



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Wambugu v Director, Occupational, Health and Safety Services & another (Miscellaneous Application E030 of 2022) [2023] KEELRC 62 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 62 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E030 OF 2022**

**K OCHARO, J
JANUARY 20, 2023**

BETWEEN

PETER WAWERU WAMBUGU APPLICANT

AND

**DIRECTOR, OCCUPATIONAL, HEALTH AND SAFETY SERVICES 1ST
RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. Through a Notice of Motion Application dated 23rd February 2022, the Applicant seeks the following orders:
 - a. That this Application be certified urgent and heard on priority basis.
 - b. That this Honourable Court be pleased to give an order directing the 1st Respondent to assess compensation due and payable to the Applicant following the accident which occurred on the 29th November, 2019 within 7 days.
 - c. That the costs of this Application be provided for.
2. The Application is grounded on the grounds obtaining on the face of the Application and the affidavit sworn on the 23rd February 2022 by the Applicant.
3. The Respondent in opposition to the Application, filed a Notice of Preliminary Objection dated 8th March 2022, raising the following grounds of objection:
 - a. That this Honourable Court lacks original jurisdiction to hear and determine any dispute relating to Work Injuries Benefits.



- b. That the claim is premature, misconceived, frivolous, vexatious and an abuse of the Court process and should be struck out in limine as the same is filed without exhausting the statutorily provided mechanisms under the *Work Injuries Benefits Act, 2007*.

The Application

4. The Applicant stated that at all material times he was an employee of Blue Stones Limited as an Assistant Plant Operator. As such an employee, his duties were to operate and repair the machine for crushing rocks into ballast.
5. On the 29th day of November 2019, he got injured in the course of his said employment. He got injured to his left eye, resultantly his vision he got impaired.
6. The Applicant stated further that, following the injury, he was treated at PCEA Kikuyu Hospital. Medical examination and tests revealed a scleral perforation with loss of vision. The degree of disability was assessed at 40%.
7. The Applicant stated that he immediately notified the employer, Blue Stones Limited, of the injury. The employer instructed the Human Resource Manager to fill a WIBA claim form. The form was received by the 1st Respondent's office on the 20th December, 2019.
8. Despite the fact that the form was served and received as hereinabove stated, the 1st Respondent has never assessed the compensation payable to the Applicant or received any communication in regard thereto, from the 1st Respondent.
9. The Applicant contends that the law obligates an employer to settle a claim arising from a work injury within 90 days of the lodging of the claim. This has not happened as the 1st Respondent is yet to assess the compensation.
10. The Applicant asserts that absurdly and without any clear reason, the 1st Respondent was abdicated his responsibility as mandated by the law.
11. The Applicant argues that this Court has jurisdiction to entertain his Application herein by dint of the provisions of section 12 [1], 12 [3] and 12 [5] [b] of the *Employment and Labour Relations Court Act*.
12. The 1st Respondent should be compelled to undertake his statutory responsibility, by an order of this Court.

The Response

13. As indicated hereinabove, the Respondent opted to assail the Application, not by a replying affidavit or grounds of opposition but a Notice of Preliminary Objection.

The Applicant's Submissions

14. The Applicant proposes two principal issues for determination by this Court, thus:
 - i. Whether this Court has jurisdiction to deal with the matter.
 - ii. Whether the prayers sought should be granted.
15. It was submitted that this Court has unlimited original jurisdiction over all employment matters by dint of Article 162 [2] [a] of the *Constitution* of Kenya, and Section 12 [1] [a] of the *Employment and Labour Relations Court Act* which cloths it with the authority to deal with disputes relating to or arising out of employment between the employer and the employee.



16. The Applicant argued that this Court being a court of equal status with the High Court, it has supervisory powers over subordinate courts and quasi judicial bodies and Commissions handling employment disputes and has power under Section 12 [3] [viii] of the *Employment and Labour Relations Court Act* to grant any appropriate reliefs.
17. That contrary to what the Respondent posits, the Applicant did exhaust the mechanism provided for under the *Work Injury Benefits Act*, and more specifically under Sections 22, 23, 25 and 26.
18. The Applicant contends that the circumstances of this matter are those that the Act has not contemplated and provided for specifically. Consequently, there is a lacuna in the law. In such situation[s] the Court should exercise its inherent jurisdiction and render itself on the matter as per the dictates of justice of that matter. Reliance was placed on the decision *Samson Chweya Mwendabole vs. Protective Custody Limited* [2021] eKLR, where the Court held:

“..... there is a lacuna in law with respect to procedure for enforcement of the awards made by the Director under WIBA. However, this Court being endorsed with unlimited original and appellate jurisdiction in disputes related to Employment and Labour Relations pursuant to Article 162 [2] [a] of the Constitution and Section 12 of the Employment and Labour Relations Court Act, I hold that this Court has the inherent jurisdiction to adopt as Judgment, the Director’s award for purposes of execution. This jurisdiction should not be confused with the appellate jurisdiction which is expressly donated under Section 52 [2] of the WIBA in respect of the Director’s reply to objection made under section 51 [1] of the WIBA.”
19. Considering the right to compensation enshrined in section 10 [1] and [2] of the Act, the orders sought should be granted to enable the Applicant fully realise the same.

The Respondents’ Submissions

20. The Respondents identified two issues that emerge for determination, that:
 - a. Whether this Court has jurisdiction to hear and determine the matter.
 - b. Whether the Respondents are entitled to costs.
21. On the first proposed issue, the Respondents submitted that Section 16 of the *Work Injury Benefits Act* ousts any original jurisdiction from the Employment and Labour Relations Court, as regards Work Injury Benefits claims.
22. It was further submitted that a person aggrieved by any decision of the Director of Occupational Health and Safety has a right against a decision and if still aggrieved, he has a right to appeal to the Employment and Labour Relations Court pursuant to the provisions of section 51 [1] and 52 [1] of the Act.
23. The Applicant has not demonstrated that he ever appealed in the manner prescribed in the above stated provisions of the law.
24. According to Section 52 [3] of the WIBA Act, this Court has only the appellate jurisdiction. It has no original jurisdiction over Work Place Injury claims. To support this point, reliance was placed on the decisions in *Saidi Muhammed v. Diamond Industries Limited* [2018] eKLR, and *Paul Muthika Mulewa v. Board of Management Mbooni Boys High School* [2010] eKLR.



25. Replying on the Supreme Court decision in *Sammy Ndungu Waity v. Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR, the Respondents argued that where the Constitution or any other law establishes an organ with clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate.
26. The provisions of Section 9 [2] of the *Fair Administrative Action Act*, is instructive. Since the Applicant has not exhausted the mechanisms for appeal under the Act, this Court should not entertain the instant Application.
27. An award of costs is discretionary pursuant to section 29 of the *Employment and Labour Relations Court Act*. Ordinarily costs follow the event. The Application should be dismissed with costs.

Determination

28. The Respondent has assailed the jurisdiction of this Court to entertain, and render itself on the Application herein. Inspired by the holding in the case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil [Kenya] Limited* [1989] KLR 1, thus:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more stop. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

This Court has to render itself on the issue first.

29. The Respondents argue that Section 16 of the *Work Injury Benefits Act* divests this Court of the original jurisdiction to entertain claims arising out of workplace injuries and consequently, it cannot entertain the instant Application. Section 16 of the Act provides:

“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 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.”
30. In my respectful view, the Respondents’ Preliminary Objection in the manner brought out is totally misplaced and anchored on a deliberate or otherwise misapprehension of the Applicant’s Application and how it relates with the provisions of the Act.
31. The above stated provision is very specific on matters that the Employment and Labour Relations Court does not have original jurisdiction over, matters for recovery of damages in respect of occupational accident or disease resulting to disablement or death, and the employer’s viability.
32. Strictly speaking the instant Application does not present itself as a claim for damages, to place it under the realm of the claims contemplated under the provision. The Application before me has to do with the Director’s failure to discharge his statutory duty and the need to have him compelled by way of a court order to.
33. It is this Court’s view that where a matter by an employee does not clearly fall in the category of those contemplated under Section 16 of the Act, but seem to arise out of the matters provided for in the Act



generally, for instance the Director’s responsibilities as is the case herein, or extension of time to lodge a claim, the court’s original jurisdiction to entertain such a matter[s] has to be, looked outside the Act or, anchored on the inherent powers of the Court, as the justice of each case may demand.

34. I am therefore not persuaded by the Respondent’s position that the Court is totally devoid of jurisdiction over all the matters flowing from matters provided for under the Work Injury Benefits Act, 2007. The decision of Saidi Mobammed versus Diamond Industries Limited [2018] eKLR does not come to the aid of the Respondents’ Preliminary Objection, therefore.
35. Kenyans had a desire to have a specialized Court with both original and appellate jurisdiction in regard to employment and labour disputes. The desire was realized through the Constitution of Kenya 2010, Article 162 [2] that dictated the establishment of the court, thus:
 - (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to –
 - a. Employment and Labour Relations.
 - b.”.
36. My understanding of this provision is that the Court that was dictated to be established under Article 162 [2], was to have powers like those of the High Court, relevant to the areas as pointed out in the provision. One of the powers that come to my mind is that under a sub-article 6, the supervisory power over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.
37. This constitutional power has not been, and cannot be, ousted by the WIBA. Therefore, where the Director, a creature of the Act fails to discharge his functions as required by the Act or Acts in a manner that is ultra vires, his powers under the Act, an aggrieved person can invite the Court in an appropriate manner to invoke its supervisory jurisdiction under Article 162 [6] for instance to compel the Director to act, prohibit him or her from acting in a particular manner or at all, quash an outcome of his or her action, or simply make a relevant declaration. All these, in exercise of its original jurisdiction.
38. However, through an inappropriate manner, the Applicant seeks to have the Director compelled to discharge a function that is statutorily bestowed upon him as regards his claim, which function he has disregarded to discharge.
39. In essence therefore, the Applicant is seeking for an order of mandamus. An order of mandamus can only be sought under Article 23 [3] [f] of the Constitution pursuant to the procedure obtaining in the Mutunga Rules, or order 53 of the Civil Procedure Rules, depending on the circumstances of each case. The Applicant ought to have approached this Court under a Judicial Review Application, under order 53 of the Civil Procedure Rules. He did not, and it is upon this premise that the Court finds the Application incompetent. I so find, I am not saying that the Application is destitute of merit.
40. The Respondents substantially submitted on the appeal process under the Act and alleged that the Applicant failed to exhaust the process. I find considerable difficulty in comprehending how relevant the submissions are in view of the circumstances of the instant matter. Having said this, I disregard the same owing to the irrelevance.
41. Having found as I have hereinabove, that the Application is incompetent following the manner the Applicant has approached this Court, the same is hereby struck out with no order as to costs.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.



OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Odhiambo for the Applicant.

No appearance for the Attorney General.

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.

OCHARO KEBIRA

JUDGE

