



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 668 OF 2017

HESBON MACHANO MAKHOHA.....CLAIMANT

VERSUS

TARMAL WIRE PRODUCTS LTD.....RESPONDENT

RULING

1. The suit herein, which is a work injury claim, was instituted by the Claimant on 17th August 2017 vide a plaint dated 3rd August 2017. The Claimant pleaded, *inter alia*, that he sustained a serious injury while at work on 11th August 2015 as a result of the negligence, carelessness and/or breach of contract of employment on the part of the Respondent, its authorized servant and/or agent, and claimed general damages, special damages, costs and interest against the Respondent.

2. The Respondent entered appearance on 23rd October 2017 and filed Response to the Claimant's claim on the same date. On 5th July 2018, the Respondent filed a notice of Preliminary Objection vide which it stated:-

“TAKE NOTICE that the Respondent herein will raise a preliminary point of law that the Court herein is DEVOID of jurisdiction as the body empowered to hear and determine the issues before this Honourable Court is the Directorate of Occupational Safety and Health Services (DOSHS), and that the said claim is bad in law as:

- a. Section 16 of the work Injury Benefits Act of 2007 (the Act) prevents an employee from instituting a Court action for recovery of damages in respect of injuries arising from an accident or disease.
- b. Section 23(1) of the Act confers upon the Directorate of Occupational Safety and Health Services (the Director) the power to make decisions on any claim and thus,
- c. The Honorable Court lacks jurisdiction to preside over the above matter.

3. On 7th November 2019, the Claimant's Advocates, P.A. Osino & Company Advocates, filed a Notice of Motion dated 4th October 2019, seeking leave to cease from acting for the Claimant. The said application has, according to the Court's record herein not been prosecuted; as none of the parties appeared in Court on 15th July 2020, when the same was supposed to be heard.

4. No action was taken towards prosecution of the suit since 15th July 2020, and the Respondent's Preliminary Objection challenging this Court's Jurisdiction is yet to be prosecuted.

5. On 9th November 2021, this Court's Deputy Registrar issued a written notice to both parties herein under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules 2016, calling upon them to attend Court on 22nd November 2021 and show cause why the suit could not be dismissed for want of prosecution.

6. When the matter finally came up for Notice to Show Cause on 29th November 2021 (as the Court did not sit on 22nd November 2021), I directed the Claimant to file an affidavit within fourteen days showing cause why the suit could not be dismissed for want of prosecution, failing which the suit would stand dismissed for want of prosecution.

7. On 30th November 2021, Counsel for the Claimant filed an affidavit, sworn by PAULINE AWINO OSINO ADVOCATE, whereby it was deponed on behalf of the Claimant; *inter-alia*:-

a. that the suit herein was filed on 17/8/2017 and following up of proceedings and taking of any further steps was affected by the ruling and stay orders issued affecting all Industrial matters in Malindi Constitutional Petition 3 of 2016 and subsequent appeal in Civil Appeal no 287 of 2018 consolidated with Civil Appeal No. 3 of 2017 during the period between 11/11/2016 and 19/10/2017, and that no steps could be taken on the matter during that period.

b. that again as from 17th November 2017, the judgment in Civil Appeal No. 133 of 2011 caused matters to be stayed for further directions on the issue of jurisdiction, hence making it impossible to take further steps on the matter, and that this has been the position to date after the Supreme Court delivered its Judgment in Civil Appeal No. 4 of 2019.

c. that the Claimant lodged his claim in the year 2017 as there was no law barring him from lodging his claim since Professor J.B Ojwang, J, had made his decision in High Court Petition No. 185 of 2008 filed on 4/4/2008 seeking to challenge the constitutionality of the said Act and on 4/3/2009 declared Sections 4, 7(1) (2), 10(4), 16, 21(1), 23(1), 25(1)(3), 52(1)(2) and 58 of WIBA null and void of the status of law *vis-à-vis* the Constitution of Kenya.

d. that the above cause commenced in the High Court in the year 2009, then proceeded on appeal all the way to the Supreme Court in the case of LAW SOCIETY OF KENYA VS- ATTORNEY GENERAL & ANOTHER [2019] eKLR where the Court made the following finding...

e. that the Supreme Court made the above decision on 3rd December 2019, way after the suit had been filed in the year 2017, when Sections 4,7(1)(2), 10(4), 16, 21(1), 23(1), 25(1)(2), 52(1)(2) and 58(2) of WIBA had been declared unconstitutional and the Claimant had legitimate expectation in filing the suit.

f. that the decision of the Supreme Court has been interpreted in the cases of MANUCHAR KENYA LIMITED –VS- DENNIS ODHIAMBO OLWETE [2020] eKLR and WEST SUGAR CO. LTD –VS- TITO LUCHELI TINGALE [CIVIL APPEAL NO. 4 OF 2019 – KISUMU] which have given two divergent views with the later Court stating that the matters which were pending before the Court ought to proceed and the former Court stating that they should not.

g. that it would be unfair to dismiss the suit in the light of two conflicting interpretations which have made it impossible for the Claimant to fix the suit for hearing; and that the matter should be referred to the Director, WIBA for determination by virtue of the doctrine of legitimate expectation.

8. Section 16 of the Work Injury Benefits Act (WIBA) provides:-

“no action shall lie by any employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”

9. Having considered the averments made in the said affidavit, I must state that a Court’s jurisdiction is everything, and that without it the Court cannot make any move. This is the creed in the Court of Appeal’s decision in the Case of OWNERS OF MOTOR VEHICLE “LILIAN S” –VS- CALTEX OIL [KENYA] LIMITED Civil Appeal No. 50 of 1989, later popularly known as “LILIAN S” Case”, where the Court (Nyarangi, JA as he then was) held:-

“...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 the proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. The Court of Appeal in the case of JOSEPH MUTHEE KAMAU & ANOTHER –VS- DAVID MWANGI GICHURE & ANOTHER [2013] eKLR stated as follows:-

“when a suit has been filed in a Court without jurisdiction, it is nullity. Many cases have established that, the most famous being KAGENYI-VS- MUSIRAMBO [1968] E.A 43....”

11. The suit herein, filed long after enactment and coming into effect of the Work Injury Benefits Act 2007 (WIBA), was filed in a Court without jurisdiction by dint of Section 16 of the said Act, and is a nullity. The Claimant’s attempt to anchor the filing of the suit in this Court on a decision of the High Court, which was subsequently overturned on appeal cannot, with respect, hold. Case Law and/or Judge-made Law cannot supercede or replace the statute.

12. In the case of SAMUEL KAMAU MACHARIA –VS- KCB & 2 OTHERS, CIVIL APPLICATION NO. 2 OF 2011, the Supreme Court of Kenya stated:-

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

13. It is clear, from the pleadings and facts of the case herein, that the Claimant’s failure to prosecute the suit stemmed from the fact of it having been filed in a Court without jurisdiction. As already stated in this Ruling, the suit was a nullity at its inception and must be struck down. In my view, Rule 16 of the Employment and Labour Relations Court (Procedure) Rules 2016 presupposes and/or envisages the existence of a valid suit.

14. Consequently, the Claimant's suit herein is hereby struck down with no orders as to cost. The Claimant may, if he so wishes, forthwith lodge his claim with the director of Occupational Safety and Health Services in accordance with the provisions of Work Injury Benefits Act (WIBA).

15. For avoidance of doubt, the Court file herein is hereby ordered closed.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MARCH, 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. Ajigo for Claimant

Miss Oreng'e for Respondent