



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

**Petition 185 of 2008**

**IN THE MATTER OF: SECTION 84 OF THE CONSTITUTION**

**OF KENYA**

**IN THE MATTER OF: THE WORK INJURY BENEFITS ACT, 2007**

**IN THE MATTER OF: CONTRAVENTION AND/OR  
APPREHENDED CONTRAVENTION**

**OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**LAW SOCIETY OF KENYA.....PETITIONER**

**-VERSUS-**

**ATTORNEY-GENERAL .....RESPONDENT**

**RULING**

The main cause herein is a Petition, dated and filed on 14<sup>th</sup> April, 2008 pursuant to s.84 of the Constitution of Kenya, Rule 12 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice & Procedure Rules, 2006.

During the pendency of the Petition, two interlocutory matters came up and were canvassed, leading to appropriate rulings. The first of these matters to be heard was an application by Chamber Summons dated and filed on 30<sup>th</sup> April, 2008, and emanating from the Central Organization of Trade Unions (K). This application, which came up under certificate of urgency and was filed by M/s. J.A. Guserwa & Co. Advocates, sought leave for joinder as Interested Party, in the constitutional petition proceedings. The applicant stated in its affidavit- evidence that it had a public mandate for the protection of the interests of workers, as these may be affected by policy-making and legislation; and consequently, COTU had a proper case to make in respect of the recently-enacted Work Injury Benefits Act, 2007 which is the subject of the constitutional petition aforesaid.

The joinder application was disposed of as follows:

**“What is substantively before the Court is a constitutional petition brought under s.84 of the Constitution.**

**“The Central Organization of Trade Unions (COTU) now applies by Chamber Summons of 30<sup>th</sup>**

**April, 2008 seeking to be admitted to the status of Interested Party, in the constitutional petition proceedings.**

**“An accompanying affidavit by COTU’s Secretary-General describes the nature of that body’s interest in the main proceedings.**

**“Mr. Ombwayo, learned counsel for the respondent in the main proceedings, has no objection to the joinder of COTU in the proceedings. It is the same with learned counsel Mr. Ngatia, for the applicant in the main proceedings.**

**“In these circumstances, it is, I think, proper to allow the application made by COTU.**

**“Accordingly, I now order that the applicant in the interlocutory matter, namely COTU, is hereby granted leave to be enjoined as Interested Party in the main proceedings.”**

The second application came from the petitioner, the Law Society of Kenya, by its Chamber Summons of 14<sup>th</sup> April, 2008. This application carries several prayers, but the one to which the parties devoted themselves was as follows:

**“Pending the hearing and determination of the Petition, an order to issue to direct that suits pending in courts be subjected to the normal judicial adjudicative process.”**

The supporting facts for the application appear in the affidavit of **Betty S. Nyabuto**, dated and filed on 14<sup>th</sup> April, 2008. She makes her depositions in her capacity as Secretary of the Law Society of Kenya, and states that the said Law Society of Kenya has in the recent past received “numerous complaints from its members.” These complaints are occasioned by the recent enactment of the *Work Injury Benefits Act, 2007 (Act No. 13 of 2007)*. Consequent on the passing of the said Act, the deponent avers, “*Subordinate Courts have consistently maintained that in view of Section 58(2) of the Work Injury Benefits Act, 2007... [those Courts] would not hear any matter covered by the Act.*”

And in upholding the said decision,

*“Subordinate Courts have stood over generally any suit relating to matters covered by the Act.”*

The deponent avers that the Work Injury Benefits Act, 2007 has no provision which would enable the parties to transfer suits currently in Court to a *similar juridical* forum. She depones that the apprehended impediment to the enforcement of individuals’ rightful claims, has revealed itself clearly before members of the petitioner who practise law and deal with claims sounding in the law touching on employers’ liability; and since the Work Injury Benefits Act, 2007 has *no saving provision* the litigants in question have found themselves deprived of a *legal-redress* avenue. It is further deponed that the limitation thus carried in the Work Injury Benefits Act, 2007 has “adversely affected the practice of law.” The deponent prays for *interim orders*, in line with one of the paragraphs of the said Chamber Summons, that “pending [the] determination of the petition...interim orders [be made] to allow Courts to adjudicate the suits currently pending...”

For more evidentiary support to the applicant’s case, a good number of supplementary affidavits have been filed, emanating from advocates in practice, throughout the country. The essence of some of these affidavits may be set out here.

**Mr. Peter Mwaura Kamau**, an advocate practising in Nairobi, thus depones:

**“THAT I am ... still handling matters that have been decided by Courts but the decrees have not been settled and others are still pending hearings related to injuries sustained in the course of employment.”**

For greater illustration of the perceived problem, that deponent avers:

“THAT as at the commencement date of the said Act I was handling NAIROBI CMCC No. 5003 of 2005 – SAMUEL MAROKO v. TWIGA CONSTRUCTION CO. LTD. whose Judgement was delivered on 8<sup>th</sup> January, 2008 in favour of the plaintiff but the plaintiff has been unable to enforce the decree as the said Act has ousted the jurisdiction of the Courts in dealing with such matters.”

**Mr. P. Ngunjiri Maina**, a Nairobi advocate, in his affidavit lists several cases which he was handling before the Magistrates’ Courts, but it became impossible to make further progress; in his words:

“THAT in all the four matters, the Advocates appearing for the defendants orally raised a preliminary point of law to the effect that the Chief Magistrate’s Court at Milimani lacked jurisdiction in view of Sections 6 and 58(2) of the Work Benefits Act.”

**Mr. Nteng’a Marube**, a Nairobi Advocate, thus depones:

“2. THAT on 3<sup>rd</sup> April, 2008 I went to Kandara Law Courts to prosecute RMCC 251 of 2007, RMCC 252 of 2007, RMCC 254 of 2007, RMCC 255 of 2007 and RMCC 256 of 2007 wherein I was acting for the plaintiffs while Kakuzi Limited the defendant therein, were being defended by various Advocates.

“3. THAT the above-said matters did not proceed due to the issue of jurisdiction raised by defence Advocates and they were stood over generally until the matter is resolved.”

**Mr. Peter Makumi Mwangi**, a Nairobi advocate has sworn an affidavit in which he lists 21 cases which were being heard before various Magistrates’ Courts and which relate to injuries to employees suffered at the place of work – and these have all been *stood over generally*, on account of *jurisdictional questions* raised in the light of the Work Injury Benefits Act, 2007. The same experience is recorded in affidavits by **Mr. Joseph Karanja Kanyi** (a Mombasa and Kilifi Advocate); **Mr. Cleveland M. Mwebi** (a Mumias Advocate); **Mr. James Wanzala Namatsi** (a Mumias Advocate); and **Mr. Patrick Ikile** (a Kitale Advocate).

The applicant’s application is opposed by the Attorney-General, on the basis of grounds of opposition dated and filed on 30<sup>th</sup> April, 2008. These are the grounds that guided learned Principal Litigation Counsel, **Mr. Ombwayo**, on the occasion of hearing the instant application.

Counsel contended that the applicant was not bringing before the Court a *prima facie* case for grant of the interim order sought: on the ground that the petitioner had an insufficient interest in the question constituting the gravamen; on the basis that the guarantees of rights provided for in s.84 of the Constitution, ill-suited the rights-claims being asserted; because s.16 (on compensation and other legal remedies) of the Work Injury Benefits Act, 2007 makes reference to employees or their dependants, but not to an entity in the position of the applicant herein; on the contention that the Petition form of the action in the main cause is inapplicable.

**Mr. Ombwayo** contests the prayer for stay orders pending the hearing and determination of the main cause, on the grounds that: there will be no *irreparable loss* to the petitioners if the prayer is not answered; the pending suits which now stand challenged on the basis of jurisdiction, are *none-the-less still alive*; on-going implementation of the Work Injury Benefits Act, 2007 ought not to be interrupted, save by *judgement on the substantive cause*; the *balance of convenience* be considered, “in granting interlocutory orders in *such serious public interest matters*”. Counsel contended that, on the foundations thus enumerated, the Court should *dismiss* this application.

In the oral submissions before the Court, learned counsel for the applicant, **Mr. Ngatia**, submitted that the Work Injury Benefits Act, 2007 which was passed towards the end of the life of the Ninth Parliament, has occasioned operational implications with a direct impact not only on the *basic rights of citizens*, but also on the *functioning of the Judiciary* as the constitutional organ entrusted with the mandate of dispute settlement in justiciable matters. While this question, counsel submitted, is a complex one which must await resolution within the main cause, vital issues already canvassed in a large number of cases, especially before the Magistrates’ Courts, are currently standing in limbo, as those Courts have stood-

over-generally the determination of the relevant litigious questions; and in some cases, even *already-issued decrees* of the Courts in favour of particular parties, have been rendered *incapable of execution*. There is, in the circumstances, learned counsel urged, an issue for interlocutory determination, namely, whether, pending the hearing and determination of the applicant's petition, this Court may allow the Magistrates' Courts before which there is pending litigation, to proceed to hear and determine the matters before them.

The pending litigation had in each case been commenced on the basis that the *Workmen's Compensation Act (Cap.236, Laws of Kenya)* was in force. That Act, however, has been repealed by s.57 of the Work Injury Benefits Act, 2007, which contains *no transitional provisions*, and which entered into force on 20<sup>th</sup> December, 2007.

Section 58(2) of the new enactment thus provides:

***“Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act.”***

**Mr. Ngatia** stated the fact emerging from the several supporting affidavits, that before the new enactment's date of commencement, there were many suits pending, founded on the repealed Workmen's Compensation Act. Employers, who were generally the defendants in such suits, counsel noted, have now invoked s.58(2) of the Work Injury Benefits Act, 2007 to *stop* the suits. In counsel's own words:

*“The Gazette [i.e. Kenya Gazette published on 18<sup>th</sup> January, 2008] has, in effect, created a new defence. This is oblivious of the progress in those suits, even those which had reached execution stage; so, even decrees [of trial Courts] are suspended.”*

The plaintiffs in such suits, learned counsel urged, had been restrained in their *use of the judicial process* to resolve their claims, without being accorded some other forum where their pending suits could be resolved. The effect, **Mr. Ngatia** submitted, was that the Work Injury Benefits Act, 2007 had denied such suitors a legal process by which they could address their grievance.

To buttress his submission that a wrong in constitutional entitlement, affecting litigants in the several Magistrates' Court cases, had been committed in the implementation of the Work Injury Benefits Act, learned counsel drew parallels with a case from the State of New York, in the United States of America, ***The People of the State of New York (upon the complaint of John Mathews) v. Thomas Toynebee***, 2 Parker Crim. Rep. 490. The comparability between the two situations, and such merits as may be found in the case relied on, however, must await the hearing and determination of the main cause; as, in general, *prima facie* scenarios of law and fact are sufficient as a basis for an interlocutory application.

As a pertinent point of law and constitutional principle, counsel urged that the decree of a competent Court, such as the Magistrates' Courts, in relation to the instant matter, confers upon a party *rights of a proprietary nature*, and no person is to be deprived of the same, much as is the case with rights to life and to liberty – without the due process of the law. Counsel thus perceived, in the tenor and effect of the aforesaid s.58(2) of the Work Injury Benefits Act, 2007, a violation of the individual's rights to property. So counsel asked that this Court do order a stay in the implementation of s.58(2) of the Act aforementioned, pending the hearing and determination of the petition. The implication would be that the pending suits would then go through hearing and determination in the normal manner.

**Mrs. Ombwayo** for the respondent, contended that the instant interlocutory application was misconceived – (i) that it was based on a misinterpretation of the law; (ii) that the applicant lacks *locus standi* in this matter; (iii) that s.58 of the Work Injury Benefits Act, 2007 does not affect pending suits, and so is not unconstitutional.

**Mrs. Guserwa**, learned counsel for the interested party, expressed support for the instant application, and urged that all work-injury cases filed before the date of commencement for the Work Injury Benefits Act (20<sup>th</sup> December, 2007) should continue to be litigated under the repealed Workmen's Compensation

Act, and that only suits arising after that date should be filed under the provisions of the new enactment. Such an interpretation of the law, counsel urged, would save s.58(2) of the new Act from being found to be unconstitutional.

**Mr. Ngatia** in his reply contested the contention that the applicant lacks *locus standi* to maintain the petition and the instant application. He submitted that the status and character of the applicant was defined in the *Law Society of Kenya Act (Cap. 18, Laws of Kenya)* and, by s.4(c) of that Act, the applicant is mandated to “assist the Government and the Courts in all matters affecting legislation”; by s.4(d) of the Act the applicant is obligated to represent members of the legal profession in Kenya regarding conditions of practice of law or any matter related thereto; by s.4(e) of the Act, the applicant has the mandate to “protect and assist the public in Kenya” in all matters related to law – and such “law” includes *statutes* enacted by Parliament; the applicant is, besides, an *employer* within the meaning set out in s.4 of the said Work Injury Benefits Act, 2007; thus, the applicant is directly affected by the new enactment. Counsel urged that when the Subordinate Courts decline to continue hearing cases of which they are seised, as has happened since the enactment of the Work Injury Benefits Act, 2007 then it was the responsibility of the applicant, by virtue of s.4(e) of the Law Society of Kenya Act, to protect and assist members of the public. In effect, it was urged, the applicant has more than sufficient *locus standi* in the instant matter.

Learned counsel urged that the application be allowed, on a *prima facie* assessment, bearing in mind not only the merits in the facts and the law as presented, but also the elementary consideration that the Attorney-General brought no affidavit-evidence to contest the fact-basis of the applicant’s case.

It is not contested that there are many workmen’s compensation cases pending before Magistrates’ Courts throughout the country. Such cases had been brought on the basis of either the now-repealed Workmen’s Compensation Act (Cap.236, Laws of Kenya), or the common law, or both. The suitors in such cases would have been exercising their rights sounding in fundamental-rights, as secured in Chapter V of the Constitution of Kenya, and so they had *legitimate expectations* that the judicial process would handle and conclude their cases. The enactment of the Work Injury Benefits Act, 2007, so far as it goes, would be a normal exercise of the *legislative power* of the Kenyan Parliament, in accordance with the terms of s.30 of the Constitution of Kenya. There is, however, room for conflict between the Constitution’s empowerment to Parliament, on the one hand, and the Constitution’s *safeguards for the citizen’s rights*, on the other: and whenever such a conflict occurs, then, ordinarily, it is the *High Court’s mandate* to make a sensible interpretation, and to declare the correct understanding of the Constitution. The relevant questions on this point turn on the content of the Work Injury Benefits Act, 2007, and the manner in which it touches on *on-going proceedings* before the Courts of law. These are substantive questions to be resolved during the hearing of the Petition itself. But at this stage, a *prima facie* position is to be taken that those fundamental rights of the citizen which are safeguarded by the Constitution, and which are already the subject of litigation in Courts, must have an *opportunity for resolution in the normal manner*. The evidence brought before the Court is that, on-going judicial proceedings have been stopped, or held in abeyance, following the entry into force of the Work Injury Benefits Act, 2007. That would work to the detriment of the suitors, as well as harm the operational set-up in the judicial process.

Without reference to the evidence in this matter, learned respondent’s counsel, **Mr. Ombwayo** submitted:

*“[Section 58 of the Work Injury Benefits Act]..does not affect pending suits; therefore it is not unconstitutional.”*

While the issue of “constitutionality” must await the hearing and determination of the Petition, it is not apparent to me that the pending suits before the Magistrates’ Courts are *not affected*, following the publication of the commencement date for the new enactment. All the evidence shows, on the contrary, that no Magistrate’s Court has proceeded to hear and determine the relevant cases, once the defendant objected to the same by citing s.58 of the Work Injury Benefits Act, 2007. I must conclude, therefore, that the said cases have, as a consequence, lost momentum, and can no longer be relied on to answer the prayers made by the plaintiffs.

Is it the case that the applicant lacks *locus standi* to maintain the Petition and the instant application? That cannot be so, in my opinion. The language of the Law Society of Kenya Act is clear enough: the applicant has a public role and obligation to assist members of the public in understanding and benefiting from the provisions of the law; and a similar role in helping government with legislation and the application of law in the society. It is also clear, that the applicant is itself an employer, and hence has a relationship with its employees which would readily call for resolution within the scope of employer-liability. I hold, in these circumstances, that the applicant has *locus standi* to maintain both the petition, and the instant application.

Learned counsel **Mr. Ombwayo**, for the respondent, contended that the repeal of the Workmen's Compensation Act (Cap.236) by s.57 of the Work Injury Benefits Act, 2007 was of no moment – because the provision for compensation in the earlier enactment (ss.5, 7) was only for *administrative action*, and “the Court was not necessarily involved”. It does not appear to me, however, that rights defined in statute law could rightly be seen as only administrative measures; the repealed Workmen's Compensation Act did give rights which, indeed, are the basis of the many suits which had been filed in the Magistrates' Courts, and which are the basis of the Petition and the application herein.

The respondent's prayer is that “the Court should apply the principle of balance of convenience in granting interlocutory orders in such serious public-interest matters”. This falls in line with the principles that regulate the grant of interlocutory injunctions, as considered in **Giella v. Cassman Brown** [1973] E.A. 358; and these are: (i) is there a *prima facie* case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? If the first head does not yield a complete answer, the Court considers the second; and if this gives no full answer, then the Court resorts to the last option. But, as this Court has in the past noted (in **Amir Suleiman v. Amboseli Resort Limited**, Nairobi HCCC No. 1078 of 2003), *in addition* to those criteria, the Court should adopt a more intrinsic test, in the nature of a general principle; the Court “*should always opt for the lower rather than the higher risk of injustice.*”

From the foregoing review of the applicant's case ? the supporting evidence and the submissions of counsel – it is clear, I think, that the application is *prima facie* a meritorious one. On the second **Cassman Brown** criterion, I have no doubts that irreparable harm will in the first place result for the suitors whose cases before the Magistrates' Courts now stand in limbo; this harm, by inference, may be attributed to the Law Society of Kenya, the organization of Advocates who have the conduct of the pending cases; the applicant, moreover, stands to *lose integrity* as a public body of professionals statutorily charged with the duty of helping members of the public in relation to the administration of the law.

I have considered the interests of a *functioning* judicial process, in line with the dispute-resolution mandate derived from the Constitution; and I have come to the conclusion that the balance of convenience in the instant matter, stands in favour of not embarrassing that process, and thus giving fulfilment to the rights of members of the public to have their disputes resolved with finality.

I am also convinced that the *lower risk of injustice* requires that the suits now pending before the Magistrates' Courts, which have implications for the accrued rights of the suitors, ought to be resolved and concluded *without delay*.

On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act (Cap. 236, Laws of Kenya), or of the common law, or of a combination of both regimes of law, *shall continue to be prosecuted* and, in a proper case, finalised, *on the basis of the operative law prior to the entry into force of the Work Injury Benefits Act, 2007 (Act No. 13 of 2007)*.

The Petition dated and filed on 14<sup>th</sup> April, 2008 shall be listed for hearing and disposal on the basis of priority.

**Orders accordingly.**

**DATED and DELIVERED** at Nairobi this 22<sup>nd</sup> day of May, 2008.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Huka**

**For the Applicant: Mr. Ngatia**

**For the Respondent: Mr. Ombwayo**

**For the Interested Party: Mrs. Guserwa**