

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. E987 OF 2024**

*(Before Hon. Lady Justice Agnes Kitiku Nzei)*

**WILLIAM KIVATI NDUNGA.....CLAIMANT**

*VERSUS*

**SEYANI BROTHERS AND COMPANY (K) LTD.....1<sup>ST</sup>**

**RESPONDENT**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND..3<sup>RD</sup> RESPONDENT**

**DIRECTOR, OCCUPATIONAL**

**SAFETY AND HEALTH SERVICES.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Claimant, who alleges in the suit documents herein to have been an employee of the 1<sup>st</sup> Respondent for 18 years prior to an alleged unfair termination on 2<sup>nd</sup> July, 2023, sued the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents seeking the following reliefs:-

- (i) That before hearing of the instant claim, an order do issue compelling the 4<sup>th</sup> Respondent to designate an Occupational and Health Officer to enter, inspect and examine, produce and report back to Court before hearing of the claim on all things and matters referred [to] in **Section 32 of the Occupational Safety and Health Act 2007 for the period ranging from September 2003 to July 2023.**
- (ii) That before hearing of the instant claim, an order do issue compelling the 4<sup>th</sup> Respondent to designate an Occupational Health and Safety Officer who is a medical practitioner under **Section 32K of the Occupational Safety and Health Act 2007 [as] read together with Rule (4)(1) of the Factory and Other Places of Work (Medical Examination) Rules 2005 to, inter-alia, undertake tests and examination on the Claimant:- Medical history review for the period from September 2003 to July 2023, Sputum cytology, full Haemogram, lung function tests, laboratory tests, Beryllium lymphocyte**

*proliferation test, Asbestos screening, Blood borne pathogen exposure test, Hearing test, Liver function test; and to present a detailed medical report outlining normal and abnormal results **linked to the period of his employment herein, being September 2003 to July 2023.***

*(iii) That before hearing of the instant claim, an order do issue compelling the Commissioner General of the 2<sup>nd</sup> Respondent to furnish the Court with the Claimant's returns showing payment of emoluments together with those particulars provided under **Rule 11** of the **Income Tax (PAYE) Rules** provided for under the Income Tax Act CAP 470 **for the period ranging from September 2003 to July 2023.***

*(iv) An order compelling the Managing Trustee of the 3<sup>rd</sup> Respondent to, before hearing of the claim, appoint a compliance officer pursuant to **Section 17** of the **National Social Security Fund Act CAP 258** to enter, inspect and examine, produce and report back to the Court detailing mandatory contributions, if any, by the 1<sup>st</sup> Respondent and*

the Claimant **for the period ranging from September 2003 to July 2023.**

(v) An order for immediate reinstatement to the Claimant's previous position or a comparable position as provided under **Section 45 of the Employment Act 2007.**

(vi) An order compelling the 1<sup>st</sup> Respondent, with the concurrence of the 3<sup>rd</sup> Respondent, to remit any unpaid mandatory contributions due from the Claimant and attendant penalties to the 3<sup>rd</sup> Respondent **for the period ranging from September 2003 to July 2023.**

(vii) An order compelling the 1<sup>st</sup> Respondent with the concurrence of the 3<sup>rd</sup> Respondent, to remit any unpaid Taxes-PAYE due from the Claimant and attendant penalties to the 2<sup>nd</sup> Respondent for the period **ranging from September 2003 to July 2023.**

(viii) An order compelling the 2<sup>nd</sup> Respondent to produce before the Court an Annual Tax Compliance Certificate (TCC) in favour of the

**Claimant for the period ranging from September 2003 to July 2023.**

- (ix) A declaration that the 1<sup>st</sup> Respondent's stoppage of the Claimant's salary in July 2023 was unlawful and amounted to constructive termination, and therefore an unfair dismissal under **Section 41 of the Employment Act 2007.**
- (x) A declaration that failure by the 1<sup>st</sup> Respondent to remit statutory deductions herein, being NSSF [deductions] violated provisions of the **National Social Security Fund Act 2007.**
- (xi) A declaration that the 1<sup>st</sup> Respondent's failure to remit statutory deductions to Kenya Revenue Authority violated provisions of the **Income Tax Act.**
- (xii) An order compelling the 1<sup>st</sup> Respondent to pay the Claimant one month salary in lieu of notice.
- (xiii) An order compelling the 1<sup>st</sup> Respondent to pay **Kshs.434,100/=** being the Claimant's severance pay that is equivalent to 1.5 months' salary for the 18 years of service.

(xiv) An order compelling the 1<sup>st</sup> Respondent to compensate the Claimant the equivalent of 12 months' salary for unjust termination of employment.

(xv) An order compelling the 1<sup>st</sup> Respondent to pay the Claimant the equivalent of 389 days being accrued leave days, pursuant to Section 28 of the Employment Act 2007.

(xvi) An order compelling the 1<sup>st</sup> Respondent to pay the Claimant Kshs.750,000/= being refund for direct medication during nursing for injuries sustained at the 1<sup>st</sup> Respondent's work place.

(xvii) An order compelling the 1<sup>st</sup> Respondent to pay the Claimant Kshs.3,000,000/= being compensation for work done on public holidays without overtime pay pursuant to Section **28A of the Employment Act.**

(xviii) An order compelling the 1<sup>st</sup> Respondent to pay the Claimant Kshs.7,000,000/= for anticipated further medical expenses, including reconstructive surgeries on the fingers.

(xix) An order compelling the 1<sup>st</sup> Respondent to pay the Claimant severance pay at the rate of 1.5 months' salary for every year of service, pursuant to **Section 35** of the Employment Act.

(xx) An order compelling the 1<sup>st</sup> Respondent to pay the Claimant Kshs.3,000,000/= being compensation for health negligence resulting in physical and financial harm due to failure to address hazardous working conditions.

(xxi) General damages for pain, suffering and inconvenience caused by the Respondents' actions, as determined by the Court.

(xxii) Costs.

(xxiii) Any further or other relief the Court deems fit.

2. On 2<sup>nd</sup> December, 2024, the Claimant filed a Notice of Motion dated 29<sup>th</sup> November, 2024, **seeking compelling orders against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents which are similar or substantially similar to those sought in the main suit, as set out in paragraph 1 of this Ruling.**

The Court gave directions on determination of the said

application, but before a Ruling date thereon could be reserved, the 4<sup>th</sup> Respondent filed a **Preliminary Objection regarding the main suit, dated 26<sup>th</sup> February, 2025.** On 14<sup>th</sup> May, 2025, the Court directed that the Preliminary Objection be determined in priority to the Claimant's said application. **This Ruling, therefore, determines the said Preliminary Objection.**

3. The 4<sup>th</sup> Respondent, in its Preliminary Objection dated 26<sup>th</sup> February, 2025, calls for the Claimant's suit to be struck off on grounds:-

(a) *That this Court has no Jurisdiction to entertain, to hear and/or to determine the suit herein pursuant to the provisions of **Sections 16, 23(1) and 52 of the Work Injury Benefits Act.***

(b) *That the suit, having been filed in the year 2024 during the subsistence of the Work Injury Benefits Act, ought to have been handled by the Director of Occupational Safety and Health Services at the first instance, but not this Court.*

*(c) That orders sought in the suit are a procedural and legal nullity, vexatious, mischievous and an abuse of the Court's process.*

4. Responses to the claim are shown to have been filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents. Pre-trial directions are yet to be taken pursuant to Rule 40 of the Employment and Labour Relations Court (Procedure) Rules 2024.
5. The sole issue for determination at this stage is whether this Court is seized of jurisdiction to entertain, to hear and to determine the Claimant's suit.
6. To the extent that the Claimant's suit relates to matters arising out of the alleged employment relationship between the Claimant and the 1<sup>st</sup> Respondent, this Court has jurisdiction pursuant to Article 162(2)(a) and (3) of the Constitution of Kenya 2010 and Section 12 of the Employment and Labour Relations Court Act.
7. Regarding work injuries and occupational diseases suffered by employees in the course of employment, I stated as

follows in the case of **Marcus Curvey Ojango - vs - Kenya Revenue Authority [2024] eKLR:-**

***“Pursuant to Article 162(2)(a) of the Constitution of Kenya 2010, this Court has inherent jurisdiction over all employment and labour relations matters, except where that jurisdiction is expressly ousted by the statute over particular matters specified in that statute. A good example of such a statutory provision is Section 16 of the Work Injury Benefits Act (WIBA) which expressly ousts courts’ jurisdiction to determine issues of liability and assessment of compensation payable in cases involving work injuries and occupational deceases. Section 23 mandates the Director to undertake such enquiries as may be necessary to decide upon any claim or liability in accordance with the Act; while Sections 28 and 30 of the Act make provision on assessment of compensation by the Director.”***

8. In the present case, the Director of Occupational Safety and Health Services (**Director**) is **not** shown to have determined the issues **of liability and quantum of compensation pursuant to Sections 16, 23, 28 and 30 of the Work Injury Benefits Act (WIBA)**. This Court **cannot** assume jurisdiction over the aforesaid two issues, **determination of liability and assessment of compensation payable to the Claimant**. This Court **can**, however, **enforce the Director's decision/award of compensation if the same is not objected to pursuant to Section 51 of the said Act, or is objected to and the objections and/or appeals from such objections have been determined in favour of the employee, and the employer has refused to pay the assessed compensation**.

9. In the foregoing regard, I stated as follows in this Court's decision in the case of **Amir Swaleh Omar - vs - Mackezie 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 deceases 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 intend 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.*

18. *What would be the purpose of the Director making or undertaking enquiries 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 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 realise that right.*

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:-*

***“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.”***

10. In view of all the foregoing, the Claimant's claim against the 4<sup>th</sup> Respondent as presented cannot stand, and must fall by the way side.

11. The Claimant's claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents must also fall by the way side, as the Claimant has **not** demonstrated that he has **any accrued** cause of action against the said Respondents regarding his employment. The emerging and worrying trend where parties file "**suits**" **without an accrued cause of action and subsequently seek to move the Court to compel the sued defendants to avail material that would purportedly form the basis of "a cause of action" against them (the sued defendants) must stop.** Suits must always be founded on **accrued cause of action**, unless the suit is aimed at moving the Court to issue orders **protecting an existing but threatened right or property.** Parties cannot be allowed to file prospective or anticipatory suits and to thereupon go fishing for facts to support such frivolous suits.
12. Granting the orders sought by the Claimant against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents would amount to the Court assisting one party to gather evidence against other parties named in the suit. This, the court cannot do; and has not been given

such Jurisdiction. Our legal system is an adversarial system. Section 107 of the Evidence Act provides as follows:-

**“(1) Whoever desires any court to give Judgment as to any legal right or liability depended on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”**

13. Section 108 of the Evidence Act provides as follows:-

**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

14. Having said that, and having perused the written submissions filed herein, I find merit in the 4<sup>th</sup> Respondent’s Preliminary Objection dated 26<sup>th</sup> February, 2025, and hereby allow the same in the following terms:-

**(a) The Claimant’s suit against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents is hereby struck off, with no order as to costs.**

**(b) The Claimant may, within fourteen (14) days of this Ruling, file and serve an amended Memorandum of Claim as may be appropriate.**

**(c) The suit will be mentioned in Court on 25<sup>th</sup> November, 2025 for appropriate directions.**

15. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS  
24<sup>TH</sup> DAY OF OCTOBER 2025**

**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:

Mr. Akanga for the Claimant

Miss Maina for 1<sup>st</sup> Respondent

Miss Jepkemei for 4<sup>th</sup> Respondent.

No appearance for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

ORIGINAL