



REPUBLIC OF KENYA



**Kemboi v Lomolo (1961) Limited (Cause E027 of 2023)
[2025] KEELRC 669 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 669 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E027 OF 2023
AN MWAURE, J
FEBRUARY 28, 2025**

BETWEEN

JONATHAN KIBET KEMBOI CLAIMANT

AND

LOMOLO (1961) LIMITED RESPONDENT

RULING

1. The Claimant instituted this cause vide a Memorandum of Claim dated 21st June, 2023 praying for judgment to be entered against the Respondent as follows:
 - a. General damages under the [Work Injury Benefits Act](#)
 - b. Future medical expenses at Kshs 15,000/=
 - c. Special damages
 - d. Interest on (a), (b), and (c) above.
 - e. Costs of this suit
 - f. Any other relief that this Honourable Court deems fit to grant.
2. The Respondent entered appearance through the firm of Sheth & Wathigo Advocates and filed a Notice of Preliminary Objection dated 14th February, 2024 on the following grounds that:
 1. The matter herein is a [WIBA](#) claim.
 2. The matter should be referred to the Director of Occupational Safety and Health Services before approaching court.



3. The said referral is pursuant to section 52 of the *Work Injuries and Benefits Act* and the decision of the Supreme Court in the case of *Law Society of Kenya v Attorney General & another* [2019] eKLR.
 4. The Claimant in total disregard of the law has approached this Honourable Court before referring the matter to the said Director.
 5. This Honourable Court does not have jurisdiction to hear and determine the claim herein.
3. The Notice of Preliminary Objection was disposed of by way of written submissions.

Respondent's submissions

4. The Respondent submitted that this Honourable Court lacks jurisdiction to entertain this cause. The Respondent relied on Sections 21, 51 and 52 of the *Work Injury Benefits Act* which provides as follows:

“21. Written or verbal notice of any accident provided for in section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or a notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident.

51.

- (1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.
- (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.

52.

- (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.
- (2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.”

5. In *Law Society of Kenya v Attorney General & another* [2019] eKLR KESC 16 (KLR) the Supreme Court noted that the jurisdiction to handle and determine claims under the Work Injuries and Benefits Authority lies with the Director of Occupational Safety and Health Services. The court can only entertain appeals from the Director's decisions. Section 16 should be read with Sections 23 and 52 of the Act, which provide for legal redress to the Industrial Court (now the Employment and Labour Relations Court). Aggrieved parties can seek judicial assistance from the court regarding the Director's



decisions. Thus, Section 16 is not an ouster clause but rather facilitates matters that may eventually end up in court.

6. In *Wanyama v Danree Multibandling Services Limited* [2024] KEELRC 765 (KLR) the court observed that the jurisdiction of the Court in matters related to the *Work Injury Benefits Act (WIBA)* is well established, with the court holding appellate jurisdiction under Section 52 of *WIBA*. This position was affirmed in Supreme Court Petition No 4 of 2019 (*Law Society of Kenya v The Attorney General & COTU*). The Supreme Court clarified that Section 16 of *WIBA*, when read with Sections 23 and 52 of *WIBA*, provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court), allowing aggrieved parties to seek judicial assistance from the court regarding the Director's decisions. Section 16 is not an ouster clause but facilitates the process that may eventually end up in court. Additionally, the Court has jurisdiction to enforce awards of the Director of Occupational Health and Safety (DOSHS) under Section 87 of the *Employment Act*.
7. The Respondent submitted that this cause filed before this Honourable Court is not in line with the requirements and guidelines of the law as per the provisions of the Work Injuries and Benefits Act which provides that jurisdiction on work-related claims is heard and determined by the DOSHS thus warranting that this Honourable Court lacks jurisdiction and so the claim is null and void ab initio.
8. The Respondent relied on the case of *Mukisa Biscuit Manufactures Ltd v Westend Distributors* [1969] E. A. 696 page 700 which sets out the threshold of Preliminary Objection as follows:

“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 a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration..... 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.”
9. In *Simba Platinum Ltd v Simba Coach Limited & another Asba Wanjiku Ali (Interested party)* [2021] eKLR cited the case of *Oraro v Mbaja* [2005] 1 KLR 141 Ojwang J, (as he was then) expressed himself as follows:

“....The principle is abundantly clear. 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...”
10. The Respondent submitted and emphasized that the Preliminary Objection is premised on the ground that this Honourable Court does not have jurisdiction to entertain the instant cause which is a pure point of law, and therefore, asks this Honourable Court to find that the Preliminary Objection has merit and dismiss the entire cause because this Honourable Court lacks jurisdiction.



Claimant's submissions

11. The Claimant submitted that this Honourable Court has jurisdiction to handle this cause as Section 12(a) of the [Employment and Labour Relations Court Act](#) gives it mandate to deal with matters arising or relating to employer-employee employment.
12. The Claimant relied on Article 165(3)(a) of the [Constitution](#) which gives the High Court original jurisdiction in criminal and civil matters. Article 165(6) of the [Constitution](#) bestows the High Court with supervisory jurisdiction over subordinate court over any person or body or authority exercising judicial and quasi-judicial function.
13. The Claimant submitted that he reported the incident to DOSH and DOSH responded vide a letter dated 11th March 2021 confirming that the sustained injuries were work-related and compelled the Respondent to report the accident pursuant to Section 21 of the [Occupational Safety and Health Act](#) and the [Work Injury Benefits Act](#). The Respondent's Human Resources responded to DOSH's letter stating that the Claimant sustained injuries during non-official hours thus the Respondent is not liable for the injuries he sustained. In a correspondence dated 21st December 2021, DOSH stated that upon perusal of the documents, the Respondent had a case to answer in accordance with the provision of Section 5 of the [WIBA](#).
14. In [Law Society of Kenya v Attorney General & another](#) (*supra*) the Supreme Court stated that [WIBA](#) matters have preliminary access to DOSH, however, supervisory and appellate jurisdiction lies with the Employment and Labour Relations Court. The Claimant submitted that the argument made by the Respondent is whether the injuries that the Claimant sustained occurred in the course of duty or outside working hours. Even when DOSH required the Respondent to submit the DOSH forms, it was futile.
15. The Claimant submitted that he is no longer an employee of the Respondent and this Honourable Court has jurisdiction to handle this cause. The Claimant also submitted the procedures governing [WIBA](#) do not give the Director powers on penalty or enforcement mechanics to issue or compel orders or contempt of court proceedings and this Honourable Court has supervisory jurisdiction to compel the Respondent to cooperate with DOSH and issue timelines to conclude this cause.
16. In [Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others](#) [2015] eKLR the court observed that a preliminary objection serves two main purposes: firstly, it acts as a shield for the originator by preventing unnecessary use of time and resources. Secondly, it helps conserve scarce judicial time by ensuring it is only used for deserving cases. It is improper to use a preliminary objection as a sword to win a case that should otherwise be resolved on its merits. In [Law Society of Kenya v Attorney General & another](#) (*supra*), the Supreme Court stated in paragraph 9 of its Judgement that the Director performs quasi-judicial functions under Section 23 of [WIBA](#) and falls under the supervisory jurisdiction of the High Court, according to Article 165(6) of the [Constitution](#). Therefore, the Director's actions and decisions, even without review or appeal, are subject to the High Court's overriding authority. Additionally, the Employment and Labour Relations Court has overriding authority over any quasi-judicial body.
17. The Claimant submitted that he is seeking recourse before this Honourable Court to unclog the issue and resolve it between the DOSH and the Respondent. The Claimant urged this Honourable Court to dismiss the Preliminary Objection.



Analysis and determination

18. The court has considered the preliminary objection and the submissions by both parties and the issue of determination is whether the preliminary objection is merited.
19. This Honourable Court will reiterate the case of *Mukisa Biscuit Manufactures Ltd v Westend Distributors*(*supra*) which has been precluded in the earlier part of this ruling.
20. The matters of DOSH were settled in the case of the *Law Society of Kenya v Attorney General & another* (*supra*). In this instant case, the Claimant was injured when he was appointed as manager in an acting capacity. DOSH communicated to the Respondent vide a letter dated 11th March 2021 and the Respondent did not respond or file the requisite DOSH forms. Infact a company Majani Mingi Sisal Estate wrote to the County DOSH Director by their letter dated 22nd March 2021 and stated the claimant was injured not in a work related incident. They were therefore not going to co-operate and submit the DOSH Form and so the claimant filed this case.
21. The Claimant was at liberty to report the claim to the Director directly.
Section 22(5) of the *Work Injury Benefits Act* provide as follows: -

“The provisions of this section do not prevent an employee from reporting an occupational accident or disease to the Director at any stage.”
22. The court holds it has no jurisdiction to handle this claim as it is about injury at the work place. The claimant reported the matter to Director who wrote to the Respondent and asked him to send the DOSH forms duly filled. The Director stated the injury had to be reported within the stipulated time and prescribed format.
23. The claimant had done his part and the Director as well called for the compliance by the Respondent which he did not comply.
24. It is hypocritical of the Respondent to file this Preliminary objection claiming the claimant did not report to the Director.
25. Even if the Preliminary objection is merited and is allowed the court grants the claimant leave to follow the claim with the Director for the sake of justice to be done. The court will not proceed with the claim as it were but claimant is at liberty to pursue his assessment from the Director of Occupational Safety Health (DOSH).
26. The costs of the Preliminary objection application to be paid to the claimant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF FEBRUARY, 2025.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

