



**Koriata v Jelite Air Ltd (Cause E523 of 2022)
[2023] KEELRC 2759 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2759 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E523 OF 2022
DKN MARETE, J
OCTOBER 24, 2023**

BETWEEN

KEN TIPAPA KORAIATA CLAIMANT

AND

JELITE AIR LTD RESPONDENT

RULING

1. This is an application by way of a Preliminary Objection dated 19th October, 2022 and comes out thus;
 1. That this Honourable Court does not have jurisdiction to hear and determine this matter pursuant to the provisions of sections 16 of the Work Injury Benefits Act 2007.
 2. That the statement of claim herein does not disclose any cause of action triable by this Court as against the Respondent.
 3. That the suit contravenes mandatory provisions of the law and as such the suit is ipso facto an abuse of the court process and ought to be truck out with costs to the Respondent.
2. The Claimant/Respondent in his Replying Affidavit sworn on 31st October, 2022 avers as follows:
 20. That the Respondent has attempted to reach out to me with an offer to pay me the outstanding salary arrears claimed in my statement of claim and it baffles me why the Respondent would now seek to have this suit truck out yet has not denied liability of my salary arrears.
 22. That I am now convinced that the filing of the Notice of Preliminary Objection by the Respondent coming after I declined the Respondent’s offer vide my Advocate’s aforesaid letter to the Respondent’s Advocates is a technical gimmick intended to defeat the ends of justice which is a technicality abhorred by Article 159 (2) (d) of the Constitution.



23. That contrary to the averments in the Respondent's Notice of Preliminary Objection dated 19th October 2022, it is the Respondent who has abused the Court process by filing a mischievous, frivolous and vexatious pleading that has no basis in law or fact.
 24. if indeed the Respondent was acting in good faith, nothing would have been easier than for it to file a reply to my statement of claim and plead that this Honourable Court has no jurisdiction and/or that this suit does not disclose a reasonable cause of action against the Respondent.
 25. That as it stands now, the Respondent has hitherto not denied owing me the salary arrears and other benefits sought in my statement of claim and this Honourable Court should not ignore a claim that has hitherto not been defended.
 26. That further to the averments at paragraph 25 above, the Respondent has not denied that it received compensation from its Insurer for the air traffic accident and for the crew of which I was part and the Respondent does not deny that it deliberately withheld and did not pass to me the benefit of that insurance.
3. The Claimant in his written submission dated 16th June, 2023 further opposes the Preliminary Objection and prays that it be dismissed with costs.
 4. In support of the Preliminary Objection the applicant as in her written submission dated 10th May, 2023 brought out various authorities in support of application. These are, Owners of the Motor Vessel "Lillian S" –V- Caltex Oil (Kenya) Limited (1989) as cited in Mombasa HCCC No. 171 of 2011 in Mutunga Tea and Coffee Company –V- Shikara Limited and Another (2010) eKLR where the court held thus;

"I think that it is reasonably plain that the 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 step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

5. Again in the case of Law Society of Kenya v Attorney General & Another [2019] eKLR where the Supreme Court of Kenya held that:

"...a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under Section 52 an appeal mechanism to the then Industrial Court. As we previously stated in Petition No. 33 of 2018, Sammy Ndungu Waity Vs I.E.B.C and 3 other [2019] eKLR;

"Where *the Constitution* or any other law establishes an organ, with a clear mandate for the resolution of a given genre of dispute, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly."

"We reiterate the above holding and in the present contest therefore we further find that Section 16 cannot be read in isolation so as to create the impression that



it curtails the right to immediately access the courts, because by looking at the intention of Section 16, the purpose it fulfils is apparent. That purpose is revealed in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the director? The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied.”

6. Again, the Court of Appeal in Civil Appeal No. 133 of 2011 – Attorney General –vs- Law society of Kenya & Another upheld the constitutionality of Section 4,16,21(1),23,35(1)(3), 53(1) (2) and 58 of the *work Injury Benefits Act* 2007. This decision was upheld/affirmed by the Supreme Court of Kenya in the case of Law Society Of Kenya –vs Attorney General & Another [2019] eKLR.

“It follows that the suit filed by the appellant in the trial Court in the year 2010 was filed in a Court without jurisdiction. The trial Court lacked jurisdiction to entertain, to hear or to determine the suit before it. The suit was a nullity at its inception. Out of nothing flows nothing. The trial Court’s judgment cannot, therefore stand. It matters not that the Respondent herein had submitted to and admitted the said Court’s jurisdiction in its statement of defence. As already stated in this judgment, a Court’s jurisdiction is conferred by *the constitution* and the statutes. It cannot be conferred by parties to a suit by their pleading should have followed the law as clearly stipulated, and should have filed the matter before the proper adjudicator, that being the Director of Occupational Safety and Health Services.”

7. This is in reliance on the authority of Zipporah Njoki Kangara v Rock and Pure limited & 3 others [2021] eKLR
8. The Claimant/Respondent submit however contends that the Preliminary Objection is premature because the point forming the subject of the preliminary objection ought to have been pleaded. In other words, the issue of jurisdiction ought first to be pleaded in the Respondent’s defence and the Preliminary Objection should arise by clear implication out of the pleadings. In this matter, the Respondent has hitherto not filed a Reply to the Statement of Claim and according to the Claimant, the issue of jurisdiction cannot be canvassed by way of a Preliminary Objection in the absence of a Reply to the Statement of Claim.
9. On this the Claimant relies to the provisions of Rule 13 (1) of the Employment and Labour Relations Court (Procedure) Rules which provides as follows;

“If a party served with a statement of claim intends to respond, the party shall, within twenty-one days from the date of service, enter appearance and file and serve a response to the suit.”

10. The Claimant further submits that the provisions of Rule 13 (1) of the Employment and Labour Relations Court (Procedure) Rules are couched in mandatory terms (using the word shall). It requires the Respondent to file and serve (not to either file or serve). Meaning the Respondent had an obligation within twenty-one from the date of service to file and serve its response to the suit. All what the Respondent has hitherto done is to enter appearance and as far as the Claimant is concerned, the Claim is undisputed and should fixed for formal proof.

11. The Claimant/Respondent further relies on the authority of MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS COMPANY



LIMITED (1069) EA 696. To define the propriety of a preliminary objection and the futility of an improper raising of preliminary objection.

11. Further in the case of Independent Electoral And Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014, the Supreme Court reiterated the principles set out in the Mukhisa biscuit case and held as follows: “A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which is argued as a preliminary point may dispose of the suit it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion.”

The Claimant further relies on the decision rendered by the Court in the case of Celina Atieno Ogutu V Undugu Society Of Kenya (2019) eKLR where the Court held as follows:-

“...the jurisdiction of this court is attracted by the reason of the fact that the factual background of the claims presented by the Claimant arose out of his contract of employment ...Once the Court is clothed with the jurisdiction to determine that aspect, it has full authority to determine the whole matter by virtue of its accrued or consequential jurisdiction”

12. The Claimant/Respondent case overwhelmed that of the Respondent/Applicant. He has ably demonstrated that the circumstances this case amount to futile attempt at a preliminary objection. It therefore fails.

13. I am therefore inclined to dismiss the preliminary objection with cost to the Claimant/Respondent.

DELIVERED, DATED AND SIGNED THIS 24TH DAY OF OCTOBER 2023.

D. K. NJAGI MARETE

JUDGE

Appearances:

- 1. Mr. Naeku instructed by Bowai & Company Advocates for the Claimant/Respondent**
- 2. Miss Omanga instructed by Conrad Law Advocate LLP for the Respondent**

