



REPUBLIC OF KENYA



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**Omutiti v Orpower 4 Inc (Employment and Labour Relations Appeal
12 of 2021) [2023] KEELRC 1974 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1974 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL 12 OF 2021
DN NDERITU, J
JULY 31, 2023**

BETWEEN

RONALD LITUNYA OMUTITI APPELLANT

AND

ORPOWER 4 INC RESPONDENT

(Being an appeal from the ruling and order of the Senior Principal Magistrate (Hon Mr. J. Karanja) delivered on 30th November, 2021, in Naivasha CMCC No. 699 of 2017)

JUDGMENT

I. Introduction

1. The Appellant herein (the Plaintiff in the lower court) commenced Naivasha CMCC No 699 of 2017 by way of a plaint dated September 26, 2017 filed in court on September 27, 2017 claiming the following –
 - a. General damages
 - b. Special damages totaling to Kshs 5,078,793.69
 - c. Cost of this suit
 - d. Interest in (a) and (b) above at the prevailing court rates
 - e. Any other relief that this court may deem just and expedient.
2. It is illustrative that prior to filing of the civil suit in lower court the Appellant had been awarded a sum of Kshs 5,078,403.69 by the Director of Occupational Safety and Health (the Director) as compensation for injuries that he had suffered while in employment and service of the Respondent (the Defendant in the lower court). As it shall come out clearly in the succeeding parts of this judgment



it is that award, inter alia, that the Appellant was intending to enforce through that suit upon adoption of the same by the trial court.

3. The Respondent entered appearance in the suit and filed a defence denying liability for the alleged injuries and the claimed general and special damages.
4. In a ruling and or directions issued on March 24, 2021 the trial lower court ordered and directed as follows –

It is hereby ordered that

1. The Plaintiff is 'non-suited' for having filed their claim herein in this court after the operationalization of the *Work Injury Benefits Act* (2007) on June 2, 2008.
 2. The Plaintiff is directed to pursue the claim using the process established under the *Work Injury Benefits Act* (2007).
 3. The proceedings herein are thus terminated to allow the Plaintiff pursue the claim as directed in Order No 2 above.
 4. The proceedings herein are thus terminated to allow the Plaintiff pursue the claim as directed in Order No 2 above.
 5. The file is hereby marked as closed.
5. On April 12, 2021, following the above ruling/directions, the Appellant (Plaintiff) filed a notice of motion dated April 9, 2021, under a certificate of urgency, seeking the following orders –
 1. That the Application be certified urgent.
 2. That the Court be pleased to vacate, review, set aside orders made on March 24, 2021 dismissing the Plaintiff/Applicant's suit for lack of jurisdiction.
 3. That the Plaintiff's suit be reinstated to hearing and decision by the Director of Occupational Safety and Health Services rendered on October 6, 2015 awarding the Plaintiff/Applicant a sum of Kshs 5,078,403.69 as against the Defendant/Respondent be adopted as a judgment of this court.
 4. That costs be in the cause.
 6. In a ruling dated and delivered on November 19, 2021 the trial court dismissed the said application stating that

'The Plaintiff is advised to heed and abide by the judgment of the Supreme Court and directions of the Chief Justice from which the orders of this court of March 24, 2021 stem and pursue his claim on(in) the appropriate forum.'
 7. The Appellant then moved to this court and filed a memorandum of appeal dated December 14, 2021 on December 15, 2021. The Appellant listed the following grounds of appeal in his memorandum –
 1. The Learned Magistrate erred in declining to enforce or adopt the award that was given by the Director of Occupational Safety and Health Services as the Judgment of the court.
 2. The Learned Magistrate erred in law and in fact dismissing the Plaintiff's suit for the enforcement of the Director's award for lack of jurisdiction.



3. The Learned Magistrate misapprehended the law in failing to adopt the Director's award of Kshs 5,078,403.69 despite being gazette to her Employment and Labour Relations matters.
4. The Learned Magistrate erred in law and in fact in failing to exercise his discretion judiciously and fairly in considering the Appellant's case that was before him and disregarded the Appellant's submissions on the facts and evidence in support thereof.
5. The Learned Magistrate erred in law and infact by ignoring the binding decisions of the higher courts thereby departing from the doctrine of stare decisis,
6. The Learned magistrate misdirected himself in dismissing the whole suit based on their reliefs sought by the Appellant and not the main relief of adoption of the Director's award.

It is proposed to request this Honourable Court for orders that:

1. That this Appeal be allowed.
 2. That the Ruling of November 30, 2021 be set aside and be substituted thereof with an order adopting the Director's award of Kshs 5,078,403.69 as a Judgment of this Court.
 3. That costs of the Appeal be borne by the Respondent.
 4. Any further relief that this Honourable Court deems fit in the interest of justice.
8. When the appeal came up in court for hearing on July 27, 2022 it was agreed and directed that the appeal be heard by way of written submissions. Mr Onyony instructed by Onyony & Co Advocates filed his written submissions on August 17, 2021 while Mr Kinyanjui instructed by Wangai Nyuthe & Co Advocates filed on August 28, 2022.

II. Issues for Determination

9. This court has carefully gone through the memorandum of appeal and the written submissions by Counsel for both parties. In my comprehensive understanding of the issues raised in the memorandum of appeal and the ruling/order that gave rise to the appeal, the learned trial magistrate struck out the suit, as opposed to dismissing the same. According to the learned magistrate, the court lacked jurisdiction to hear and determine the matter in the manner and style in which it had been filed and presented. The learned magistrate advised the Plaintiff, the Appellant, to follow and apply the laid down procedure as per the law in filing a claim for adoption of the award by the Director under the *Work Injury Benefits Act* (WIBA) in accordance with the decision of the Supreme Court in *Law Society of Kenya V Attorney General & Another (2019) eKLR*.
10. What the learned trial magistrate stated and concluded in not so few words is that he had no jurisdiction over the cause as presented to him and more so since the matter was about adoption of an award by the director. In fact, a close scrutiny of all the grounds of appeal in the memorandum of appeal as reproduced above clearly indicates that what the Appellant is complaining about is that the learned trial magistrate declined to hear and determine a matter over which the court had jurisdiction. At the heart of this appeal for determination is whether the trial magistrate had the jurisdiction over the suit as filed and presented before him. Once that issue is resolved nothing else shall be left for determination other than what orders this court may issue depending on the finding in regard to that main issue.
11. Therefore, there is only one broad issue for determination in this appeal followed by the question of what orders this court shall make arising from the determination of that main issue –
 - a. Did the trial court (lower court) have the requisite jurisdiction to hear and determine the suit?



- b. Depending on the outcome of (a) above, what orders may this court issue?
 - c. Costs
12. It is important to note that the first issue on jurisdiction was not canvassed during the trial as the court made the order on lack of jurisdiction suo motto. However, the Appellant has raised the issue on appeal and both sides have extensively addressed the court on the issue and this court has thus to make a finding on the same. This is an issue of law and Counsel for both parties have had the occasion to extensively address this court on the same in their respective written submissions.
 13. Noticeably, the outcome on this first issue shall determine the entire appeal as jurisdiction is everything – See the sentiments of Nyarangi J in *The Owners of Motor Vessel Lilian 'S' V Caltex Oil (K) LTD (1989) KLR* 1.
 14. Therefore, now that the issue of jurisdiction of the lower court to hear and determine the suit has been raised at this point, and as noted the same is a matter of law and not fact, this court shall deal with the issue and make a finding thereon. The fact that the issue of jurisdiction was not raised or pleaded in pleadings before the trial court does not render the same a non-issue. In fact, even if the issue had not been raised by either party at all this court should still have had the liberty to raise and deal with the issue suo motto.

III. Determination

15. The issue raised by the Appellant on the jurisdiction of the trial court and indeed any other court, including this court (ELRC), to hear and determine a case arising from work injury benefits and compensation has been a contested area for some time now.
16. In *Law Society of Kenya V Attorney General & Another (2009) eKLR* in a judgment delivered on March 4, 2009 Ojwang J (as he then was) declared various sections of WIBA to be in conflict and inconsistent with the then constitution of Kenya (old constitution) and hence declared the said sections null and devoid of the status of law. The said sections that were declared null and void are – Sections 4, 7(1) & (2), 10(4), 16, 21(1), 23(1), 25(1) & (3), 51(1) & (2), and 58(2).
17. Of particular relevance in this appeal are Sections 16 and 23(1) of the WIBA. In summary, Section 16 provides that no legal action for compensation shall be filed in court by an employee who alleges injury of any sort sustained at work place may it be from occupational accident or disease. Section 23(1) provides that it is the Director who shall make inquiries into such injuries and circumstances thereof and determine liability thereof and make an award, or as the case may be. Section 52 provides for remedy for a party aggrieved by the decision of the Director and the manner of finally approaching this court for adoption and enforcement of the award or otherwise.
18. The Attorney General was dissatisfied with the above judgment and approached the Court of Appeal vide Civil Appeal No 133 of 2011. In a judgment delivered on November 17, 2017 in *Attorney General V Law Society of Kenya (2017) eKLR* the Court of Appeal set aside the judgment of the High Court above and declared that all the above sections of WIBA except Sections 7 and 10(4) were constitutional and hence had status of good law.
19. The matter did not rest there as the Law Society of Kenya was dissatisfied and hence approached the Supreme Court vide Petition No 4 of 2019 – *Law Society of Kenya V Attorney General & Another (2019) eKLR*. In a judgment delivered on December 3, 2019 the Supreme Court upheld the decision of the Court of Appeal.



20. In their respective decisions, the Court of Appeal and the Supreme Court directed that for those matters that had been filed before WIBA came into operation such cases, based on the doctrine of legitimate expectation, were to proceed to logical conclusion in the court where they had been instituted. That was a logical and a rather straight forward matter and one would be forgiven for assuming that was the end of the topic.
21. The following dates are very important to this appeal and any other matter relating to the issues herein. The date of commencement of the WIBA is June 2, 2008 as per Legal Notice (LN) No 60 of May 23, 2008. The judgment of the High Court was delivered on March 4, 2009 and that of the Court of Appeal was delivered on November 17, 2017. The judgment of the Supreme Court was delivered on December 3, 2019.
22. The case in the lower court by the Appellant in this appeal was filed on September 27, 2017. There are two very important aspects of this date. The first one is that the case by the Appellant was filed after the WIBA had commenced operation. Secondly, the High Court had declared various sections of the Act unconstitutional, as alluded to above, before the case was filed. The third angle is that the Court of Appeal and the Supreme Court had not dealt with the respective appeals filed therein as alluded to above as at the date of filing of the case.
23. What has probably caused the confusion that has been witnessed in matters raising the same or similar issues as raised in this appeal is that the Court of Appeal and the Supreme Court did not comment on or give directions on cases that were filed between the decision of the High Court and the decision of the Court of Appeal. The two superior courts directed on matters that had been filed prior to coming into operation of WIBA on June 2, 2008 and directed that such matters should proceed on merits to logical conclusion based on the doctrine of legitimate expectation.
24. This court takes the considered view that a declaration by a court of law on the constitutionality or otherwise of a law is simply a declaration with the effect that upon exhaustion of the appeal process, as it happened in the matter between the Law Society of Kenya V Attorney General above, the Supreme Court declared that the various sections of the WIBA were constitutional, except those mentioned, and they were so ab initio.
25. In other words, Sections 16 and 23 of the Act were always constitutional and hence the jurisdiction of courts on matters concerning compensation on injuries at work was ousted upon the Act coming into operation on June 2, 2008.
26. It is on the understanding of the foregoing that the Appellant first approached the Director and was awarded as alluded to above. The issue then becomes what the Appellant was to do with the award after the Respondent had failed, refused, and or neglected to settle the award. The Appellant opted to file a civil suit in the lower trial court seeking adoption and enforcement of the award. The prayers and orders that he sought are set out verbatim at the inception of this judgment. The net effect of the decision was to terminate the civil suit. The suit was politely struck out. The court advised the Appellant to follow the law as provided for in WIBA in adoption of the award and the enforcement thereof.
27. The next logical question then becomes – what is the procedure to be followed in applying for adoption and subsequent enforcement of an award by the Director?
28. Section 16 of WIBA takes away the jurisdiction of any court from hearing a claim based on injuries sustained at work as a first port of call. This section of the law is not strictly speaking an ouster clause as Section 52(2) of WIBA gives a party dissatisfied with the decision or award of the Director a leeway to bring the matter to court by way of an appeal to the Industrial Court – see the reasoning of the Supreme court in Law Society of Kenya V Attorney General & Another (Supra).



29. The reference to Industrial Court in the above law should not invite any doubts or obscurity as the Industrial Court is the precursor to the Employment and Labour Relations Court (ELRC).
30. ELRC is created pursuant to Article 162(2) of the *Constitution* and established under Section 4 of the *Employment and Labour Relations Court Act*. The composition of the court is spelt in Section 5 of the said Act. For avoidance of doubt, the magistrates who exercise jurisdiction over employment and labour relations matters are not included in the body or institution of the ELRC. Such magistrates exercise that jurisdiction under the Magistrates Act following a gazette notice by the Chief Justice authorizing such magistrates to exercise such jurisdiction in matters wherein the monthly gross salary does not exceed Kshs 80,000/=.
31. Flowing from the foregoing, it is clear and unambiguous that an application for adoption and enforcement of an award from the Director should be filed in the ELRC and not in a magistrate's court. Consequently, a magistrate has no jurisdiction to deal with a matter of adoption and enforcement of such an award.
32. In the considered view of this court the trial court was right in refusing and declining to handle the suit before it for lack of jurisdiction. The learned magistrate was extremely polite and helpful to the Appellant advising that he did not dismiss the matter but rather directed the Appellant to file the matter in the proper forum or court. The trial court opted to be polite and avoided use of the proper term of the action it took which amounted to striking out the civil suit. The good magistrate repeated the same words in declining an application for review of the orders terminating the suit alluded to above.
33. This court is unable to disagree with the learned magistrate that the court had no jurisdiction to handle the matter. The same ought to have been filed before this court (ELRC).
34. Although Section 52(2) of WIBA does not provide for the procedure to be followed in bringing an action to this court for adoption and enforcement of the award by the Director the court should be more concerned with the substance rather than the form. In *Ruth Wambui Mwangi & Another V Alfarah Wholesalers Limited (2017) eKLR* Radido J made a finding that such an action should be brought by way of an ordinary claim filed in this court. But whether filed by way of a miscellaneous application or a cause this court should be more concerned with the substance rather than the form and the procedural technicalities that may come into play.
35. What is as clear as sunlight is that an action for adoption and enforcement of an award by the Director should be filed in the ELRC and not before any other court. The learned magistrate was clearly without jurisdiction and he correctly declined to hear and determine the civil suit.
36. Counsel for the Appellant has passionately submitted that the civil suit was for adoption and enforcement of the award. However, this court has looked at the plaint filed in the lower court and established that the Appellant pleaded the award by the Director as special damage and further pleaded for unspecified general damages. The learned trial magistrate was right and correct in refusing and declining to hear the suit as pleaded and presented before him. Sadly, the plea to the Appellant to file a proper action in the right forum was ignored and trashed culminating in this appeal.
37. Having gone through the memorandum of appeal and the written submissions by Counsel for both parties, and further having come to the considered view and holding that the learned trial magistrate had no jurisdiction to hear and determine the civil suit as pleaded and presented before him, this court finds and concludes that there is no other issue of substance for consideration in this appeal.
38. For all the foregoing reasons, this appeal is dismissed for lack of merits.



IV. Costs

39. There is established an agency relationship between a counsel and a client. The action of counsel binds the client. However, such counsel is under an obligation to advise and help a client in understanding and navigating the intricate web of legal process and litigation. This appeal hinged on purely matters of law concerning the jurisdiction of the lower court to hear and determine the suit filed therein by the Appellant. Although counsel for the Appellant insists that the trial court had jurisdiction to hear and determine the suit as pleaded and presented in the trial court this court has found to the contrary. I would not wish to speculate on whether the Appellant still has time left to approach the right forum for adoption and enforcement of the award. However, what is clear is that the Appellant has thus far not benefited from the fruits of the award by the Director.
40. For the foregoing reasons, this court orders each party to meet own costs for this appeal and for the proceedings in the lower court.

V. Orders

41. The court issues the following orders-
- a. The order of the lower trial court striking out the suit in the lower court for want of jurisdiction is hereby affirmed.
 - b. Each party shall meet own costs for the trial in the lower court and for this appeal.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF JULY, 2023.

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DAVID NDERITU

JUDGE

