



REPUBLIC OF KENYA



KENYA LAW
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**Abarufa v Gicheha Farms Ltd (Civil Appeal E045 of 2022)
[2023] KEHC 21270 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E045 OF 2022
GMA DULU, J
JULY 25, 2023**

BETWEEN

FATUMA GABHABH-DU ABARUFA APPELLANT

AND

GICHEHA FARMS LTD RESPONDENT

*(From the Ruling and Order of Hon. D. M. Ndungi (PM) at Taveta Law
Court delivered on 8th September, 2022 in Civil Case No. 15 of 2018)*

JUDGMENT

1. In a ruling delivered or order on September 8, 2022, the Magistrate court at Taveta struck out the appellant's (plaintiff's) suit by ordering as follows:-
 - i. The plaintiff's suit is hereby struck out.
 - ii. Each party to bear its own costs of the Preliminary Objection.
2. Aggrieved by the decision of the Magistrate's court, the appellant who was the plaintiff in the trial court, has come to this court on appeal on the following grounds through counsel M/s Kibunja Nyambura & Company: –
 1. That the learned Magistrate erred in law in failing to appreciate the nature and purport of the Work Injury Benefit Act.
 2. The learned Magistrate erred in fact and in law in failing to interpret the meaning of the words used in Section 16 of the Work Injury Benefit Act.
 3. The learned Magistrate erred in fact and in law in failing to appreciate that the appellant suffered neither disablement nor death.



4. The learned Magistrate erred in fact and in law in failing to consider that the appellant had not based her cause of action on the *Work Injury Benefits Act*.
 5. The learned Magistrate erred in fact and in law in failing to consider that the appellant had also based her cause of action on breach of statutory duty.
 6. The learned Magistrate erred in fact and in law in upholding the Preliminary Objection.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Kibunja Nyambura & Company Advocates for the appellant, as well as the submissions filed by Wainaina Ireri Advocates LLP for the respondent. Both sides cited sections of the *Work Injury Benefits Act 2007* as well as decided court cases, with the appellant's counsel relying heavily on English Common Law and Statutes which altered the common law position, while the respondent's counsel cited the case of *Law Society of Kenya v Attorney General & Another* [2019] eKLR.
4. I note that the plaint dated July 2, 2018, had paragraphs 3, 4, 5 and 6 in which it was pleaded as follows:-
3. At all material times the plaintiff was employed by the defendant as a casual general worker at the defendants Ziwani Estate premises in Taita Taveta County.
 4. They were terms of the said contract of employment that the defendant would maintain a safe system of work, provide proper plant and appliances and would not expose the plaintiff to unnecessary risk or danger.
 5. On or about the plaintiff was carefully working for the defendant and was injured.
 6. The said accident was occasioned by the defendants breach of statutory duty in that the plaintiff was employed in a process(and) was not provided with adequate effective and suitable protective footwear/goggles contrary to Section 10(1) of the *Occupational Safety and Health Act 2007*.
5. To this plaint, the respondents who were the defendants filed a defence as well as a Notice of Preliminary Objection dated January 10, 2021. The trial court then determined the case at an interlocutory stage, and struck it out on the basis of the Preliminary Objection filed, which is now the subject of this appeal. For the record, the Preliminary Objection dated January 10, 2021 was in the following terms:-
1. That the present suit is a work injury related claim within the purview of the *Work Injury Benefits Act, 2007*.
 2. That pursuant to Section 22 (5) of the *Work Injury Benefits Act 2007*, the plaintiff herein ought to have reported the claim to the Director of Occupational Safety and Health Services as provided for in the said Act.
 3. That the present suit is therefore defective and is improperly before this honourable court.
 4. That the present suit is not maintainable in this honourable court for lack of jurisdiction and should be struck out in limine.
6. Having considered the appeal, the proceedings and decision of the trial court, and the submissions on both sides, I find that an employee under the law in Kenya since 2007 may pursue an employer for injury suffered and allegedly caused by the negligence of an employer under two distinct methods depending on the circumstances of the case.



7. The first method relates to injuries suffered and diseases contracted in the course of employment and for connected purposes, which is governed by the provisions of *Work Injury Benefits Act, 2007* which replaced the Workmen’s Compensation Act from 2007.
8. Under this method, which only covers claims arising from injuries or diseases contracted in the course of employment as so established either through pleadings or evidence, the provisions of the Act applies in the place of common law on the repealed Workmen’s Compensation Act.
9. In that regard, Section 16 of the *Act*, provides as follows:-
 16. No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
10. The above statutory provisions clearly state that an employee who is injured on duty or his or her dependants, cannot directly sue an employer for compensation, unless he or she pursues her claim as provided for under the *Work Injury Benefits Act*.
11. The second method or situation wherein an employee can pursue an employer for compensation for injury or disease occasioned by the employer, is when such injury or disease is caused outside performance of employment duty or outside the workplace. In that event, an employee or dependant can sue an employer for negligence under the general common law of negligent and seek compensation in the ordinary courts, like any other person.
12. Coming back to the present case, the appellant came to the Magistrate’s court specifically pleading that she was injured in the course of duty, which she described clearly in the plaint. Thus in my view, she was bound by the provisions of the *Work Injury Benefits Act*, which required her to lodge a claim or notice to the Director of Occupational Health for further processing. In this regard Section 23(1) of the *Act* provides as follows:-

“ 23 (1) After having received notice of an accident or having learned that an employee has been injured in an accident, the Director shall make such inquiries as are necessary to decide upon any liability in accordance with this Act.”
13. In my view therefore, the pleadings herein having been very clear that the appellant suffered the alleged injuries on duty, she had to comply with the provisions of the *Work Injury Benefits Act* and reported her claim or given notice of the accident on duty to the Director. The appellant was debarred by Act from suing the employer under common law or the Workmen’s Compensation Act, for alleged injury suffered on duty or in the course of employment.
14. I thus find that the trial court was correct in striking out the appellant’s suit, and this appeal is accordingly hereby dismissed.
15. With regard to costs, as this is an employee versus employer matter, I order that parties will bear their respective costs of the appeal. It is so ordered.

DATED, SIGNED AND DELIVERED AT VOI THIS 25TH DAY OF JULY 2023 AT VOI IN OPEN COURT VIRTUALLY.

GEORGE DULU

JUDGE



In the presence of:-

Mr. Kibunja for the appellant

Mr. Musya for respondent

Mr. Otolo court clerk

