



REPUBLIC OF KENYA



**Andukan v Bilashaka Flowers Limited & another (Civil Appeal
E069 of 2022) [2025] KEHC 9344 (KLR) (Civ) (22 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 9344 (KLR)

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

CIVIL

CIVIL APPEAL E069 OF 2022

GL NZIOKA, J

APRIL 22, 2025

BETWEEN

JULIUS ERUMU ANDUKAN APPELLANT

AND

BILASHAKA FLOWERS LIMITED 1ST RESPONDENT

JOSEPH KUNGU MUCHIRI 2ND RESPONDENT

*(Being an appeal from the decision of Honourable Y. Barasa Senior Resident
Magistrate delivered on 15th September 2022 vide Naivasha CMCC No. E077 of 2021)*

JUDGMENT

1. By a plaint dated 23rd December 2020, the plaintiff (herein “the appellant”) sued the defendants (herein “the respondents”) seeking for judgment for:
 - a. General damages
 - b. Special damages
 - c. Costs and interest of this suit
 - d. Interest on (a) above from the date of judgment and on special from the date of filing of this suit.
2. By a statement of defence dated 23rd June 2021 the Respondent denied the claim and in addition filed a notice of preliminary objection dated 24th June 2021, on the following grounds that: -
 - a. The instant proceedings have been improperly commenced.



- b. The application filed herein is premature, bad in law, a non-starter and an abuse of the court process.
 - c. The honourable court does not have subject matter jurisdiction as the claim herein arises out of a Work Injury Benefit Act, 2007 and should be lodged with the Director of Safety and Health.
3. The preliminary objection was disposed off vide filing of submission. The applicant in submission dated 6th September 2022 argued in a nutshell as follows: -
- a. The objection is premised on the fact that the plaintiff complaint is a work claim which should have been filed with the Director of Occupational Safety and Health Services as particularized at paragraph 7-11 of the plaint.
 - b. That the plaintiff's claim is that, he was injured while in the course of work and there exists an employer/employee relationship between the parties.
 - c. That the preliminary objection relates to an issue of jurisdiction which is a point of law as discussed in the cases of JN & 5 others –vs- Board of Management of ST.G School Nairobi & Another (2017) eKLR and Owners of the Motor vessels “Lilian” S –vs- Caltex Oil(K) Ltd (1989) KLR and therefore the preliminary objection is properly before the court.
 - d. Further, section 16 of *Work Injury Benefits Act* restricts claims for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of an employee to the procedure laid down under the Act.
 - e. That section 53 confers upon the Director of Occupational Health and Safety Services adjudicative powers.
 - f. That the plaintiff has not utilized these provisions and as such the suit is incompetent, frivolous, premature and should be determined in limine.
 - g. Reference was made to the case of Samuel Kamau Macharia & Another –vs Kenya Commercial Bank Limited & 2 others (2012) eKLR and Law Society of Kenya –vs Attorney General & Another (2019) eKLR (Supreme Court of Kenya).
4. However, the preliminary objection was opposed vide a response dated 9th September 2022 to the effect that: -
- a. The deceased herein was lawfully checking the pressure under the motor vehicle registration number KBS 650 B/ZE 1402 when the driver of the said motor vehicle so negligently drove, managed and/or controlled the said motor vehicle that it ran over him and caused his “death”.
Further, it is not clear whether the afore submissions relate to this matter as the plaintiff herein did not suffer fatal injury.
 - b. That the objector has not proved that the plaintiff was an employee, hence failure to comply with the provisions of section 107 (1) of the *Evidence Act* and as discussed in the case of Evans Otieno Nyakwana –VS – Cleophas Bwana Ongaro (2015) eKLR and Casmir Nyakuru Nyaberi –vs- Mwakikar Agencies Limited (2016) eKLR.
 - c. That no document, letter of employment, a register with a record of all the objectors' employees and/or employment contract to prove that indeed the “deceased” was their employee.
 - d. The preliminary objection be dismissed



5. The trial court in its ruling dated 15th September 2022 arrived at the finding that: -
 - a. The preliminary objection raises a point of law.
 - b. The plaintiff at paragraph 4 pleads that, the plaintiff was an authorized employee of 1st defendant therefore the court lacks jurisdiction to hear the matter in view of Section 16 of the Work Injury Benefit Act.
 - c. The preliminary objection was allowed and suit struck out.
6. However, the appellant has appealed against the decision based on the following grounds: -
 - a. That the learned Trial Magistrate erred and misdirected himself in law and in fact by striking out the appellant's suit in total disregard of the appellant's pleadings, submissions and the authorities cited therein.
 - b. That the learned Trial Magistrate erred and misdirected himself in law and in fact by allowing the respondent's preliminary objection to strike out the appellant's suit.
 - c. That the learned Trial Magistrate erred in law and in fact by failing to appreciate that the appellant's suit is a hybrid suit both on negligence and on breach of contract.
 - d. That the learned trial Magistrate erred in law and in fact by upholding the appellant's preliminary objection and holding that it had no jurisdiction to handle the matter. The claim arose from a road traffic accident under an employment relationship.
7. The appeal was disposed of vide filing of submission. The appellant in submissions dated 9th June 2023 conceded that there was an employment relationship between himself and the respondents, but contended that the suit is a hybrid claim under both negligence and breach of contract, having been a road traffic accident in the course of employment.
8. He argued that where a road traffic accident occurs in the course of employment, the same should be decided as a road traffic case as opposed to a work injury as there is a lacuna in the law.

The appellant relied on the case(s) of Simiyu Daniel –vs- Benson Muli Makau (2020) eKLR and Petronilla Tsisika Anyanda (suing as the administrator and personal representative of the Estate of Philip Luvale Mwanje) vs Butali Sugar Company Limited (2019) eKLR where the High Court and the Employment and Labour Relations Court determined an appeal arising from a road traffic case where there was an employment relationship between the parties.
9. He further argued that, the Chief Justice in practice directions under Legal Notice No. 5476 of 28th April 2023, gave directions on how to dispose off WIBA matters already instituted in court and that, the appellant has a legitimate expectation to be heard on the claim.
10. The appellant submitted that the provisions of section 16, 23 and 53 of WIBA violate the spirit of *the Constitution* of Kenya 2010 and more precisely Article 159 which provides judicial authority vests and shall be exercised by courts and tribunals established under *the Constitution* of Kenya.
11. That the Office of the Director created under section 53 of WIBA is neither a Court nor a Tribunal but is an appointee of the executive arm of the Government and therefore lacks the authority to receive, investigate and adjudicate complaints, is in breach of the doctrine of separation of powers.



12. Further, there is lack of a clear structure for the establishment of the Office of the Director and in any case, it has not been operational, infringing on litigants' right to access justice and the right to fair hearing under Article 48 and 50 of *the Constitution* of Kenya respectively.
13. That in addition, Section 26 of WIBA provides a limitation period to bring a cause of action to one (1) year from the date of an accident unless notice has been given to the Director under section 21 of WIBA. That the provision impacts cases filed between the year 2007 and the present case, during which period WIBA was declared unconstitutional and cases arising therefrom were adjudicated by the Magistrates and the Employment and Labour Relations Courts. That the present case is already over the limitation period and amounts to taking away his right to the cause of action arbitrarily.
14. Furthermore, Part V of WIBA makes the earnings of an injured employee an integral part of determining compensation contravening common law and generally accepted international principle that similar injuries should attract similar compensation for pain and suffering denigrating the right against discrimination and right to human dignity under Article 27 and 28 of *the Constitution*
15. Furthermore, section 58 of WIBA provides for retroactivity by providing that any claim in respect of an accident or disease occurring before commencement of the Act is subject to the Act.
16. The appellant submitted that he had a legitimate expectation that, having filed the matter in the trial court that it would be heard and determined, and that it would be prejudicial if he was directed to a forum that is not operational leaving his hands tied without any redress.
17. However, the respondent in submissions dated 7th June 2023 argued that the preliminary objection was properly before the court as it raised issue of the jurisdiction of the trial court. That jurisdiction is not a matter of judicial discretion, since where a court lacks jurisdiction it lacks the latitude to deal with the matter further, as held by the Court of Appeal in Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited [1989] KLR 1.
18. Further, jurisdiction is a pure point of law aptly defined in the case of JN and 5 Others vs Board of Management of St. G School Nairobi and Another [2017] eKLR where the High Court stated that a point of law is a question that is answered by applying relevant legal principles to interpretation of the law.
19. Additionally, the objection to the trial court's jurisdiction was premised on the fact that the appellant's claim is a work injury claim as particularized in paragraphs 7 to 11 of the plaint and the plaintiff's witness statement and therefore there were no facts that required to be ascertained.
20. The respondent submitted that the trial court lacked the jurisdiction to hear and determine the appellant's claim as the nature of the subject matter was a work injury claim as particularized in paragraphs 5 and 7 of the appellant's plaint that established an employer–employee relationship between him and the respondents.
21. That section 16 of WIBA restricts recovery of damages in respect of occupational damages or diseases resulting in disablement or death of an employee to the provisions of the Act. Further, under section 53 of WIBA the adjudicative power lies with the Director of Occupational Health and Safety Services and therefore the appellant ought to have utilized the provided for mechanism and relied on the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR where it was stated that, where there is a clear procedure for redress of a grievance prescribed by *the Constitution* or an Act of Parliament, it should be strictly followed.
22. Further, reliance was placed on the case of Law Society of Kenya vs Attorney General & Another [2019] eKLR where the Supreme Court of Kenya noted that section 16 of WIBA does not limit the right to



- access court by an aggrieved party but is the initial point of call for decisions in workers compensation allowing alternative dispute resolution mechanisms to be invoked before approaching the court.
23. That in addition, the suit was dated 23rd December 2020 and filed on 10th February 2021 which was after the Supreme Court's decision that was rendered on 3rd December 2019, therefore there was no legitimate expectation that the trial court had jurisdiction to hear and determine the suit in the first instance.
 24. Be that as it were, I note that the appellant in his submissions delved into the issues of constitutionality of the provisions of section 16 23 and 53 of WIBA and the authority of the court's under Article 159 of *the Constitution*.
 25. With due respect the other issues discussed in the submissions on the office and non-operationalization of the office the Director under section 53 of WIBA, section 26 of WIBA on period of limitation of actions, the test of reasonability and substantive justice, and expansive discussion on WIBA and Constitution of Kenya were not before the trial court and cannot be the subject of this appeal.
 26. Be that as it were, this matter was rather straight forward on only one issue as to whether the court had the jurisdiction to hear and determine the plaintiff's suit.
 27. In my considered opinion the guiding factor was the pleading. The trial court needed to look at the pleading, basically the plaint. I realize that the trial court relied purely on the issue of the relationships between the parties and arrived at the conclusion that it had no jurisdiction. However, a reading of the plaint indicates that the plaintiff's claim is based on both the tort of negligence and contract as evidenced by the content of paragraphs 5 to 11 of the plaint where the plaintiff pleads to particulars of negligence and breach of contract.
 28. Further from the parties to the suit, the 2nd defendant did not have an employment contract with the plaintiff therefore the suit against the 2nd defendant cannot be based on WIBA provision. Consequently the suit could not have been fully struck out more so when the 2nd defendant did not challenge the claim. Furthermore, the only way the nature of the claim could be fully appreciated was after hearing the evidence in support thereof.
 29. It is also noteworthy that Article 48 of *the constitution* of Kenya guarantees each person a right to access justice. It states

“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”
 30. Similarly, Article 159 of *the Constitution* of Kenya implores upon the court to promote substantive justice.

Finally, striking out of the suit is a draconian act and should be resulted to as a last action as held by the Court of Appeal in Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission, & others [2013] KECA 113 (KLR) that: -

“The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases.
 31. The upshot is that the ruling is set aside, suit reinstated and ordered be heard expeditiously.



32. However, as obiter dicta and without delving into the merit of the matter, I observe that the rain in this matter was caused by the appellant whose pleadings are rather convoluted as it is based on both contract and tort.
33. Further, while canvassing the preliminary objection the appellant simply shifted the burden to the respondent to prove the employment relationship between the parties. It is not surprising that the trial court relied on the issue. I say no more.
34. Consequently, costs of the appeal not awarded to the appellant
35. It is so ordered

DATED, DELIVERED AND SIGNED THIS 22ND DAY OF APRIL 2025

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Kiberenge for the appellant

Mr. Muriithi holding brief for Kisila for respondent

Mr. Dennis: court assistant

