



**Brixton Estates Limited & another v Talam & another; Genya & another (Interested Parties) (Cause E006 of 2024) [2024] KEELRC 1358 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1358 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
CAUSE E006 OF 2024**

**M MBARŪ, J**

**JUNE 6, 2024**

**BETWEEN**

**BRIXTON ESTATES LIMITED ..... 1<sup>ST</sup> CLAIMANT**

**INTRA AFRICA ASSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**GLADYS CHEPCHUMBA TALAM ..... 1<sup>ST</sup> RESPONDENT**

**MARY MBUNGO GENYA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MURERWA MBUNGO GENYA ..... INTERESTED PARTY**

**COUNTY OCCUPATIONAL SAFETY & HEALTH OFFICE**

**MALINDI ..... INTERESTED PARTY**

**JUDGMENT**

1. The claimants were heard in the absence of the respondents and interested parties. Despite being served with the summons, only the 2<sup>nd</sup> interested party respondents through the Replying Affidavit of Joseck Peter Mwaniki filed on 9 January 2024. The court was satisfied that the respondents and 1<sup>st</sup> interested party were properly served and Affidavit of Service of Catherine Mumbua Mutua was filed, and the claimants were heard on their case.

**Claim**

2. The claimants are limited liability companies. The 1<sup>st</sup> claimant is the insured of the 2<sup>nd</sup> claimant and the 2<sup>nd</sup> claimant is licensed to carry out business as an insurance business.



3. The 1<sup>st</sup> respondent is an adult male who was the respondent in SPMCCC Bo. E180 of 2022 – Mary Mbungu Genya (suing as the legal representative of Ronald Genya) v Gladys Chepchumba. The 2<sup>nd</sup> respondent is an adult and was the legal representative of the Estate of the late Ronald Genya in SPMCCC Bo. E180 of 2022 – Mary Mbungu Genya (suing as the legal representative of Ronald Genya) v Gladys Chepchumba.
4. The 1<sup>st</sup> interested party is an adult and was the claimant in work injury benefits claim filed and determined by the 2<sup>nd</sup> interested party against the 1<sup>st</sup> claimant. The 2<sup>nd</sup> interested party is a body established under the [Occupational Safety and Health Work](#) Act to provide for the safety, health and welfare of workers and all persons lawfully present at workplaces and in this case ordered the compensation of Ksh.3, 360,000 in favour of the 1<sup>st</sup> interested party in a WIBA claim filed against the 1<sup>st</sup> claimant.
5. The claim is that the 1<sup>st</sup> claimant took out an insurance policy with the 2<sup>nd</sup> claimant under the provisions of [WIBA](#) being WIBA Policy No.20/MS/AIB2/11/WIB/0253 covering the period 5 August 2021 to 4 August 2022.
6. On 28 August 2021 the 1<sup>st</sup> claimant employee, Ronald Mbungu Geya was involved in a fatal accident collision with the 1<sup>st</sup> respondent's vehicle KCV 872G while on official duty as he was driving his motorcycle along Malindi Watamu road. After the accident, the deceased's dependants being the 1<sup>st</sup> interested party filed a claim under the [WIBA](#) seeking compensation for his death.
7. On 19 May 2022, the 2<sup>nd</sup> interested party issued a compensation award to the deceased's dependants for Ksh.3, 360,000 and issued a payment demand to the 1<sup>st</sup> claimant to settle the claim. The compensation award therefore became payable under the [WIBA](#) and the claimants were obliged to pay.
8. Before the amount could be settled, the claimants learnt that the 2<sup>nd</sup> respondent Mary Mbungu Genya, the sister to the deceased and acting on behalf of the 1<sup>st</sup> interested party had been granted a Limited Grant Ad Litem on 21<sup>st</sup> February 2022 in Kilifi SPMCC, Probate and Administration Cause E13 of 2022 and in a judgment delivered on 19 June 2023, the Court in Kilifi SPMCC No.E180 of 2022 held the 1<sup>st</sup> respondent's driver wholly liable for driving negligently and the 1<sup>st</sup> respondent vicariously liable for the negligence. The court entered judgment in favour of the Estate of the deceased and awarded Ksh.5, 254,540.
9. The claim is that the 2<sup>nd</sup> respondent acting on behalf of the 1<sup>st</sup> interested party in Kilifi SPMCC No. E180 of 2022 failed, neglected and refused to disclose to the court or the claimants that the deceased's dependants had filed a parallel claim under the [WIBA](#). Consequently, the court was not privy to the award issued and did not consider the award in its final judgment as required under Section 17(2) of [WIBA](#).
10. The provisions of Section 17(2) [WIBA](#), the claimants are entitled to recover the compensation that they are obligated to pay under the [WIBA](#) from the 1<sup>st</sup> respondent who is a third party as contemplated under the law. However, the status of execution of the judgment is unknown to the claimants and in the event the judgment sum has been paid by the 1<sup>st</sup> respondent to the Estate of the deceased, the obligation to pay the award by the 2<sup>nd</sup> interested party should not attach to the claimants as they are entitled to set off from the Estate.
11. The claimants by reason of the failure of the deceased estate to disclose the issued award under [WIBA](#) to the court and the claimants, leave the 1<sup>st</sup> claimant in danger of facing fines and imprisonment by being obliged to pay the award sum while the 2<sup>nd</sup> claimant may be liable for breach of contract.



12. The failure by the 2<sup>nd</sup> respondent to disclose the material fact of the award to the court and the claimants will result in unjust enrichment of the estate of the deceased and his dependants at the claimants' expense and result in grave injustice if the WIBA award is enforced, the claimants' action is for a declaration from the court that they are entitled to be compensated by the 1<sup>st</sup> respondent or in the alternative set off the award of the 2<sup>nd</sup> interested party from the judgment of the court in Kilifi SMPCC No.E180 of 2022 and it is not entitled to pay the demand for payment by the 2<sup>nd</sup> interested party.
13. The claimants are seeking the following orders;
- a. A declaration that the claimants are entitled to compensation recovery from the third party under Section 17(1) (b) of the Work Injury Benefits Act as the 1<sup>st</sup> respondent was found liable for the death of Ronald Mbungu in Kilifi SPMCC No. E180 of 2022.
  - b. An Order in favour of the 2<sup>nd</sup> claimant to recover the compensation award of Ksh.3, 360,000 dated 19 May 2022 issued by the 2<sup>nd</sup> interested party from the 2<sup>nd</sup> respondent.
  - c. An order declaring a priority/first equitable lien of Ksh.3, 360,000 in favour of the 2<sup>nd</sup> claimant against the decretal sum of Ksh.5, 254,540 awarded to the estate of Ronald Mbungu in Kilifi SMPCC No.180 of 2022.
  - d. In the alternative to (c) above and in the event the decretal sum has been paid to the estate of the deceased, a declaration that the 2<sup>nd</sup> claimant is entitled to a set off of the award of Ksh.3, 360,000 or the amount so paid by the 2<sup>nd</sup> respondent from the estate of the deceased in final settlement of the award and demand for payment of Ksh.3, 360,000 dated 19 May 2022.
  - e. Any other relief that the court finds fit to grant in the interest of justice.
  - f. Costs of the suit.
14. To support the claim, the claimants called Mary Kalunde the legal officer with the 2<sup>nd</sup> claimant who testified that the 1<sup>st</sup> claimant took out insurance policy with the 2<sup>nd</sup> claimant under WIBA. On 8 October 2021, the 2<sup>nd</sup> claimant received a work injury claim from the 1<sup>st</sup> claimant on the grounds that on 28 August 2021, its employee had been involved in a fatal accident while on duty. A claim was made to the 2<sup>nd</sup> interested party by the deceased's dependant and Mother, Murerwa Mbungu Genya and his two children Athuman Mbingo Ronald and Jacinta Pendo Ronald who were minors.
15. Ms. Kalunde testified that while the matter was ongoing before the 2<sup>nd</sup> interested party, the deceased sister, Mary Genya the 2<sup>nd</sup> respondent acting on behalf of the deceased estate claiming under WIBA was granted a Limited Grant Ad Litem on 21<sup>st</sup> February 2022 in Kilifi SPMCC, Probate and Administration Cause E13 of 2022 – In the Matter of the Estate of Ronald Mbungu Genya (Deceased). She then sued the 1<sup>st</sup> respondent for general damages under the Law Reform Act and the Fatal Accidents Act in SPMCC No. E180 of 2022 – Mary Mbungu Genya (suing as the legal representative of Ronald Genya) v Gladys Chepchumba and judgment delivered on 19 June 2023 and the award in favour of the deceased estate for Ksh.5, 254,540 made up as follows;
- a. General damages;
    - i. For pain and suffering Ksh.50,000;
    - ii. Loss of expectation of life Ksh.100,000;
    - iii. Loss of dependency Ksh.5,001,280;
  - b. Special damages Ksh. 103,260.



16. Ms. Kalunde testified that as the matter in court was progressing, in the WIBA case, there was an assessment and award of ksh.3, 360,000 and payment demand issued to the claimants the 2<sup>nd</sup> interested party.
17. The 2<sup>nd</sup> respondent acting on behalf of the 1<sup>st</sup> interested party in SMPCC No. E180 of 2022 failed to inform the court or the claimants that the deceased dependants had filed a parallel claim under WIBA to benefit and double-form both regimes. This commission by the 2<sup>nd</sup> respondent made the court issue an award as required under Section 17(1)(b) of WIBA which requires the claim to recover the compensation that they are obligated to pay under the law from the 1<sup>st</sup> respondent.
18. The status of the execution of the judgment and what has been paid is not disclosed and the respondents have refused to disclose the same. Unless the orders sought by the claimants are issued, great injustice will arise leading to double payment.
19. In reply, the 2<sup>nd</sup> interested party filed the Replying Affidavit of Joseck Peter Mwaniki who aver that he is the principal Occupational Safety and Health Officer currently based in Kilifi County in charge of the 2<sup>nd</sup> interested party.
20. Mr. Mwaniki aver in response that the 2<sup>nd</sup> interested party is charged with the responsibility of processing compensation for injuries sustained at work under the provisions of WIBA. The process of work injury claim lodgment and composition is outlined under Sections 22, 24 and 21 of WIBA in case of a fatal injury.
21. Upon receipt of notice of the occurrence of an accident at work, DOSH1, the directorate proceeds to investigate the accident under Section 23 of WIBA. In the case of a fatal accident, computation of work injury compensation to the dependants is done and a demand is lodged through DOSH4 with the employer while the process of identifying the dependants is initiated and upon which the amount compensable is apportioned for each under Section 36 and third schedule of the WIBA. The employer is required to provide for the payments under the breakdown.
22. Upon receipt of the demand for DOSH4, the employer is obliged to settle the claim within 90 days under Section 26 of WIBA to the dependants in case of fatal injuries, in the vent of a dispute as to the award, the aggrieved party lodges an appeal with the Directorate and after the court if dissatisfied by the director's decision under Section 51 of WIBA. Upon receipt of an appeal, the directorate makes a report and any dispute thereof proceeds to the court under Section 52 of WIBA.
23. Mr Mwaniki avers that On 23 September 2021, the 2<sup>nd</sup> interested party received notification of a fatal occupational accident that had occurred on 25 August 2021 involving an employee, Ronald Mbungu Genya. This initiated the compensation process. The dependants were identified as provided in the Certificate of Dependency DOSH6.
24. On 19 May 2022, the 2<sup>nd</sup> interested party computed and raised a demand form DOSH4 and lodged it with the 1<sup>st</sup> claimant requiring settlement of Ksh.3, 360,000 in compensation to dependants of the deceased employee. The compensation was apportioned to the dependants under Sections 36 and 20 of WIBA which prohibits compensation for work injury from forming part of an employee's estate.
25. The 1<sup>st</sup> claimant has not settled the payment and compensation to the dependants. The settlement of the claim is owing to Section 20 of WIBA should not be withheld and has nothing to do with the estate of the deceased. No objection has been raised with the 2<sup>nd</sup> interested party on the compensation due. There is no formal appeal arising from the assessment and award of compensation. No orders have been issued stopping the 2<sup>nd</sup> interested party from directing the payment.



26. As noted above, the respondents and interested parties did not attend in these proceedings.

### Determination

27. The facts herein are not contested. On 28 August 2021, Ronald Mbungu Geya (deceased) formerly employed by the 1<sup>st</sup> claimant, Brixton Estates Limited was involved in a fatal accident in a collision with the 1<sup>st</sup> respondent vehicle registration No. KCV 872G along Malindi Watamu road. The 1<sup>st</sup> claimant was covered over WIBA Policy No.20/MS/AIB2/11/WIBA/0253 for the period 5 August 2021 to 4 August 2022.
28. Following the fatal accident, the 1<sup>st</sup> interested party filed a claim under WIBA seeking compensation for his death while at work and on 19 May 2022 the 2<sup>nd</sup> interested party assessed the claim and awarded compensation at Ksh.3, 360,000 and issued a payment demand upon the 1<sup>st</sup> claimant. Due to the policy issued by the 2<sup>nd</sup> claimant, they are bound to pay the award.
29. The claimants also learnt that on 21<sup>st</sup> February 2022 the 2<sup>nd</sup> respondent, sister to the deceased had obtained Limited Grant *Ad Litem* in Kilifi SPMCC Probate and Administration Cause E13 of 2022 and had sued the 1<sup>st</sup> respondent for general damages under the Law Reform Act and Fatal Accidents Act in Kilifi SMPCC No. E180 of 2022 and obtained a judgment in favour of the estate of the deceased for the sum of Ksh.5, 254,540.
30. The claim is that the respondents and 1<sup>st</sup> interested party failed to inform the claimants of these proceedings and award of Ksh.5, 254,540 and under the provisions of Section 17(1) (b) of WIBA, they are entitled to recover compensation that they are obliged to pay from the 1<sup>st</sup> respondent who was held liable in negligence for the fatal accident of the deceased. Under the law, the 1<sup>st</sup> respondent is defined as a third party and hence the assessment by the 2<sup>nd</sup> interested party should be offset from the award of general damages awarded to the 2<sup>nd</sup> respondent for and on behalf of the estate of the deceased.
31. Under the WIBA, an employee who has died while at work, his estate is allowed to report and recover compensation from the employer. In this regard, the 1<sup>st</sup> interested party lodged a claim with the 2<sup>nd</sup> interested party as the mother of the deceased for the benefit of minor children. The 2<sup>nd</sup> interested party assessed the claim and made an award of Ksh.3, 360,000. No objection proceedings are arising out of this award. There is no appeal challenging the award and compensation.
32. Indeed, the 1<sup>st</sup> claimant filed with the 2<sup>nd</sup> interested party DOSH Form 1, a report of the fatal accident of the deceased former employee, Ronald Mbungu Genya on 23 September 2021. The 2<sup>nd</sup> interested party addressed as required and issued a demand to pay on 19 May 2022.
33. The claimants have acknowledged the demand to pay and filed DOSH/WIBA 4 received on 7 June 2022.
34. In the Replying Affidavit of the 2<sup>nd</sup> interested party, there is an acknowledgement that upon issuance of a demand notice to pay to the employer, if the same is disputed, under Section 51 of WIBA, a party is allowed to file objections or lodge an appeal with the Director. Under Section 52 of WIBA, where a party is aggrieved by the decision of the Director, an appeal should be lodged with the court. Therefore, the assessed award by the Director should be paid by the claimants.
35. Under Section 17(1) (b) of WIBA, a claim arising out of work injury caused by the negligence of a third party should be taken into account when assessing payment of an award. Under Section 17(1) (b) of WIBA requires that;

17. Claims against third parties



- (1) If an occupational accident or disease in respect of which compensation is payable was caused in circumstances resulting in another person other than the employer concerned (in this section referred to as the ‘third party’) being liable for damages in respect of such accident or disease—
  - (a) the employee may claim compensation in accordance with this Act and may also institute an action for damages in a court against the third party; and
  - (b) the employer or insurer by whom compensation in respect of that accident or disease is payable may institute an action in a court against the third party for the recovery of compensation that the employer or insurer, as the case may be, is obliged to pay under this Act.
- (2) In awarding damages in an action referred to in subsection (1)(a) the court shall have regard to the compensation paid in accordance with this Act
 

The assessed award by the Director must take into account all these circumstances. Further under the provisions of Section 17(3) and (4) of *WIBA*; an employer is allowed to recover that amount that does not exceed what is due as awarded in damage under the *WIBA*;
- (3) In an action referred to in subsection (1)(b), the amount recoverable may not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for the provisions of this Act.
- (4) For the purposes of this section, compensation includes the cost of medical aid already incurred and any amount paid or payable in accordance with the provision of section 15 and, in the case of an allowance, the capitalized value of the allowance, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such allowance.

36. Therefore, under the *Law Reform Act* and the *Fatal Accidents Act*, these being the earlier statutes must be read in the context of *WIBA* where there is a fatal injury of an employee through the act of negligence by a third party. The general damages awarded under the *Law Reform Act* and *Fatal Accidents Act* in Kilifi SPMCC. No. E180 of 2022 in the context of Section 17(1) (b) of *WIBA*, even where objections and or appeals have not been lodged, the same is relevant in making an award. Accordingly, orders sought to recover compensation award from the general damages awarded from the 1<sup>st</sup> respondent and if paid to be offset from what is awarded by the 2<sup>nd</sup> interested party is justified.
37. On costs, the claimants are urging this case after the report to the 2<sup>nd</sup> interested party who has since issued a demand for payment. Upon the report to the 2<sup>nd</sup> respondent, the claimant failed to follow through and should bear its costs.
38. Accordingly, orders sought by the claimants are justified and the claim is allowed in the following terms;
  - a. Declaration that the claimants are entitled to compensation recovery from the 1<sup>st</sup> respondent found liable in Kilifi SPMCC No. E180 of 2022.
  - b. An Order is hereby issued to the 2<sup>nd</sup> claimant to recover the compensation award of Ksh.3,360,000 assessed by the 2<sup>nd</sup> interested party from the 2<sup>nd</sup> respondent.



- c. An order declaring the first equitable lien of Ksh.3,360,000 in favour of the 2<sup>nd</sup> claimant against the decretal sum of Ksh.5,254,540 awarded to the estate of Ronald Mbungo in Kilifi SMPCC No. E180 of 2022.
- d. Where the estate has been paid at (c) above the 2<sup>nd</sup> claimant to set off the award of Ksh.3,360,000 or the amount so paid by the 2<sup>nd</sup> respondent from the estate of the deceased in the final settlement of the award.
- e. In the circumstances of the case, each party bears its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JUNE 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

