



Republic v Kisumu County Occupational Safety and Health Officer & another; Agumba (Interested Party); Chemelil Sugar Co. Limited (Exparte Applicant) (Judicial Review Application E024 of 2022) [2023] KEHC 20265 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
JUDICIAL REVIEW APPLICATION E024 OF 2022
MS SHARIFF, J
JULY 19, 2023
IN THE MATTER OF WORK INJURY BENEFITS ACT
AND
IN THE MATTER OF KISUMU COUNTY
OCCUPATIONAL SAFETY AND HEALTH OFFICER
AND
IN THE MATTER OF PRINCIPAL MAGISTRATES COURT TAMU
AND
IN THE MATTER OF AN APPLICATION BY CHEMELIL SUGAR COMPANY
LIMITED FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW
IN THE NATURE OF ORDERS OF CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC APPLICANT

AND

**KISUMU COUNTY OCCUPATIONAL SAFETY AND HEALTH
OFFICER 1ST RESPONDENT**

PRINCIPAL MAGISTRATES COURT TAMU 2ND RESPONDENT

AND

JAMES OMONDI AGUMBA INTERESTED PARTY

AND

CHEMELIL SUGAR CO. LIMITED EXPARTE APPLICANT



RULING

1. The ex-parte applicant moved this court by way of chamber summons dated 9th December, 2022 seeking;
 - a. The honourable court be pleased to grant leave to the applicant to institute judicial review proceedings in the nature of certiorari quashing the proceedings and decision of the Kisumu county occupational safety and health officer adopted by the Tamu Principal Magistrates Court on the 1st December, 2022 in miscellaneous application no. E024 of 2022 entering judgement in favour of the interested party herein as against the ex-parte applicant in the sum of Kshs 964, 742/- being the amount assessed under the work injury benefit act.
 - b. That leave granted by this court do operate as stay of award in Kisumu County Occupational Safety and Health Officer and adoption as judgement by Tamu Principal Magistrates Court on 1/12/2022 in Miscellaneous Application No. E024 of 2022 pending the hearing and determination of the intended substantive application.
 - c. The ex-parte applicant be at liberty to apply to this court for necessary and or consequential orders that the court may deem fit and just to grant.
 - d. The costs of the application be provided for.
2. Upon service, the interested party filed a Preliminary Objection dated 23rd December, 2022 raising the following grounds;
 - a. The application is time barred having been filed outside the 6 months after the decision of the 1st respondent dated 23/3/2022 as prescribed in Order 53 Rule 1(2) of the [Civil Procedure Rules](#), Section 9(3) of the [Law Reform Act](#) and section 9(1) of the [Fair Administrative Action Act](#).
 - b. The application is an abuse of the court process and section 9(2) of the [Fair Administrative Action Act](#) since the applicant did not exhaust all the remedies he had before instituting judicial review proceedings.
 - i. The applicant had 60 days under Section 51 of the [Work Injury Benefits Act](#) from March, 23, 2022 to appeal the decision of the 1st respondent but did not pursue an appeal.
 - ii. The applicant had the opportunity to be heard on the interested party's application for adoption of the assessment of the 1st respondent as a judgement of the 2nd respondent but did no challenge the same despite being aware of the hearing of the application.
3. The application was canvassed by way of written submissions. Both parties filed their respective submissions.
4. The interested party submitted that the sole issue for determination is whether the preliminary objection is merited. It is posited that the Employment and Labour Relations Court being a superior court has the requisite jurisdiction to entertain this matter by dint of Article 262(2) of [the Constitution](#). Further that under section 9(2) of the [Law Reform Act](#), the time within which to institute judicial review application is 6 months from the date of the act. The instant application was brought 9 months later without leave of the court.



5. In this regard, the provisions of Order 53 Rule 2 of the Civil Procedure Rules have been cited and the authorities in *Motokaa Nthautho V Joseph Njeru & 3 others* (2005) eKLR and *Gideon Kandagor & Philemon Kandagor (suing as the administrators of the estate of Hosea Kimeres Kandagor) v Deputy County Commissioner Baringo Central & 5 others ex parte Gideon Kandagor & another; Charkes Kigen (interested party)* (2022) eKLR.
6. The interested party also submits that the ex parte applicant did not exhaust internal remedies before approaching the court as provided for under Section 90 of the Fair Administrative Actions Act. Moreover, section 51(1) of the *Work Injury Benefits Act* requires the applicant to move the director by way of an objection before approaching the court.
7. In this limb, the interested party's contention is supported by authority in *Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly* (2022) eKLR.
8. On his part, the ex-parte applicant submits that the application is not time barred in that the award was served on the ex parte applicant on 18/9/2022 vide letter dated 15/9/2022 and the second award dated 23/3/2022 was served on the ex parte applicant on 24/3/2022. Given that the company was not aware of the existence of the 2nd award, the time started running on 18/9/2022. On this issue, counsel relies on the provisions of Order 45 Rule 2 of the Civil Procedure Rules.
9. On the issue of jurisdiction, the ex parte applicant submits that this court is properly vested with jurisdiction to hear and determine the matter. If it finds that it has no jurisdiction, it can transfer the matter to the requisite court for determination. That the ex parte applicant was injured in the course of employment and is entitled to compensation under section 10 of the *work injury benefits act*.
10. On whether the application is merited, it is submitted that the same is merited and should be allowed with costs.

Analysis and determination.

11. The first issue that emerges for determination in this application is whether this court has jurisdiction to hear and determine the matter since the matter complained of relate to work injury sustained by the interested party in the course of his employment with the interested party.
12. The issue of jurisdiction goes to the very root of the matter as was stated in *Owners of Motor Vessel "Lilian S" -Versus- Caltex Oil (Kenya) Limited* (1989) eKLR where it was held 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....”
13. The issue of jurisdiction herein relates to 2 issues; firstly, is whether the Employment and Labour Relations Court is vested with jurisdiction to entertain the matter as opposed to this court, and secondly, whether the application offends the mandatory provisions of the law requiring judicial review applications to be instituted within 6 months from the date of the decision.
14. It is instructive to note from the onset that this application emanates from an adoption of a decree by the subordinate court in a work injury claim.



15. In a ruling in *Perfect Scan Limited v Harrison Kabindi Said*- High Court Civil Appeal No.160 of 2016 at Mombasa on 08.05.2020 by P.J Otieno J, the learned judge held;

“7. From the foregoing, this Court has no hesitation that work injury claim is an employment underpinned matter and is a reserve of the exclusive jurisdiction of the Employment and Labour Relations Court and not the High Court. It is a reserve for that Court because the entire claim was grounded upon alleged breach of contract leading to the injury pleaded. Accordingly, I decline jurisdiction to hear this Appeal and therefore order that the same be transferred to the Employment and Labour Relations Court, Mombasa, for hearing and determination. 8. Costs shall abide the outcome of the appeal because the issue was raised at the instance of the Court and both parties took common stand that the Court is vested with jurisdiction.”

16. The issue herein being exactly the same as in the above stated case, I find in the circumstances that this court lacks the requisite jurisdiction to hear and entertain the matter herein.

17. It is trite law, firmly established in our jurisprudence that once a court finds that it lacks jurisdiction over a matter, it cannot take a single further step in the matter other than to down its tools.

18. In the circumstances, I am not permitted to delve further into the issue of whether the matter was barred by the mandatory provisions of the law under Order 53 Rule 2 of the Civil Procedure Rules and Section 9(2) of the *Law Reform Act*.

19. I thus find the Preliminary Objection dated 23rd December, 2022 merited and proceed strike out the Judicial review Application dated 9th December, 2022. The orders issued in the matter are hereby vacated. There shall be no orders as to costs.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 19TH DAY OF JULY 2023

MWANAISHA. S. SHARIFF

JUDGE

In the presence of:

Mr Oyuko for the ex parte applicant

Mr Jeji holding brief for Juliet Dima for the interested party.

