



Gitue (Suing as the Administrator of the Estate of Charles Were Opado, Deceased) v Kenya Ports Authority & another (Civil Suit 95 of 2017) [2023] KEHC 21005 (KLR) (20 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 95 OF 2017
OA SEWE, J
JULY 20, 2023**

BETWEEN

GRACE WANJA GITUE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF CHARLES WERE OPADO, DECEASED) PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

INCHCAPE SHIPPING SERVICES LIMITED 2ND DEFENDANT

RULING

1. The plaintiff, Grace Wanja Gitue, commenced this action on the 12th October 2017 in her capacity as the widow of Charles Were Opado, now deceased. She explained that, at all material times, the deceased was employed as a docker by the 1st defendant, Kenya Ports Authority; and that he was on duty aboard Motor Vessel “PINE 6” on the 13th October 2014 when a hook holding a roll of coiled wire snapped, thereby causing the coil to fall on his head. She averred that the deceased died instantly as a direct result of the accident.
2. The plaintiff further averred, at paragraph 7 of her Complaint that, subsequent to the accident, the 2nd defendant wrote a Letter of Undertaking dated 20th October 2014 in consideration of, and as a condition for the release of the vessel, committing itself to pay to the 1st defendant, on behalf of the family of the deceased, Charles Opado, such sum as may be agreed upon amicably or adjudged by the Court subject to a maximum of Kshs. 10,000,000/=. She added that, it was on the basis of that Undertaking that the offending Motor Vessel “PINE 6” was allowed by the 1st defendant to sail away from the Port of Mombasa.
3. At paragraph 11 of the Complaint, the plaintiff stated that, contrary to the terms and obligations stated in the Letter of Undertaking, the 2nd defendant failed, neglected and/or refused to pay to the 1st defendant the compensation for the loss of the deceased’s life. She accordingly was constrained to file the suit for



- compensation under the [Law Reform Act](#), Chapter 26 of the Laws of Kenya, and the [Fatal Accidents Act](#), Chapter 31 of the Laws of Kenya, on behalf of the estate of the deceased.
4. The defendants filed their respective Statements of Defence denying liability herein. In the case of the 2nd defendant, it proceeded to file a notice of Motion dated 8th April 2019 seeking that the suit against it be struck out for being frivolous, vexatious and an abuse of the process of the Court. The application was however dismissed by Hon. Chepkwony, J. on 12th July 2021 on the ground that the Plaintiff does disclose a reasonable cause of action against the 2nd defendant. A Notice of Appeal for filed in that regard dated 22nd July 2021, evincing the 2nd defendant's intention to challenge the ruling.
 5. On its part, the 1st defendant pointed out that the amount payable under the WIBA had been assessed in the sum of Kshs. 4,888,320/= and paid out by the 1st defendant through its insurers. Nevertheless, the 1st defendant filed a Notice of Preliminary Objection dated 13th March 2018, contending that this Court lacks jurisdiction to hear and determine this suit pursuant to Sections 65 and 66 of the [Kenya Ports Authority Act](#), Chapter 391 of the Laws of Kenya to the extent that:
 - (a) The 1st defendant was not given notice as required.
 - (b) The suit was filed out of time; and,
 - (c) The Court is divested of jurisdiction by virtue of Section 16 of the [Work Injury Benefits Act](#), Chapter 236 of the Laws of Kenya.
 6. Accordingly, directions were given on 23rd May 2022 that the 1st defendant's Preliminary Objection be disposed of by way of written submissions. Hence, learned counsel for the 1st defendant, Mr. Turasha Kinyanjui, filed his written submissions on 25th July 2022, contending, in the main that the suit is barred from the standpoint of Section 66 of the [Kenya Ports Authority Act](#) which provides for a limitation period of 12 months for all legal proceedings against the 1st defendant. He pointed out that the suit was filed in 2018, more than 3 years from the date of accrual of the cause of action. Counsel relied on [Bob Thompson Dickens v Kenya Ports Authority & Others](#) [2017] eKLR and [Kenya Ports Authority v Cyrus Maina Njoroge](#) [2018] eKLR to underscore his argument.
 7. On the consequences of statutory time bar, Mr. Kinyanjui relied on [Rift Valley Railways \(Kenya\) Ltd v Hawkins Wagunza Musonye & Another](#) [2016] eKLR and submitted that, in this situation the relevant statute has no provision for extension of time; and therefore that the suit is a non-starter as against the 1st defendant.
 8. Further to the foregoing, Mr. Kinyanjui submitted that the jurisdiction of the Court is also expressly ousted under Section 16 of the [Work Injury Benefits Act](#), 2007. He relied on [Attorney General v Law Society of Kenya & Another](#) [2017] eKLR as well as the [Law Society of Kenya v Attorney General & Another](#) [2019] eKLR for the proposition that such disputes must first be resolved by the Director before an approach can be made to the High Court. Accordingly, counsel prayed that the 1st defendant's Preliminary Objection be upheld and the suit against the 1st defendant struck out with costs.
 9. On behalf of the 2nd defendant, Mr. Nanji filed his written submissions on 20th July 2022. He likewise relied on the [Work Injury Benefits Act](#), 2007 and submitted that the Act confers jurisdiction to the Director of Occupational Safety and Health Services to resolve such claims. He similarly made reference to [Attorney General v Law Society of Kenya](#) [2017] eKLR by the Court of Appeal and the decision of the Supreme Court on appeal, being [Law Society of Kenya v Attorney General & Another](#) [2019] eKLR among other decisions to support the posturing that this Court lacks jurisdiction to



hear and determine the plaintiff's claim against the 1st defendant as the deceased's employer; and by extension against the 2nd defendant, because the liability of the 2nd defendant flows from the liability of the 1st defendant. Counsel accordingly prayed that the suit be struck out with costs to the 2nd defendant for want of jurisdiction.

10. In response to the Preliminary Objection, Mr. Tindika for the plaintiff relied on his written submissions filed on 31st October 2022. He reiterated the background facts and pointed out that it is unseemly that the 2nd defendant has joined hands with the 1st defendant in urging the Preliminary Objection, yet it has a pending appeal before the Court of Appeal in respect of the ruling dated 12th July 2021. He submitted that, although some payment has been made pursuant to [WIBA](#) by the 1st defendant, the plaintiff's claim against the 2nd defendant in connection with the Undertaking given by the 2nd defendant is yet to be determined. He was therefore of the view that only this Court is best suited to entertain the remaining aspect of the claim; and that the two defendants are so inextricably involved in the subject undertaking as to be inseparable.
11. Further to the foregoing, Mr. Tindika urged the Court to take into account the fact that the existence of the Undertaking was not revealed to the plaintiff by the defendants until much later; and therefore that they cannot rely on limitation with a view of denying the plaintiff's a chance to be heard. He relied on [Kenya Ports Authority v Timberland \(K\) Limited](#) [2017] eKLR and [Margaret Wairimu Magugu v Karura Investment Limited & 4 Others](#) [2019] eKLR for the submission that time only began to run for purposes of limitation from the moment the plaintiff became aware of the Undertaking.
12. In respect of Section 66 of the [Kenya Ports Authority Act](#), Mr. Tindika urged the Court to find that the provision was specific to acts done in pursuance or execution of the duties of the 1st defendant under the Act. In his view, the provision has no relevance to the plaintiff's claim or the acts of fraud and concealment complained of by the plaintiff. In any event, he submitted, the two aspects of the claim, tort and contract, were brought within the respective three years and 6 years provided for in the [Limitation of Actions Act](#). He therefore urged the Court to dismiss the preliminary objection.
13. It is now trite that a preliminary point can only be raised if it consists of a pure point of law. Thus, in [Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors](#) [1969] EA 696 it was held that:

“... 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 may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
14. For good measure, Sir Charles Newbold, P. added thus, in the [Mukisa Biscuits Manufacturing Co. Ltd](#) Case:

“...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...”
15. The centrality of the issue of jurisdiction was well captured in [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1 thus:

“...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given..."

16. Having given due consideration to the grounds raised in the 1st defendant's Notice of Preliminary Objection dated 13th March 2018, as well as the written submissions presented by learned counsel, two issues emerge for determination; firstly, whether the plaintiff's suit is time barred from the standpoint of Sections 65 and 66 of the *Kenya Ports Authority Act*; and secondly, whether the Court lacks jurisdiction on account of the provisions of Section 16 of the WIBA.
17. Both Sections 65 and 66 of the *Kenya Ports Authority Act* provide for notices and consequently entail an inquiry on the part of the Court as to whether or not those provisions were complied with. For instance, Section 65 of the *Kenya Ports Authority Act* provides that:
 - (1) No person shall be entitled to compensation for non-delivery of the whole of a consignment of goods, or for any separate package forming part of such consignment, accepted by the Authority for handling or warehousing unless a claim in writing, giving such particulars as may reasonably be necessary, is given to the Managing Director within six months of the date upon which such goods were accepted by the Authority.
 - (2) No person shall be entitled to compensation for any goods missing from a packed or unpacked consignment of, or for misdelivery of, or damage to, any goods accepted by the Authority for handling or warehousing unless—
 - (a) the Managing Director is notified of such fact in writing within four days of the date upon which such goods were delivered to the consignee or person entitled to take delivery thereof; and
 - (b) a claim in writing, giving such particulars as may reasonably be necessary, is given to the Managing Director within one month of such date.
 - (3) Where the person claiming compensation proves that it was impracticable for him to notify the Managing Director, or give the Managing Director his claim, as set out in subsections (1) and (2) within the time specified therein and that such notification or claim was made or given in reasonable time nothing in those subsections shall prejudice the right of such person to obtain compensation.

18. Section 66 of the *Kenya Ports Authority Act*, on the other hand, provides that:

Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

- a. the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the



action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent;

- b. the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of continuing injury or damage, within six months next after the cessation thereof.

19. While it is the assertion of the 1st defendant that no such notices as required by the two provisions were served on it, the plaintiff insisted that her suit was filed within the time for it. She pointed out that the suit has not only been brought in tort but also in contract to enforce the Undertaking given by the 2nd defendant. It is therefore manifest that the issue of limitation, as raised by the 1st defendant is not suitable for determination as a preliminary point seeing as it is premised on disputed facts.

20. I find succor in this posturing in the decision of Hon. Ojwang, J. (as he then was) in *Oraro v Mbaja* [2005] 1 KLR 141, that:

“...A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes 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...”

21. On that score, the 1st defendant’s argument that the plaintiff’s suit was filed out of time for purposes of Section 65 and 66 of the *Kenya Ports Authority Act* is not a suitable argument to raise as a preliminary point and is therefore dismissed accordingly.

22. As to whether the Court is divested of jurisdiction by virtue of Section 16 of the *Work Injury Benefits Act*, Chapter 236 of the Laws of Kenya, it cannot be gainsaid that there have been conflicting decisions in respect of litigation touching on the interpretation of the *Work Injury Benefit Act* No. 13 of 2007. It is worth noting that in *Law Society of Kenya v Attorney General & Another* [2009] eKLR, Hon. Ojwang, J, (as he then was) declared Sections 4; 7(1) and (2); 10(4); 16; 21(1); 23(1); 25(1) and (3); 52(1) and (2); and 58 (2) of the Work Injury Benefit Act to be inconsistent with the provisions of the former Constitution.

23. On Appeal to the Court of Appeal in Civil Appeal No. 13 of 2011 (*Attorney General v Law Society of Kenya & Another* [2017] eKLR), the High Court’s decision was overturned. The Court of Appeal took the view that Sections 4; 16; 21(1); 23(1); 25(1) and (3); 52(1) and (2); and 58 (2) of the Work Injury Benefit Act are not inconsistent with the former Constitution. The Court further held that only Sections 7 (insofar as it provides for the Minister’s approval or exemption) and 10(4) are inconsistent with the former and current *Constitution of Kenya, 2010*.

24. Thereafter, in *Law Society of Kenya v Attorney General & Another* (*supra*), the Supreme Court upheld the decision of the Court of Appeal and held a follows:

“(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...

- (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...
- (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..."

25. It is therefore clear from the decision of the Supreme Court that the jurisdiction of the High Court to deal with constitutional questions and violations that may arise from the Work Injury Benefit Act is not ousted, but reinforced. Moreover, the Chief Justice has since issued Practice Directions to offer guidance on how such matters are to be handled, namely, Practice Directions Relating to Pending Court Claims Regarding Compensation for Work related Injuries and Diseases Instituted Prior to the Supreme Court Decision in *Law Society of Kenya v Attorney General and Another*, Petition No. 4 of 2019; (2019) eKLR. The import of Paragraph 7(a) of the Directions is that, on account of the doctrine of legitimate expectation, the matters filed after *WIBA* came into force but before the Supreme Court decision are to be proceeded with to conclusion where filed. As this suit falls within that category, it is plain that the arguments as to jurisdiction are untenable. It is noteworthy too that the suit also sounds well in contract and is therefore, to that extent, is properly before the Court.

26. In the light of the foregoing, I find no merit in the 1st defendant's Preliminary Objection dated 13th March 2018. The same is hereby dismissed with an order that the costs thereof be costs in the cause.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF JULY 2023

OLGA SEWE

JUDGE

