



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. E051 OF 2021

WYCLIFFE MKOKO MUSOMACLAIMANT/RESPONDENT

VERSUS

TULSI CONSTRUCTION LIMITEDRESPONDENT/APPLICANT

R U L I N G

1. The suit herein was instituted by the Claimant vide a memorandum of claim dated 17th May 2021 and filed in Court on 18th May 2021. Reliefs sought by the Claimant are as follows:-

- a) a declaration that the Respondent is liable to settle the assessment of ksh.1,309,550 in favour of the Claimant as advised by Mombasa Occupational Safety and Health Officer on 26th October 2020.
- b) an order directing the Respondent to pay the Claimant ksh.1,309,550 together with interest at Court rates from 26th October 2020 until payment in full.
- c) a declaration that by failing to settle the assessment of ksh.1,309,550 as advised by the Mombasa County Occupational Safety and Health Officer on 26th October 2020, the Respondent committed an offence under Section 26(4) of the WIBA and the Court consequently sentence the Respondent as appropriate.
- d) costs of the suit together with interest.

2. The Respondent entered appearance on 28th June 2021 and subsequently filed a Response to the memorandum of Claim on 17th August 2021.

3. On 15th October 2021, the Respondent filed the Notice of Motion dated 24th September 2021 seeking orders:-

- a) that the application be certified urgent.
- b) that the Honourable Court be pleased to review/vary/set aside the Orders issued on 26/10/2020 by the County Occupational Safety and Health Officer in favour of the Claimant against the Respondent/Applicant.
- c) that the Respondent be granted unconditional leave to defend and file a statement of defence with the County Occupational Safety and Health Officer.
- d) that costs of the application be provided for.

This is the application before me.

4. On 14th October 2021, the Claimant filed an affidavit in reply to the Respondent's Notice of Motion (dated 24th September 2021) together with a Notice of Preliminary Objection (dated 14/10/2021) stating that this Court lacks jurisdiction over the said application by virtue of Sections 51 and 52(2) of the Work Injury Benefits Act.

5. On 1st November 2021, I directed counsel for parties herein to file written submissions on the said Preliminary Objection, which they eventually did. I have considered the submissions filed.

6. It was held in the case of MUKHISA BISCUITS MANUFACTURERS CO. LTD –VS- WEST END DISTRIBUTORS LTD [1969] EA 696 that:-

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is urged on the assumption that all facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. In the present case, the Claimant/Respondent has called to question, and actually challenged this Court’s jurisdiction over the subject of the Respondent/Applicant’s Notice of Motion dated 24th September 2021, vide which this Court has been called upon to **review/vary/set aside the work injury assessment made by Mombasa County Occupational Safety and Health Officer/Director (under Sections 28 and 30 of the Work Injury Benefits Act)**. Can this Court grant such orders or even entertain the application; does the Court have jurisdiction to do so? The answer is a resounding NO.

8. The Claimant has, in his Notice of Preliminary Objection dated 14th October 2021, called in aid the provisions of Section 51 and 52(2) of the Work Injury Benefits Act (WIBA); **hence raising a pure point of law.**

9. Section 51 of the Work Injury Benefits Act (WIBA) provides:-

(1) “Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.

(2) The Objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims; or the question which he desires to have determined.”

10. Section 52 of the Work Injury Benefits Act (WIBA) provides as follows:

(1) “ The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to; and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An Objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.”

11. The Respondent/Applicant’s grievance over the Director’s assessment has not come to this Court by way of an appeal as contemplated in Section 52(2) of the Work Injury Benefits Act. The Applicant’s grievance/objection ought to have been lodged with the Director, Occupational Safety and Health within sixty (60) days of the assessment in issue. This Court lacks primary jurisdiction over the subject matter in the application, and cannot be called upon to usurp the Director’s administrative powers donated by the statute.

12. The Court has no jurisdiction to entertain or to hear the Notice of Motion dated 24th September 2021; and the same is hereby struck off with no orders as to costs.

13. Parties herein are hereby directed to fast-track the suit to facilitate its hearing and determination on merit.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF FEBRUARY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, 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:

Mr. Magiya for Claimant/Respondent

Miss. Mukobi for Respondent/Applicant