



**Kite v Teachers Service Commission (Cause 1186 of 2018)
[2023] KEELRC 1347 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1347 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1186 OF 2018**

**JK GAKERI, J
MAY 29, 2023**

BETWEEN

SAMMY MUTHENGI KITE CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. Before the court for determination is a preliminary objection by the Respondent dated January 23, 2023 based on the grounds that:-
 1. The claimant's suit is time barred and offends the mandatory provisions of section 90 of the *Employment Act*.
 2. This court lacks jurisdiction, in the first instance, to entertain the particulars at paragraph 14 and 15 of the Memorandum of Claim and prayers (a), (b), (c) and (e), as enumerated, the same falling within the *Work Injury Benefits Act*.
 3. The prayers sought offend the provisions of Part IV of the *Work Injury Benefits Act*.
2. The claimant filed grounds of opposition dated March 27, 2023 stating that the preliminary objection;
 1. Is frivolous, vexatious, an abuse of the court process and devoid of merit.
 2. Does not disclose any reasonable cause of action.
 3. Is a veiled attempt by the Respondent to use the judicial process as an avenue to frustrate the claimant.
 4. Is intended to delay the just and expeditious resolution of the matter.



Claimant's submissions

3. Counsel for the claimant addressed two issues;
 - i. Whether the court has jurisdiction to hear the claim and
 - ii. Whether the suit is time barred.
4. On jurisdiction, counsel submitted that on July 24, 2015, the Claimant was involved in a road traffic accident and his permanent incapacitation was assessed at 50% and relies on section 26 of the [Work Injury Benefits Act, 2007](#) (herein after WIBA) on the timeliness of filing the claim with the Director of Occupational Safety and Health Services (herein after DOSHS).
5. Reliance was made on the sentiments of Radido J. in [West Kenya Sugar Co. Ltd V Tito Lucheli Tangale](#) (2021) eKLR.
6. Counsel urged that even after filing of the DOSHS Form I, the Respondent did not compensate the Claimant.
7. Reliance was also made on the decision in Lucy Muthoni Kamande & another V Ace Freight Ltd where the court held that it had jurisdiction to hear and determine the suit under WIBA.
8. The court was urged to hold that it had jurisdiction to determine the suit.
9. On whether the suit was statute barred, counsel submitted that the Claimant was to retire on 31st July, 2016 but his retirement date was extended to 60 years due to the incapacity but the Respondent took 9 months to reinstate the Claimant despite having been informed that he was living with a disability and was therefore not paid from July 2016 to March 2017 a period of 9 months.
10. That in April 2017, the sum of Kshs.265,654/= was deducted from the Claimant's salary unlawfully.
11. Reliance was made on the provisions of section 90 of the [Employment Act](#) as well as the decision in Cyrus Obama Machina V Safaricom Ltd on the applicability of WIBA.
12. The decision in [I.E.B.C V Jane Cheperenger & 2 others](#) (2015) eKLR was also relied upon.
13. Counsel urged the court to dismiss the preliminary objection.

Respondent's submissions

14. As to whether the suit is time barred, counsel urged that the matters raised fell within the provisions of section 87 of the [Employment Act, 2007](#) and section 96 of the [Employment Act](#) was applicable.
15. That the Claimant was claiming Kshs.265,654/= from his salary after reinstatement from July 2016 to March 2017.
16. That deduction was effected for salary withdrawn for the period when the Claimant was on interdiction and 3 months suspension from November 22, 2007 to May 2008 by letter dated June 11, 2008.
17. That the deductions were a continuing injury and had to be filed within one (1) year from 11th June, 2008 and was subject to the 3 year rule but the suit was filed on 12th July, 2018, 7 years after the alleged caused of action arose and was thus statute barred.



18. Counsel urged that even the claimant's claim for salary for 9 months from July 2016 to March 2017 fell under the category of continuing injury and ought to have been filed by April 2018 but filed on July 12, 2018.
19. On jurisdiction, counsel relied on the sentiments of the courts in *Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd* (1989) KLR and *Re The Interim Independent Electoral and Boundaries Commission* (2011) eKLR among others to underscore the essence of jurisdiction.
20. The decision in *Analet Kalia Musau V Attorney General & 2 others* (2020) eKLR was relied upon to urge that jurisdiction was so essential that a court could raise the issue suo motu.
21. As regards the prayers sought, counsel submitted that since some of the prayers were based on WIBA and no claim was submitted to the Respondent for payment, and no assessment had been done by the DOSHS who had original jurisdiction to make the computations, the court had no jurisdiction to do so.
22. That the suit was a waste of court's time.
23. Reliance was made on the sentiments of Crabbe JA in *Mehta V Shab* (1965) EA 321 on the essence of limitation of time.
24. The singular issue for determination is whether there is a competent Preliminary Objection before the court and whether the same is merited.
25. In the often cited Court of Appeal decision 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 dispute arbitration . . .”
26. According to Sir Charles Newbold P.;

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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.”
27. According to the Court of Appeal in *G4S Security Services (K) Ltd V Joseph Kamau & 468 others* (2018) eKLR;

“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.”
28. 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 terminate a suit before hearing and determination.



29. In the instant suit, the respondent’s preliminary objection is grounded on limitation of time and jurisdiction which from the sentiments of the court in the Mukisa case (Supra) are competent preliminary objections.
30. To that extent, the court is satisfied that the preliminary objection before the court is competent.
31. However, the claim herein raises WIBA claims including compensation, treatment expenses and damages for pain and suffering and the suit was filed on 12th July, 2018.
32. It is elemental to ascertain whether on that date the court had jurisdiction to entertain the WIBA claims in light of the High Court and Court of Appeal decisions in Law Society of Kenya & another V Attorney General (2009) eKLR and Attorney General V Law Society of Kenya & another (2017) eKLR.
33. The claimant’s counsel relied on the sentiments of Radido J. in West Kenya Sugar Co. Ltd V Tito Lucheli Tangale (2021) eKLR on the doctrine of legitimate expectations as follows;
- “The Court of Appeal and the Supreme Court invoked the doctrine to give life and therefore render justice to the Claimants who had lodged their work injury claims with courts prior to the coming into effect of the Work Injury Benefits Act.
- In the view of this court, these litigants who filed their disputes with the courts from 22nd May, 2008 to 3rd December, 2019 on the firm belief that the judge declared law was valid law, in place then, are entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before the courts where they had lodged.”
34. From the foregoing sentiments, it is clear that neither the Court of Appeal nor the Supreme Court made a holding or determination on the fate of suits filed after the Court of Appeal decision on December 17, 2017.
35. In Law Society of Kenya V Attorney General & another (2019) eKLR, the Supreme Court stated as follows;
- “In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on . . . All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that Claimants in those pending cases have legitimate expectation that upon the passage of the Act, their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional, and an even more progressive statute, as we have shown above, we opine that it is best that all matters are finalized under Section 52 aforesaid.”
36. The Supreme Court upheld the decision of the Court of Appeal.
37. The Court of Appeal set aside the High Court’s decision declaring sections 4, 16, 21(1), 23(1), 25(1) (3), 52(1)(2) and 58 to be inconsistent with the former Constitution. Only Sections 7 (in so far as it provided for the Minister’s approval or exemption) and section 10(4) were found to be inconsistent with the former and new Constitution.
38. In other words, the provisions of Work Injury Benefits Act, 2007 other than sections 7 and 10(4) were applicable as law.



39. Since the instant suit was filed on 12th July, 2018, almost 7 months after the Court of Appeal decision and more than 6 months before the Court of Appeal decision was appealed against at the Supreme Court, the court is satisfied that operative legal regime at the time was the *Work Injury Benefits Act, 2007* and all WIBA claims herein ought to have been pursued in accordance with the provisions of *Work Injury Benefits Act, 2007*.
40. Indeed, the parties appreciated that fact and the DOSHS/FORM I was completed and was signed by the then Respondents County Human Resource Officer-Makueni, Mr. Peter Kariithi on 3rd March or May 2016.
41. It is unclear as to whether the application was processed by the DOSHS.
42. Flowing from the foregoing, it is the finding of the court that it has no jurisdiction to hear and determine the WIBA claim in the instant suit with regard to whether there are facts to be ascertained, the court is persuaded that there are indeed facts to be ascertained as regards the Claimant's employment history including when the Claimant informed the Respondent that he was a person living with a disability, his date of birth and the alleged salary deductions as submitted by the Claimant's counsel.
43. In the end, the court is constrained to agree with the claimant's counsel that since there are contested issues of fact, it would be injudicious and inopportune to declare the suit statute barred on the basis of the preliminary objection herein.
44. Consequently, the preliminary objection dated January 23, 2023 is partially successful to the extent that it relates to the court's jurisdiction to hear and determine WIBA claims but fails on the question of limitation of time.
45. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF MAY 2023

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 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 *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

