Musau v Premier Industries Ltd (Civil Suit 630 of 2009)
[2024] KEHC 8237 (KLR) (Civ) (20 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8237 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 630 OF 2009

CW MEOLI, J

JUNE 20, 2024

BETWEEN

BONIFACE MUTINDA MUSAU ..... PLAINTIFF

AND

PREMIER INDUSTRIES LTD ..... DEFENDANT

RULING

1. The background to the Preliminary Objection dated 12.04.2024, raised by Premier Industries Ltd (hereafter the Defendant) is as follows. Boniface Mutinda Musau (hereafter the Plaintiff) via a plaint dated 16.10.2009 and amended on 31.03.2010 instituted his claim herein founded on tort of negligence. By the suit, he sought general damages for pain and suffering, loss of amenities of life, diminished capacity to earn or loss of earning capacity, and special damages his employer, the Defendant.

2. It was averred that by the terms of the employment contract and or implied term of contract and or statutory duty, and common law, the Defendant was under the obligation to take reasonable care of the Plaintiff whilst so employed, not to expose the Plaintiff to a risk of bodily injury it knew or ought to have known and or to provide safe means of work and or a safe place of work. That on 03.09.2008, the Plaintiff while working on the Defendant's molding machine was injured due to hydraulic switches problems, electrical faults and or due to the Defendant's, its servant or agent's breach of contract, statute and or negligence.

3. The Defendant filed a statement of defence dated 13.04.2010 and amended on 16.12.2022. Therein denying the key averments in the amended plaint and in the alternative asserting that the Plaintiff was paid compensation in the sum of Kshs. 283,661/- assessed by the Director of Occupational Safety and Health Services offices for 35% incapacity.

4. Prior to hearing of the suit scheduled for 17.04.2024, the Defendant filed the Preliminary Objection based on grounds that pursuant to the provisions of the *Work Injury Benefits Act*, 2007, the Court had no jurisdiction to entertain the claim; that the suit was filed in the year 2009 during the subsistence of the *Work Injury Benefits Act*, 2007 which is the applicable law and which provides that litigation related to work injuries should be handled in the first instance by the Director of Occupation Safety and Health Services and not this Court; that the suit has been lodged contrary to Section 51 and 52 of the *Work Injury Benefits Act*, 2007; and hence the entire suit is scandalous, frivolous, vexatious and otherwise amounts to an abuse of the process of the court.

5. The Preliminary Objection was canvassed by way of oral submissions. On the part of the Defendant, counsel began by pointing out that the suit was filed in 2009 during the subsistence of the *Work Injury Benefits Act*. Therefore, pursuant to the provisions of Section 2, 16 and 23 of the Act, the claim herein does not lie. Recounting that prior to the suit, a claim was first lodged before the Director of Occupational Safety and Health Services who awarded compensation to the Plaintiff. He asserted therefore that , the Plaintiff ought not to have instituted the present suit, having already accepted the said compensation and eschewing filing an objection thereto by way of file an appeal at the Employment and Labour Relations Court (ELRC).

6. Counsel citing the decision of the Supreme Court on the *Work Injury Benefits Act*, delivered in December 2022 and the resultant Practice Directions issued by the Chief Justice vide Gazette Notice No 5476 of 2023 asserted the want of jurisdiction by this court. And that the claim having been filed after the enactment of the *Work Injury Benefits Act*, ought to have proceeded before the Court's envisaged in the Chief Justice Practice Directions, if the Plaintiff was dissatisfied with the decision of the Director of Occupational Safety and Health Services. It was equally asserted that the suit was not filed in the subordinate Court and hence the Practice Directions would in any event not apply here. Counsel reiterated the Plaintiff's pleadings indicating that the matter had already been determined by Director of Occupational Safety and Health Services, and hence viewed the suit as an abuse of the Court process and liable to be struck out.

7. Counsel for the Plaintiff firstly took issue with the Defendant's failure to plead the objection in the defence statement. He took the position that the law applicable in the material period was the Workmen's Compensation Act and or Common law, the High Court having declared the *Work Injury Benefits Act* unconstitutional in 2009; that consequently parties continued to file Common law claims during the subsistence of the decision of the High Court (Ojwang, J). It was further contended that because of the confusion generated by protracted litigation relating to the *Work Injury Benefits Act*, the Chief Justice issued Practice Directions to guide the manner in which pending work related injury claims were to proceed.

8. Therefore, the said claims could not be transferred to the Director of Occupational Safety and Health Services. Moreover, at Paras. 81- 88 of the Supreme Court decision, the Court addressed itself to the legitimate expectation of litigants who had work related injury claims pending in Court. Counsel admitting that indeed a claim lodged with the Director of Occupational Safety and Health Services in 2009 had been determined however insisted that this was not a bar to the Plaintiff's claim under Common law.

9. In a brief rejoinder, counsel for the Defendant reiterated the claim accrued on 03.09.2008 while the *Work Injury Benefits Act* was operational, the determined claim before the Director of Occupational Safety and Health Services and that the Practice Directions issued by the Chief Justice relate to matters filed before the subordinate Court and not the High Court, pursuant to the decision of the Supreme

Court. Therefore, the initial jurisdiction to deal with the Plaintiff's claim lay with the Director of Occupational Safety and Health Services.

10. It was further argued that all claims filed after enactment of the *Work Injury Benefits Act* and before the Supreme Court decision were to proceed before the Magistrate's Court or the Employment and Labour Relations Court (ELRC) and not the High Court. Counsel equally maintained that if the Plaintiff was aggrieved with the decision of Director of Occupational Safety and Health Services, he ought to have appealed the decision under Section 52 of the *Work Injury Benefits Act* instead of instituting a fresh suit.

11. The Court has considered the record, the rival submissions. The Defendant's Preliminary Objection (PO) is fundamentally premised on Section 51 and 52 and ostensibly other provision of the *Work Injury Benefits Act* (hereafter the Act). Section 51 of the Act states that; -

    (1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.

    (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.

12. Section 52 of the Act on the other hand provides that; -

    (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

    (2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.

13. As to the nature of a Preliminary Objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* (1969) EA 696, Law J. A. stated:"

> " So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....
>
> A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop."

14. In the case of *Oraro v Mbaja* [2005] KLR 141, Ojwang J. (as he then was) reiterated the above by stating that:

> " A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to

be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

See also *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR.

15. Further, in *Mulemi v Angwenye & another* (Civil Appeal 170 of 2016) [2021] KECA 214 the Court of Appeal distilled the definition of a Preliminary Objection as elucidated in Mukisa Biscuits (supra) by stating as follows:-

"i) It must be a pure point of law;

ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;

iii) If argued as a pure point of law, it may dispose of the suit;

iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court's discretion".

16. The gravamen of the objection raised by the Defendant relates to the jurisdiction of this Court to entertain the suit as presented. The locus classicus on the question of jurisdiction is the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated: -

"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."

17. Further, it was held in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, that a Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. In this case, the facts surrounding the objection are agreed, and in the court's view, the Defendant's PO raises a pure point of law.

18. The history of the litigation in respect of the Act requires no elucidation. In summary, the Act was enacted into law in 2007 whereupon the Law Society of Kenya vide Nairobi HC. Petition 185 of 2008 [2009] eKLR. By the Petion the Law Society of Kenya inter alia sought orders declaring Section 7(1) & (2), 10(4), 16, 23(1), 25(1) & (3), 52(1) and 58(2) of the Act unconstitutional. Ojwang, J (as he then was) having heard the Petition, agreed with the petitioners that the Act was inconsistent with the provisions of the retired Constitution of Kenya in force prior to 2010. The Court declared the

impugned provisions of the Act to be ".....null and devoid of the status of law". This decision was subsequently set aside by the Court of Appeal in Civil Appeal No 133 of 2011 [2017] eKLR.

19. Ultimately, the legal challenges to the Act, were finally settled by the decision of the Supreme Court in Petition No 4 of 2019 [2019] eKLR. The Supreme Court decision resulted in the issuance of Practice Directions by the Chief Justice vide Kenya Gazette Notice No 5476 of 2023.

20. Thus, given the foregoing, the provisions of Section 51 and 52 of the Act cannot be read independently of Section 16 and 23 of the Act which equally speak to the question of this Court's jurisdiction to entertain the Plaintiff's suit. Section 16 and 23 of the Act provide that; -

    16. No action shall lie by an employee or any dependent 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.

    17. ...

    18. ...

    19. ...

    20. ...

    21. ...

    22. ...

    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 claim or liability in accordance with this Act.

        (2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.

        (3) An employer or employee shall, at the request of the Director, furnish such further particulars regarding the accident as the Director may require.

        (4) A person who fails to comply with the provisions of subsection (3) commits an offence.

    24 ...

21. It is undisputed that the Plaintiff's suit for damages is founded in part on the tort of negligence under common law. The pronouncements Court of Appeal in Civil Appeal No 133 of 2011, *Attorney General v Law Society of Kenya & another* [2017] eKLR and the subsequent Supreme Court decision in Petition No 4 of 2019 regarding the Act are clear. The decision of the Court of Appeal as upheld by the Supreme Court concluded with the following order: -

    "In the end, we allow the appeal to the extent that we set aside the learned Judge's orders declaring Sections 4, 16, 21 (1), 23(1), 25 (1) (3), 52 (1) (2) and 58(2) to be inconsistent with the former Constitution. The result is that only Sections 7 (in so far as it provides for the

Minister's approval or exemption) and 10 (4) are inconsistent with the former and current Constitution."

22. The pertinent portions of the judgment of the Supreme Court are reproduced in extenso below: -

> "(61) Furthermore, this Court should consider the *Constitution* 2010's provisions to help deduce whether or not the impugned provisions, when read alongside the purpose of WIBA would assist in bringing clarity and justice to the issues in contest. In doing so, a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under Section 52 an appeal mechanism to the then Industrial Court. As we previously stated in Petition No 33 of 2018, *Sammy Ndungu Waity v I.E.B.C. and 3 others* [2019] eKLR;
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> > "Where the *Constitution* or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly."
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> (62) We reiterate the above holding and in the present context therefore we further find that Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the courts, because by looking at the intention of Section 16, the purpose it fulfils is apparent. That purpose is revealed in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director? The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied.
>
> (63) Having so held, it is evident that by granting the Director authority to make inquiries that are necessary to decide upon any claim or liability in accordance with WIBA, the jurisdiction of the High Court to deal with constitutional questions and violations that may arise from such claims under Article 165 of the *Constitution* 2010 is not ousted at all. Similarly, the appellate mechanism to the Industrial Court, in the circumstances, cannot be legitimately questioned.
>
> (64) The Director's inquiries are also essentially preliminary investigations. Such mechanisms, set out by statute must be left to run their full course before a court intervenes. Not only does this simplify procedures to ensure that courts focus on substantive rather than procedural justice, but also potentially addresses the problem of backlog of cases, enhances access to justice, encourages expeditious disposal of disputes, and lowers the costs of accessing justice.
>
> (65) There is also the added benefit that inquiries by the Director inevitably means that work injuries and accidents are well captured and understood by his office. He can for example take measures or instruct his officers to hasten remedial administrative measures to avoid further occurrence of similar incidents.
>
> (66) .....

(67) .....

(68) The next issue to address is whether Section 16 is an ouster clause. .....

(69) 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.

(70) 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.

(71) We must in concluding on this issue also acknowledge, that this is a system that has been operational without complaint from employees through their union as divulged in court by the COTU for over a decade and we therefore find no reason to interfere with an already efficient system. It is our finding, therefore, that neither Section 16, 23, nor 52(1) of WIBA can be said to be inconsistent with the former Constitution or the *Constitution* 2010." (sic)

23. The final orders were to the effect that; -

> " (93) Consequently, upon our findings above, the final orders are that;
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> (i) Petition of Appeal No 4 of 2019 dated 1st February 2019 is hereby dismissed.
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> (ii) For the avoidance of doubt the determination in Civil Appeal No 133 of 2011 (Waki, Makhandia, Ouko JJ. A) is hereby upheld.
>
> (iii) ...." (sic)

24. The Plaintiff's suit was filed on 19.11.2009 after the enactment and or commencement of the Act on 02.06.2008 which repealed the Workmen's Compensation Act. However, pursuant to the decision in Nairobi HC. Petition 185 of 2008 [2009] eKLR delivered on 04.03.2009, the provisions of Section 16, 23(1) & 52 (1) & (2) of the said Act had been declared unconstitutional. Meaning that the route and mechanism of processing work related injury claims prescribed by the Act had been closed, albeit temporarily.

25. Besides, during the pendency of the appeal from the decision of the High Court, that is, Civil Appeal No 133 of 2011, *Attorney General v Law Society of Kenya & another* [2017] eKLR there were no stay orders issued in respect of the decision in Nairobi HC. Petition 185 of 2008 [2009] eKLR. Consequently, in view of the decision in Nairobi HC. Petition 185 of 2008 [2009] eKLR, at the material time, the court could entertain the suit for work related injury compensation under common law and the now repealed *Workmen's Compensation Act*. In this case, the Plaintiff having already benefitted, without objection, from compensation under the latter Act, could only approach the court

in pursuit of further damages under common law. This is part of the essence of the Practice Directions issued by the Hon. Chief Justice in 2023.

26. It is pertinent to note here that the above Practice Directions were premised for the most part, upon the matter of legitimate expectation of litigants as addressed by the Court of Appeal and the Supreme Court, specifically at Paragraphs 82 to 88 of the judgment of the latter Court. And which expectation applied to inter alia work related injury claims filed prior to the commencement of the Act and claims filed after the commencement of the Act but before the Supreme Court decision in *Attorney-General & 2 others v Ndii & 79 others; Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR).

27. In relation to the Defendant's final argument that the High Court was not among courts envisaged in the Practice Directions, the fact that the said Directions did not expressly indicate their application to the High Court or include work related injury related claims already filed in the High Court cannot be interpreted in a restrictive manner, that results in the defeat of a claim properly filed before such court, in the material period. In the court's reading it was neither the intent nor purport of the Practice Directions to divest the High Court, where already seized of such matters before it, of jurisdiction to deal with them.

28. Any reading of the Practice Directions as proposed by the Defendant would amount to a negation of the full counsel of the decision of the Supreme Court, specifically concerning the legitimate expectation of claimants such as the Plaintiff, in a bid to salvage their pending claims under the circumstances. As held in *Samuel Kamau Macharia* (*supra*), a Court's jurisdiction flows from either the *Constitution* or legislation or both. The Practice Directions were published under the aegis of the 2010 Constitution which in Article 165(3)(a), provides that the High Court has unlimited original jurisdiction in civil matters. That however is not to say that the High Court, rather than the Employment and Labour Relations Court, is the best suited court to handle the present or similar claims.

29. In the result, the Court is of the considered view that the Defendant's preliminary objection is not well taken. Accordingly, the objection is dismissed. However, the final order that commends itself in the circumstances is to direct that the suit herein be transferred to the Employment and Labour Relations Court (ELRC) in Nairobi for hearing. The costs occasioned by the preliminary objection will abide the outcome of the suit. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF JUNE 2024.

C. MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr Kaburu

For the Defendant: Mr. Onyango

C/A: Erick