



Chome v Mombasa Water Supply & Sanitation Co Ltd (Miscellaneous Application E031 of 2022) [2023] KEELRC 1120 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 1120 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E031 OF 2022**

**AK NZEI, J
APRIL 28, 2023**

BETWEEN

JOSEPH MUMBA CHOME APPLICANT

AND

MOMBASA WATER SUPPLY & SANITATION CO LTD RESPONDENT

RULING

1. The application before me is the Applicant's Notice of Motion dated April 13, 2022 whereby the following orders are sought:-
 - a) that the Honourable Court be pleased to adopt as judgement of this Court the award of the Directorate of Occupational Safety and Health Officer made on 28/5/2018.
 - b) that judgment be entered for the Applicant against the Respondent for the sum of ksh. 1,721,176, the sum awarded, with interest at 14% per annum from 28/5/2018 until payment in full.
 - c) that costs of the application be assessed and awarded by the Court.
2. The application is based on the Applicant's Supporting Affidavit sworn on April 13, 2022 whereby it is deponed, inter-alia:-
 - a) that the Applicant sustained an eye injury on his left eye on 31/1/2017 while in the course of employment and the matter was reported to the Respondent which then subjected itself to Work Injury Benefits Act process.
 - b) that the Applicant reported the matter to the Director of Occupational Safety and Health Services (DOSHS) who gave the Applicant Dosh/Form 1 which was then filled by the Respondent.



- c) that on 28/5/2018, the DOSH assessed the Applicant's permanent incapacity at 35% and compensation (payable) at ksh. 1,721,176, which continues to attract interest.
 - d) that the Respondent did not object or appeal the said decision within 90 days as required by the law, but instead proceeded to engage its insurance (insurers).
 - e) that the Respondent has not paid, despite reminder from the DOSH.
 - f) that this Court has unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to article 162(2) (a) of *the Constitution*, and has inherent jurisdiction to adopt as its judgment the Director's award for purposes of execution.
 - g) that the Respondent's continued refusal to pay the awarded sum amounts to injustice; considering that the substantive issue for determination of the award has been determined without opposition from the Respondent.
3. Documents annexed to the appellant's supporting affidavit and exhibited herein include copies of Dosh/Wiba 4, Dosh/Form 1 and Director's letter to the Respondent dated 29/9/2021 asking the Respondent to pay the awarded sum of ksh. 1,721,176.
 4. On November 24, 2022, the Respondent entered appearance and filed a preliminary objection dated 22nd November 2022 and a replying affidavit of one Daniel Kombe Katana, sworn on even date.
 5. Vide the Preliminary objection aforesaid, the claimant objected to this Court's jurisdiction over the application herein on grounds:-
 - a. that this Court is only vested with appellate jurisdiction under Sections 51 and 52 of the Work Injury Benefits Aft (WIBA).
 - b. that the suit falls short of the doctrine of sub-judice under section 6 of the *Civil Procedure Act* in view of a pending suit, SPMCC No. 18 of 2020 [Joseph Mumba Chome -vs- The Managing Director, Mombasa Water Supply And Sanitation Co. LTD).
 - c. that the entire suit is bad in law, fatally incompetent, unsuitable, and is an abuse of the Court's process.
 6. Matters stated in the Respondent's Preliminary Objections are reiterated in the replying affidavit of Daniel Kombe Katana, wherein it is deponed:-
 - a. that the Applicant reported an injury on his left eye and due procedure was adhered to by the Respondent.
 - b. that the Applicant has a similar suit involving the same subject matter being Mombasa PMCC No. 18 of 2020 (Joseph Mumba Chome -vs The Managing Director, Momabsa Water Supply & Sanitation Company Limited); and that this Court ought to decline the invitation to entertain the suit herein as it would offend the sub-judice rule.
 - c. that this Court is divested of jurisdiction to enforce the Director's award of ksh. 1,721,176 granted to the claimant on 25th May 2018, and that this Court can only exercise appellate jurisdiction under WIBA.
 7. It is worthy noting at the onset that the Respondent has not presented any evidence before this Court regarding the pendency or existence of the alleged Mombasa PMCC No. 18 of 2020. No proceedings or orders regarding the said suit have been exhibited in this Court.



8. The Applicant filed a further affidavit in response to the Preliminary Objection on December 13, 2022.
9. On 7th December 2022, this Court ordered that the Respondent's Preliminary Objection be taken as the Respondent's response to the application herein.
10. Parties have since filed written submissions on the application pursuant to the Court's directions in that regard, which I have considered.
11. Before delving into the issues that fall for determination in this matter, I must address an issue of law that I have noted, but which none of the parties herein raised. That is the issue of limitation. Whereas the Director's award has been shown by the applicant to have been made on 28th May 2018, the present application was not filed until 9th November 2022, over four years down the line.
12. The claimant's claim arises out of his employment with the Respondent. Section 90 of the Employment Act states as follows:-

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of a continuing injury or damage within twelve months next after the cessation thereof.”
13. In the present case, limitation period, in my view, started running four (4) months from the date of the Director's award in view of the one month appeal period provided for in section 51 of the Work Injury Benefits Act (WIBA) and the three months (90 days) provided for under Section 26(4) of the same Act. The suit herein was instituted some four (4) years and five (5) months from the date of assessment of the Director's award.
14. The Applicant's application herein ought to have been filed within three (3) years from the date the cause of action arose. The cause of action arose four (4) months after the date of the Director's award. The suit was filed over four years after the cause of action arose. It is statute-barred and cannot be entertained by this Court.
15. Consequently, the Applicant's notice of motion dated April 13, 2022 is hereby dismissed with no order as to costs.
16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH APRIL 2023

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 Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Applicant



..... for Respondent

