



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**AT MOMBASA**

**CAUSE NO. 534 OF 2017**

**DAVID CHANGASI OUNOI.....PLAINTIFF**

**VERSUS**

**KWALE INTERNATIONAL SUGAR COMPANY LIMITED .....RESPONDENT**

**R U L I N G**

1. The suit herein, which is a work injury claim, was filed in Court on 3<sup>rd</sup> July 2017 vide a statement of Claim dated 12<sup>th</sup> June 2017. There is on record an affidavit of service, sworn on 11<sup>th</sup> October 2019 by one Fredrick Omondi Osino (a Court Process Server) indicating that the Respondent was served with summons and copies of suit documents on 11<sup>th</sup> October 2019.

2. It is not clear, from the Court's record, how summons shown to have been issued by the Court on 5<sup>th</sup> July 2017 could be served on the Respondent on 11<sup>th</sup> October 2019 without re-issue thereof under Rule 11(3) of the Employment and Labour Relations Court (Procedure) Rules 2016. Nevertheless, the Respondent never entered appearance, and has todate not filed response to the Claimant's claim.

3. The Claimant's advocates wrote to the Court's Deputy Registrar on 29<sup>th</sup> November 2019 requesting that the matter be fixed for mention before the judge for pre-trial directions or for fixing of a hearing date. The suit was subsequently fixed for mention on 29<sup>th</sup> October 2020.

4. When the matter came up for mention on 29<sup>th</sup> October 2020, the Court made the following orders:-

- “ a) The trial judge is on transfer.
- b) Not dealing with fresh matters.
- c) The matter is taken out
- d) Parties shall move the Court when incoming judge is sitting.”

5. On the same date (29<sup>th</sup> November 2020), a representative of the Claimant's advocates attended the Court's Registry and fixed the suit for mention on 18<sup>th</sup> November 2020. The Court's record does not indicate what happened on 18<sup>th</sup> November 2020 as no proceedings are shown to have been taken on the said date.

6. The Claimant did not, from 18<sup>th</sup> November 2020, take any further step towards prosecution or disposal of the suit herein in one way or the other. On 10<sup>th</sup> November 2021, the Court's Deputy Registrar issued a written notice pursuant to Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, calling upon parties herein to attend Court on 24<sup>th</sup> November 2021 and show cause why the suit could not be dismissed for want of prosecution.

7. When the matter finally came up for Notice to Show Cause on 1<sup>st</sup> December 2021 (as the Court did not sit on 24<sup>th</sup> November 2021), Counsel for the Claimant informed the Court that the Claimant had on 30<sup>th</sup> November 2021, filed an affidavit showing cause why the suit should not be dismissed for want of prosecution.

8. Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:-

*“In any suit where no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of filing, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.”*

9. As already stated in paragraph 5 of this Ruling, the suit was supposed to be mentioned in Court on 18<sup>th</sup> November 2021, a date fixed by a representative of the Claimant’s Counsel, and on which date no Court proceedings are shown to have been taken. For purposes of Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules, time started running on 18<sup>th</sup> November 2020. It follows, therefore, that the Notice to Show Cause dated 10<sup>th</sup> November 2021 was issued before expiry of one year from the date the suit was last supposed to be mentioned in Court. For that reason, I will not dismiss the suit for want of prosecution.

10. The question that follows is whether this Court has jurisdiction to entertain the suit herein which, as I preceded to point out in paragraph 1 of this Ruling, is a Work Injury Claim. Section 16 of the Work Injury Benefits Act provides:-

*“No action shall lie by an 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.”*

11. In view of the foregoing statutory provision, this Court lacks jurisdiction to entertain, to hear or to determine the suit herein. The Claimant’s Counsel has, in her affidavit sworn on 30<sup>th</sup> November 2021 and filed herein, stated:-

Paragraph 5

*“That the Claimant had lodged his claim in 2017 for injury at his work place on 3/7/2017 as there was no law barring him from lodging his claim since Professor JB Ojwang, J, had made his decision in the case HIGH COURT PETITION NO. 185 of 2008 filed on 14/4/2008 seeking to challenge the constitutionality of the said Act, and on 4<sup>th</sup> March 2009 he declared Sections 4,7(1) (2), 10(4), 16, 21(1), 23(1), 25(1) (3), 52(1) (2) and 58(2) of WIBA null and devoid of status of law vis-à-vis the Constitution of Kenya.*

Paragraph 6

*The above case, which commenced in the year 2009 in the High Court 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 decision...*

Paragraph 7

*That the Supreme Court made the above decision on 3<sup>rd</sup> 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) & (3), 52(1) (2) and 58(2) of the WIBA had been declared unconstitutional and the Claimant had legitimate expectation in filing the suit.”*

12. Having considered the averments made in the said affidavit, I must state that a Court’s jurisdiction is everything and without it the Court cannot make any move. In the case of OWNERS OF MOTOR VESSEL “LILIAN S” –VS- CALTEX OIL (KENYA) LIMITED, CIVIL APPEAL NO. 50 OF 1989, later popularly known as “ The LILIAN S” case the Court of Appeal (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.”*

13. 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 as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”*

14. The Claimant’s attempt to anchor the filing of his suit in this Court on a decision of the High Court, which was subsequently overturned on appeal, cannot hold. Case law and/or judge-made law cannot supercede the statute.

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

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

16. The suit herein was filed in a Court without jurisdiction and is therefore a nullity. The suit is hereby struck down with no order as to costs.

17. The Claimant may, if he so wishes, forthwith lodge his claim with the Director of Occupational Safety and Health Services in the manner provided in the Work Injury Benefits Act.

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

19. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> 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:**

**MISS OSINO FOR CLAIMANT**

**NO APPEARANCE RESPONDENT**