



REPUBLIC OF KENYA



**Ondече v Kenya Horticulture Exporters (1977) Limited (Civil Appeal
E476 of 2021) [2023] KEHC 941 (KLR) (Civ) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E476 OF 2021**

AA VISRAM, J

FEBRUARY 17, 2023

BETWEEN

PETRO OKOTH ONDECHE APPELLANT

AND

KENYA HORTICULTURE EXPORTERS (1977) LIMITED RESPONDENT

(Being an appeal from the ruling and order of the principle magistrate Hon A. N. Makau dated 17th July 2021 in Milimani Commercial Court, Civil Case No. E4051 of 2020)

JUDGMENT

Introduction

1. The appellant (plaintiff in the lower court) filed a suit in the lower court vide a plaint dated August 10, 2020. He alleged that on or about May 5, 2008 he was employed by the respondent (defendant in the lower court) as a mason and a general artisan, and eventually, as a supervisor. On or about December 31, 2019 the appellant's employment with the respondent was terminated by mutual agreement. On August 11, 2015 while the appellant was still an employee of the respondent, he was injured in the course of his employment and his dues under the *Work Injuries Benefit Act* (Act No 13 of 2007) (hereinafter referred to as "WIBA" or "the Act") were assessed at Kshs. 438,586.40. He claimed that based on the terms of the mutual agreement executed on 31 December, 2019, the respondent promised to pay him the sum of Kshs. 438,586.40, which payment was never made.
2. The respondent opposed the suit vide its statement of defence dated December 21, 2020 where it denied the appellant's allegations entirely. The respondent's defence stated that the suit was statute barred by virtue of section 90 of the *Employment Act*; that the court lacked jurisdiction to determine the issues raised by the plaintiff in light of the provisions of WIBA which require the appellant to pursue his claim with the Directorate of Occupational Safety, and in accordance with the strict timelines provided



- under the said Act; and finally, that the appellant's suit was not in fact, a suit for recovery of a liquidated claim, but rather, a claim between an employer and employee, for which the court lacked jurisdiction to determine.
3. The respondent consequently filed a Notice of Preliminary Objection dated February 15, 2021, on the grounds that the court lacked jurisdiction to hear and determine the suit by virtue of Section 16 of *WIBA*.
 4. The trial court, in its ruling dated July 16, 2021, found that it lacked jurisdiction to hear and determine the suit and therefore struck out the suit with costs.
 5. Aggrieved by the above ruling, the appellant has now filed this appeal dated August 4, 2021, on the following grounds;
 1. That the learned Principal Magistrate grossly erred in law and in fact in upholding the respondent's Preliminary Objection dated February 15, 2021 resulting in striking out the appellant's suit with costs.
 2. That the learned Principal Magistrate grossly erred in law and in fact in failing to appreciate that the appellants action was merely to enforce payment of the amount of compensation found due to him under the *Work Injury Benefits Act 2007* (act No13 of 2007) (the Act) and was not claiming damages for injuries he had sustained in the course of his employment with the respondent.
 3. That the learned Principal Magistrate grossly erred in law and in fact in failing to appreciate that once a claimant compensation has been assessed under the Act, and the employer fails to pay such a claimant such compensation there is no other process provided for under the Act for the claimant to enforce the payment for such compensation.
 4. That the learned Principal Magistrate grossly erred in law and in fact in failing to appreciate that the court had the requisite jurisdiction to order the respondent to pay the appellant the amount of compensation found to be due to him under the act.
 6. The parties agreed that the matter be disposed of by way of written submissions, and the appellant and respondent filed their respective submissions on November 9, 2022, and January 18, 2023.

Appellants submissions

7. The appellant submitted that he had complied with the relevant provisions of the Act, in so far as he referred the matter to the Director of Occupational Safety and Health Services, ("the Director") who assessed his claim for compensation for the injuries he suffered at Kshs 438,586.40.
8. Once assessed, the Act mandated the respondent to obtain the said amount from its insurers and pay the appellant. The respondent's failure to comply necessitated an action in the Chief Magistrate's court to enforce payment of the award.
9. The appellant further submitted that he followed the process set out in the Act and pursuant to the same, the Director assessed the compensation due to him as the sum of Kshs. 438,586.40.
10. He contended that section 7 of the *Act* stipulated that once the Director had assessed compensation due to an employee, the employer is under legal duty to obtain the sum from its insurers and pay the same to the employee.



11. He further submitted that pursuant to section 10 of the Act, he was entitled to the benefits provided under the Act.
12. In support of his position, the appellant cited the Supreme Court decision in Law Society of Kenya v Attorney General & another [2019] eKLR where it was held;

“We have stated that Section 16 cannot be read in isolation because if read with Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. It cannot, therefore, be the case that section 16 amounts to an ouster clause. It is in fact merely facilitative of what may eventually end up in Court.

...

Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed under Section 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers’ compensation. When read in whole with Section 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to resort to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court.”

13. Finally, that in the event an employer fails and/or neglects to make such payment, the only recourse available to an employee is to institute an action against the employer in a court of law to enforce payment.

The respondent’s submissions (in the high court)

14. The respondent submitted that the substratum of this matter revolved around the relationship between an employer and his employee. Accordingly, the appellant ought to have filed his appeal at the Employment and Labour Relations Court (“ELRC”), and not this court.
15. The respondent cited section 12 of the ELRC Act which reads “the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written laws which extends the jurisdiction to the court relating to employment and labour relations..”
16. The respondent submitted that Article 162 of the Constitution of Kenya, established the ELRC and provided clear jurisdictional boundaries between the various constitutional courts. Accordingly, this court lacked jurisdiction to hear appeals arising out of employment related disputes; and nor did it have the jurisdiction to transfer the appeal because the same was filed in a court without jurisdiction in the first place.

Analysis and determination

17. I have carefully reviewed the contents of the record of appeal, the rival written submissions filed by the parties, and perused the record in its entirety. Two primary issues arise in this appeal, namely:
 - a. Whether this court has jurisdiction to determine the appeal herein?



b. Whether the trial court had jurisdiction to determine the suit herein?

18. I will begin with the first issue for the reason that in the event this court lacks jurisdiction to entertain the appeal, any determination on the second issue will be a nullity.
19. The starting point is that jurisdiction is everything and without it, a court has no power to take any further step. This principle was stated in the classic case of *The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* (1989) KLR 1. Where Nyarangi J.A. held as follows:
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
20. Further to the above, the Supreme Court in the cases of *In Re The Matter of the Interim Independent Electoral Commission, SC.*, Constitutional Application No 2 of 2011; [2011] eKLR, and in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others*, SC Application No 2 of 2012; [2012] eKLR, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. It was stated:
- “A Court’s jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.
21. The issue before me is whether the High Court has jurisdiction to entertain this appeal. At this point I am not addressing the question of whether the lower court had jurisdiction.
22. The appellant’s submissions were primarily directed at the jurisdiction of the lower court to enforce awards. Very little, if anything at all, was advanced by the appellant in support of his contention that the High Court has jurisdiction to hear and determine this appeal. They cited the above authority, LSK and the AG and Another, Supreme Court Petition No 4 of 2019.
23. On the other hand, the respondent submitted that the substratum of this dispute, is at its heart, a labour related issue, and falls squarely under the jurisdiction of the ELRC pursuant to Article 162 of the *Constitution* and section 12 of the *ELRC Act*.
24. A review of the relevant sections of the Act, such as section 52 (1) and (2) which relate to a decision by the Director and challenge the same, reads “An objector may, within thirty days of the Directors reply being received by him, appeal to the Industrial Court against such decision”. A further review of the case law in this area relating to appeals in particular, confirms that the courts have taken the view that the ELRC is the appropriate court to hear and determine appeals arising from WIBA related disputes under the Act.
25. In *Milton Khamasi Anord v Capital Reef (Co) Ltd* [2022] eKLR it was held that;
- “Hence, this being an appeal arising from a work injury, is a dispute between an employer and employee. Accordingly, it is my finding that the Court with jurisdiction to hear and determine this appeal is the Employment and Labour Relations Court.”



26. In *Austin Oduor Odira v Kenya Sweets Limited & another* [2021] eKLR, the learned Judge suggests that once the Director makes an award, the parties cannot approach the court to re-open the matter except by way of an appeal to the ELRC. In other words, the parties may not approach the lower court or even the ELRC outside the appellate jurisdiction under section 52 of *WIBA* to, for instance, argue that the award was too low or unwarranted.
27. For the sake of completeness, on my own accord, I have also considered the fact that this appeal arises from the Magistrate's court, and there may be temptation to argue that Article 165 of the *Constitution* clothes this court with supervisory jurisdiction to hear and determine the same. Having considered this point, I am of the view that while the High Court certainly has jurisdiction to deal with constitutional questions and violations that may arise, even in the course of *WIBA* related matters, I do not think it was intended as the appropriate forum to hear and determine appeals relating to enforcement, or failure to enforce awards arising from *WIBA*.
28. My reluctance to adopt such a view is based primarily on the reason that Article 162 of the *Constitution* specifically created the ELRC as a specialized court with unlimited original and appellate jurisdiction in employment and labour related disputes. There was a specific purpose in mind, and I am of the view that the court should be allowed to carry out that purpose, and all ancillary matters that fall within its dominant purpose. To my mind, this would include hearing and determining appeals arising out of enforcement, or failure to enforce *WIBA* related awards. To find otherwise, would create a parallel stream or overlap between the High Court and ELRC in relation to appeals on enforcement. This would create unnecessary confusion and undermine the purpose of the specialized courts.
29. Finally, had the framers of the Act intended to create such an overlap or parallel stream, specifically in relation to appeals relating to enforcement of awards, nothing would have been easier than to simply state so in the main body of the legislation.
30. Based on the reasons set out above, I find and hold that that this appeal ought to have been filed in the ELRC and not this court. Having found that I have no jurisdiction, I do not think that it would be proper to render my decision on the remaining issues.
31. The appeal before me is accordingly incompetent and is struck out with costs to the respondent.

DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY, 2023

ALEEM VISRAM

JUDGE

