



**Sarai v Easy Coach Limited (Cause E597 of 2022)  
[2024] KEELRC 195 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 195 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E597 OF 2022  
JK GAKERI, J  
FEBRUARY 12, 2024**

**BETWEEN**

**RASTO SHIUNDU SARAI ..... CLAIMANT**

**AND**

**EASY COACH LIMITED ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Respondent’s Notice of Preliminary Objection dated 18<sup>th</sup> October, 2023 seeking the striking out of the Claimant’s suit on the grounds that;
  - a. The claim filed and canvassed in the suit is fatally and incurably defective as the court lacks jurisdiction to determine the claim.
  - b. The claim to enforce the director’s award is time barred pursuant to Section 90 of the Employment Act, 2007.
  - c. The entire suit is an abuse of the process of the court and ought to be dismissed with costs.
2. In his Replying Affidavit, the Claimant deposes that the court has jurisdiction to hear and determine any issue or dispute relating to an employer and an employee and the action to enforce the first DOSHS award is not time barred having been made in 2021 and hence within 3 years.
3. That the claim to enforce the second DOSH award following the injury sustained in 2016 is not statute barred as there was a subsisting case on the accident to determine who was to blame and the Claimant was exonerated and thus entitled to compensation.
4. The Claimant prays for dismissal of the Preliminary Objection with costs as it is unmerited, unfounded and meant to derail the suit.



## Respondent's submission

5. Counsel submitted that the Claimant's claim for payment of injury benefit sustained in 2016 of KShs.500,000/= was time barred as it was filed after 3 years as it was filed on 29<sup>th</sup> August, 2022 and the Claimant had not attached documentary evidence of the alleged case on the accident or tendered other evidence.
6. Reliance was made on the sentiments of Mbaru J in *Richard Akama Nyambane V ICG Maitauro Spa* (2020) eKLR where the learned Judge declined to enforce an award filed after 3 years.
7. That the claim as pleaded was subject to the provisions of Section 90 of the *Employment Act*, 2007 and was time barred.

## Claimant's submissions

8. As to whether the court has jurisdiction to hear and determine the suit, counsel submitted that the court had jurisdiction as the court's jurisdiction to hear cases on matters employment and labour relations as set out in Article 162(2) (a) of *the Constitution* of Kenya, 2010 and Section 12 of the *Employment and Labour Relation Court Act*, 2011.
9. Counsel urged that the Preliminary Objection did not meet the test in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696.
10. Reliance was also made in *Owners of the Motor Vessel Lilian "S" V Caltex oil (Kenya) Ltd*.
11. On jurisdiction, which is the central issue of the Preliminary Objection, counsel cited Section 52(2) of the *Work Injury Benefits Act*, 2007 (herein after WIBA, 2007) on appeals against awards by the DOSHS.
12. Counsel also relied on Section 16 of *WIBA*, 2007 to urge that WIBA, 2000 did not provide for the procedure or mechanism for the enforcement of an award by the DOSHS and it would be illogical to argue that an award against which no appeal had been made was unenforceable.
13. Reliance was made on the sentiments of the court in *Ng'ang'a V County Government of Nakuru* (2023) KEELRC to urge that an award not challenged or appealed against was a debt due and payable and the court had jurisdiction to hear and determine the suit under Section 12 of the *Employment and Labour Relations Court Act*, 2011.
14. Finally, counsel urged that the 1<sup>st</sup> DOSHS award was not time barred as it was made in 2021 and in the case of the other injury, there was a subsisting case in court whose details were not availed.
15. The issue for determination is whether the Notice of Preliminary Objection dated 18<sup>th</sup> October, 2023 raises a competent Preliminary Objection and whether the same is merited.
16. In the often cited sentiments of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696, Law JA stated:

“ . . . A Preliminary Objection consists of a pure 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 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 . . . ”



17. In *G4S Security Services (K) Ltd V Joseph Kamau & 468 others* (2018) eKLR, the Court of Appeal stated;

“The test to be applied in determining whether the Preliminary Objection met the threshold as is in the Mukisa case (*Supra*) which are whether the preliminary objection raises a pure point of law, that there is a demonstration that all facts pleaded by the other side are correct and that there is no fact that needs to be ascertained.”
18. As held in legions of decisions, a Preliminary Objection raises a threshold question that requires determination at the earliest possible instance owing to its potential to dispose of the suit before its hearing and determination.
19. In the instant suit, the Respondent’s Preliminary Objection is grounded on jurisdiction of the court and limitation of time, two of the three examples used by Law JA in the *Mukisa case (Supra)*.
20. To that extent, the court is satisfied that the Notice of Preliminary Objection raises a competent preliminary objection.
21. It is common ground that jurisdiction is everything and without it, a court has no power to make any step in hearing or determining a suit before it.
22. (See *Owners of the Motor Vessels “Lilian S” V Caltex Oil (Kenya) Ltd* (1989) eKLR, [Joseph Muthee Kamau & another V David Mwangi Gitbure & another](#) (2013) eKLR, *Phoenix East Africa Assurance Co. Ltd V S.M. Thiga T/A Newspaper Services* Civ. Appeal No. 6 of 2018).
23. Significantly, Section 16 of [WIBA](#) provides that;

“No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident, or disease resulting in the disablement or death of such an employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”
24. The Claimant alleges that on 27<sup>th</sup> May, 2021, he was involved in an accident in the course of his employment and sustaining serious injuries and the DOSHS assessed the amount payable at Kshs.291,000/= but the Respondent is yet to pay the amount awarded.
25. Similarly, the Claimant alleges that on 28<sup>th</sup> October, 2016, he was seriously injured in the course of his employment and the Respondent is yet to pay for the loss assessed by the Claimant at Kshs.500,000/=.
26. Finally, the Claimant prays for damages at Kshs.200,000/=, costs and interest.
27. The Claimant prays to the court to make certain findings and make various awards after the suit is heard and determined.
28. Regrettably, the Claimant has not availed any documentary evidence of the alleged awards by the DOSHS nor any communication from the office.
29. Contrary to the Claimant’s counsel’s argument that Section 12 of the [Employment and Labour Relations Court Act](#), 2011 and 87 of the [Employment Act](#), 2007 confers upon the Employment and Labour Relations Court jurisdiction, to hear and determine the instant suit, they do not as the suit is founded on injuries sustained in the course of employment in 2016 and 2021 which fall exclusively under the domain of [WIBA](#), 2007.



30. As adverted to elsewhere in this ruling, Section 16 and other provisions of WIBA are emphatic on the mechanisms attendant to claims under WIBA, 2007.
31. Finally, under Section 52 (2) of the WIBA, 2007 a person dissatisfied with the decision of the Director may appeal to the Employment and Labour Relations Court within 30 days of receipt of the director's decision.
32. There is a school of thought that this court has no other jurisdiction, other than the appellate jurisdiction conferred by Section 52(2) of *WIBA*, 2007.
33. The other school of thought postulates that the court's jurisdiction in Employment and Labour Relations under Article 162(2) (a) *the Constitution* of Kenya, 2010 and Section 12 of the *Employment and Labour Relations Court*, 2011 is unlimited and includes adoption of awards made by the Director of Occupational Safety and Health Services.
34. Regrettably, the Claimant's suit is framed as an ordinary cause yet this is not the case as its substratum is compensation for injuries sustained by an employee, a mandate of the Director, Occupational Safety and Health Services, under *WIBA*, 2007 and Section 16 of *WIBA*, 2007 is unambiguous on this issue.
35. For the foregoing reasons, it is the finding of the court that it has no jurisdiction to hear and determine the instant suit and hereby downs its tools.
36. The Claimant is however at liberty to file a Miscellaneous Application for adoption of the DOSHS award, if any.
37. In the circumstances, it is only fair that parties bear their own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF FEBRUARY 2024**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

