Ogol & another (Suing as the legal representatives of the Estate of Ibrahim Oketch) v Badar Hardware Limited & another (Cause E116 of 2023) [2024] KEELRC 1828 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1828 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE E116 OF 2023

AK NZEI, J

JULY 11, 2024

BETWEEN

SUSAN ADHIAMBO OGOL & ANOTHER (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF IBRAHIM OKETCH) .... CLAIMANT

AND

BADAR HARDWARE LIMITED ..... 1ST RESPONDENT

TAKAFUL INSURANCE OF AFRICA ..... 2ND RESPONDENT

RULING

1. The suit herein was instituted by the Claimants vide a statement of claim dated 3/10/2023 and filed in this Court on 30/10/2023. The Claimants are described in the suit documents as legal representatives of Ibrahim Oketch (hereinafter referred to as "the deceased"), an employee of the 1st Respondent who suffered fatal work injuries on 12/7/2021. It is further pleaded by the Claimants that compensation payable regarding the deceased was subsequently assessed by the Occupational Safety and Heath Office at kshs. 3,360,000.

2. It is the Claimants' further pleading that upon the aforesaid assessment, the 2nd Respondent, being the 1st Respondent's insurer, remitted kshs. 2,147,408 to the Claimants' representatives, leaving a balance of kshs. 1,212,592, which the Respondents have refused to pay.

3. The Claimants seek the following reliefs in the suit:-

    a. An order of specific performance compelling the Respondents to remit kshs. 1,212,592 being the balance of the award made by the Occupational Safety and Health Officer.

    b. Costs of the suit.

    c. Interest on (a) and (b) at Court rates.

4. The suit was filed contemporaneously with a Notice of Motion dated 3/10/2023 whereby the following orders are sought by the Claimants:-

   a. an order compelling the Respondents to pay kshs. 1,212,592 being the balance of the award to the deceased's dependants by the Occupational Safety and Health Officer on 25/5/2022.

   b. that costs of the application be borne by the Respondents.

5. It is clear from the foregoing that the Notice of Motion dated 3/10/2023 seeks the same reliefs as are sought in the main suit herein. The Respondents filed responses to both the claim and the application.

6. On 4/12/2023, the 2nd Respondent filed an evenly dated Notice of Preliminary Objection stating:-

   a. that this Court lacks jurisdiction to entertain this dispute in its entirety as there is no legal framework that allows this Court to entertain a first instance dispute for enforcement of an assessment decision of the Director of Occupational Safety and Health.

   b. that there is no cause of action against the 2nd Respondent because there is no direct link between it and the Claimants. That the only directly connected parties are the Respondents, and the dispute between them is commercial in nature, which dispute is beyond the jurisdiction of this Court.

   Reasons Wherefore, the 2nd Respondent prays that the entire suit against it be struck out with costs or Alternatively the 2nd Respondent be struck out from these proceedings with costs and for the dispute between the Claimants and the 1st Respondent to continue.

7. It is quite clear from the foregoing that the 2nd Respondent's preliminary objection, though appearing to challenge this Court's jurisdiction to entertain the dispute herein, does not raise a pure point of law. It alludes to lack of legal framework. In determining the issues raised in the preliminary objection, this Court will have to look at several facts and the law. Once an otherwise point of law becomes clouded with matters of fact, it ceases to be a point of law.

8. It was held as follows in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* [1969] EA 696:-

   > " 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 urgued 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."

9. Sir Charles Newbold observed as follows in the Mukisa Biscuits Case (*Supra*)

   > " ...A Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was urgued on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion..."

10. For the Court to determine the issues raised in the 2nd Respondent's preliminary objection, which reads like part of a statement of defence/response, it will have to look at all the evidential materials filed by all the parties herein against the law that the Court may find applicable. The 2nd Respondent's alleged preliminary objection does not refer to any particular provision of the law. It generally alludes to "lack of legal framework" without any single reference to any law.

11. It ought to be appreciated that pursuant to Article 162(2) (a) of the *Constitution* of Kenya 2010, this Court has jurisdiction over all matters employment and labour relations except where such jurisdiction has been expressly ousted by the statute. Regarding matters falling under the *Work Injury Benefits Act* (WIBA), this Court has jurisdiction to enforce decisions of the Director of Occupational Safety and Health Services (Director) where such a decision (award) has not been objected to or appealed against under Sections 51 and 52 of the *WIBA*. Indeed, decisions of this Court on that issue abound.

12. I held as follows in the case of *Amir Swaleh Omar v Mackenzie Maritime [e.a] Limited* [2022] eKLR:-

> " 17. The Act *(WIBA)* is silent on how the awards of compensation made by the Director in favour of employees involved in occupational accidents or who suffer occupational diseases are to be enforced. At the same time, the Act does not expressly divest this Court of jurisdiction to enforce such awards; and especially where the award of compensation by the Director has not been objected to and the employer has refused to pay the assessed compensation. Did parliament intent that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum" I do not think so.
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> 18. What would be the purpose of the Director making or undertaking inquiries in order to determine the issue of liability and proceeding to assess the compensation payable if the compensation assessed by the Director was not meant to be paid to the injured employee" In my view, once the Director assesses the compensation payable and the same is not objected to pursuant to Section 51 of the WIBA, the assessed sum becomes the injured employee's right and entitlement regarding which the employee can move to Court and seek enforcement of that right by seeking entry of judgment in terms of the Director's assessment, and issuance of a decree which can then be executed to realize that right.
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> 19. Indeed, failure by an employer to pay a demanded compensation that has been assessed by the Director and to which no objection has been lodged creates a dispute over a liquidated claim, which this Court can entertain and determine. Article 50(1) of the *Constitution* of Kenya 2010 provides:-
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>> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body."

13. In the present case, the 2nd Respondent is shown to have paid a substantial part of the sum assessed/ award made by the Director. Indeed, more than a half of the award money is shown to have been paid. The Claimants are seeking enforcement of the Director's decision/award regarding the remaining balance.

14. Regarding determination of the nature of the legal relationship/connection between the 1st and the 2nd Respondents, the Court will have to interrogate matters of fact if it were to determine the same. This cannot be the subject of a preliminary objection.

15. In sum, and having considered written submissions filed on behalf of the claimants and the 2nd Respondent, I find no merit in the 2nd Respondent's Preliminary Objection dated 4/12/2023, and the same is hereby dismissed with costs

16. Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH July 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent