



Makau v Occidental Insurance Company Limited (Cause E1069 of 2023) [2024] KEELRC 1637 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1637 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1069 OF 2023
B ONGAYA, J
JUNE 28, 2024
IN THE MATTER OF THE WORK INJURY BENEFITS ACT NO. 13 OF 2007**

BETWEEN

URBANUS MAKAU CLAIMANT

AND

OCCIDENTAL INSURANCE COMPANY LIMITED RESPONDENT

RULING

1. The Respondent herein filed the Preliminary Objection dated 05.02.2024 through J.N Muema & Co. Advocates citing the following grounds:

a) That the court lacks jurisdiction to hear and determine the present claim as section 11 of the Personal Accident Insurance Policy dated 27.06.2023 provides that in the event of a dispute arising from the policy the insured - the claimant herein shall endeavor to:

“

- (a) resolve the matter by negotiation with the Company
- (b) Any disputes or issues not resolved by negotiation 30 days after the dispute arising may be resolved through a sole mediator jointly appointed by the parties in writing
- (c) Disputes that remain unresolved 60 days after the dispute arose (unless the parties extend the period in writing) shall be resolved by a sole arbitrator appointed either by the parties in writing or in the absence of an agreement on the choice of arbitrator, by the chairperson of the



Chartered Institute of Arbitration (Kenya Branch) upon the request of any of the parties.....”

The Honourable court therefore lacks the requisite jurisdiction to hear and determine the present dispute if any as this clause preferred negotiation, mediation or arbitration as the mode of dispute resolution on any claim arising from the policy.

- (b) The Court lacks the Jurisdiction to hear and determine the present claim as framed as the entire suit offends Section 51 of the *Work Injury Benefits Act* (WIBA) which provides for objections and appeals as follows:

..... Section 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 an objection 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 question which he desires to have determined.....”

The Honourable Court therefore lacks the requisite jurisdiction to vary, amend or enlarge the award issued by the Director WIBA – Mr. James Mithanga on 14th March 2023 in line with the ML/DOSH/WIBA/FORM 4.

- (c) That the present cause as filed is incompetent and totally ill-advised as the Claimant ought to have moved the Court through a miscellaneous application to seek the enforcement of the Award – if any by the Director of WIBA instead of filing the present suit.
3. The respondent prayed that consequently the entire memorandum of claim dated 20th December, 2024 be struck out for being a total abuse of the court process and the same be dismissed with costs to the respondent.
 4. The Court issued directions that the said preliminary objection be canvassed by way of written submissions. Both parties filed their written submissions. The Court has considered the preliminary objection and parties’ respective positions and submissions and returns as follows:
 - a. The memorandum of claim filed on 21.12.2023 for the claimant through Timothy Got Ondego Advocates is based on accident said to have occurred on 20.10.2022. It was reported per the *Work Injury Benefits Act*, 2007 and the Director of Occupational Safety and Health assessed the compensation due to the claimant at Kshs.4, 094, 208.00. The re-examination report at the instance of the respondent put the compensation at Kshs. 14, 329, 728.00 and which was consequential to waiver of initial assessment by the claimant at respondent’s instance. The claim is for the court to find that the claimant is entitled to the re-assessed amount plus interest. Further that the respondent should submit to the provisions of the *Act* for realization of the reassessed amount.
 - b. In the memorandum of response to the claim, the respondent urges that the claimant never waived the initial assessment and that the applicant may be eligible for a further assessment



under the Act in view of further and future expenses the respondent may have to incur and bear under the voluntary retirement program.

- c. The Court finds that indeed, the matters in dispute about the initial assessment and subsequent assessments are within the authority of the Director under the Act and may come to the Court by way of appeal as urged in the preliminary objection. The preliminary objection will be upheld, the suit struck out, each party to bear own costs and, parties at liberty to move the Director for appropriate intervention under the Work Injury Act, 2007.

In conclusion, the preliminary objection is hereby upheld with orders:

1. The suit is struck out and each party to bear own costs.
2. Parties at liberty to move the Director for appropriate intervention under the Work Injury Act, 2007.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MACHAKOS THIS FRIDAY 28TH JUNE 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

