitution entitles and provides the right to a fair hearing in dispute resolution but the balance of the provisions boarders on the realms of criminal law practice. I therefore dismiss the submission by counsel for the Respondent that both on either Article 50(1) and Section 20(1) of the Constitution and Act respectively would be viable and applicable in the circumstances of this case.

This being the case the opposition to the application fails and the application for injunction as prayed would stand and the Respondents are injuncted in terms of prayers 3 and 4 of the Notice of Motion dated 28th August, 2012.

This court however notes the state of this application and suit and finds that the subject matter is a delicate balance of an industrial relationship gone sour and whose balance is critical to the lifelines and economic welfare of both parties. I agree with counsel for the Respondent's submissions that the best way forward is not an injunction but a preservation of the Claimants interest by way of provision of security to the Claimant. This could, in my view be the middle ground and bridge between the competing and vested interest of the parties. I recommend that in the circumstances, the parties should explore this avenue in order to sustain the economic interests decipherable from the facts of the case. This is a win-win situation that is healthy and appropriate for proper industrial dispute resolution where the end is not final and breakingly adversarial.

I also note that the parties at the close of submissions were agreeable on adopting the above as an alternative to the extension of the interim injunction as ordered on the 30th August, 2012. This approach would be most sustainable and is recommended to the parties as it would significantly advance the intended transaction by the Respondent and therefore nurture economic advancement for the benefit of the economy and all. It would simultaneously take care of the interest of the Applicant. It is recommended that the parties should consider this in a most sincere manner.

I therefore so rule and recommend in the circumstances.

DATED and given at Nairobi this 3rd day October of 2012.

D.K.N. Marete
JUDGE