



**Ogada v Mitehcell Cotss Freight [K] Limited (Cause 12 of 2017)  
[2022] KEELRC 1127 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1127 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 12 OF 2017**

**AK NZEI, J  
MAY 19, 2022**

**BETWEEN**  
**STEPHEN AGESA OGADA ALIAS STEVEN AGESA ..... CLAIMANT**  
**AND**  
**MITEHCELL COTSS FREIGHT [K] LIMITED ..... RESPONDENT**

**RULING**

1. The suit herein, which is a work injury claim, was instituted by the Claimant on 6<sup>th</sup> January 2017 vide a statement of claim dated 3<sup>rd</sup> January 2017. The Claimant claims general and special damages arising from injuries sustained by the Claimant as a result of an occupational accident pleaded to have occurred on 20<sup>th</sup> April 2016.
2. The Respondent entered appearance on 5<sup>th</sup> April 2017 and subsequently filed a Response to the Claimant's claim on 10<sup>th</sup> April 2017; denying the Claimant's claim and denying this Court's jurisdiction to hear and to determine the suit.
3. Although the suit is shown to have been fixed for hearing severally over the years, hearing never proceeded. The suit is shown to have been in Court on 4<sup>th</sup> October 2020, and thereafter, no action was taken by the parties towards fixing the case for hearing.
4. On 10<sup>th</sup> November 2021, the Court's Deputy Registrar issued a written notice to both parties under Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules 2016*, calling upon them to attend Court on 23<sup>rd</sup> November 2021 and show cause why the suit could not be dismissed for want of prosecution.
5. Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides as follows:-
  - (1) "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.

- (2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
  - (3) Any party to the suit may apply for dismissal as provided in paragraph (1).
  - (4) The Court may dismiss the suit for non-compliance with any direction given under this Rule.”
6. The Court did not sit on 23<sup>rd</sup> November 2021, and when the suit finally came up for notice to show cause before me on 30<sup>th</sup> November 2021, I made the following orders:-
- “(1) the Claimant is granted 7 days to file an affidavit showing cause why the suit cannot be dismissed for want of prosecution, failing which the suit shall stand dismissed for want of prosecution.
  - (2) mention on 26/1/2022.”
7. On 2<sup>nd</sup> December 2021, the Claimant’s Advocates filed an affidavit in reply to the notice to show cause, sworn by PAuline Awino Osino Advocate on 1<sup>st</sup> December 2021. It is deponed in the said affidavit, inter-alia:-
- a) that prosecution of the suit herein was affected by the ruling and stay orders issued in Malindi Constitutional Petition No. 3 of 2016 affecting all industrial matters, and subsequent appeal in Civil Appeal no. 287 of 2018 (consolidated with Appeal no. 3 of 2016) during the period between 11/11/2016 and 19/10/2017.
  - b) that from 17<sup>th</sup> March 2017, the judgment in Civil Appeal no. 133 of 2011 caused matters to be stayed for further directions on the issue of jurisdiction and that this remains the position to date after the Supreme Court delivered its judgment in Civil Appeal no. 4 of 2019.
  - c) that the claim herein was lodged in the year 2017 as there was no law barring its filing in view of the High Court’s decision in Petition No. 185 of 2008 wherein the constitutionality of Sections 4, 7(1) & (2), 10 (4), 16, 21(1), 23(1), 25(1) (3), 52(1) (2) and 58(2) of *WIBA* had been challenged, and the Court on 4<sup>th</sup> March 2009 declared them null and devoid of the status of law vis-à-vis *the Constitution* of Kenya.
  - d) that the High Court case proceeded on appeal all the way to the Supreme Court in the case of *Law Society Of Kenya v Attorney General & another*[2019] eKLR, whereon the Supreme Court made its decision on 3<sup>rd</sup> December 2019.
  - e) that the Supreme Court’s judgment has been interpreted in the cases of *Manuchar Kenya Limited -vs- Dennis Odhiambo Olwete* [2020] eKLR and *West Kenya Sugar Co. Ltd v Tito Lucheli Tangale*, Kisumu Civil Appeal No. 4 of 2019, with the later Court stating that matters which were pending before the Court ought to proceed and the former court stating that they should not.
  - f) that in the premises, it would be unfair to dismiss the suit in the light of the two conflicting interpretations, which have made it impossible for the Claimant to fix the cause for hearing.
  - g) that the Claimant seeks directions that the matter be referred to the director WIBA for determination by virtue of the doctrine of legitimate expectation.



- h) that the Claimant is desirous to have the matter determined on merit and had previously fixed the same for hearing.
8. When the matter came up for mention on 26<sup>th</sup> January 2022, Counsel for the Respondent submitted:-
- a) that the Supreme Court had in Case No. 4 of 2019, *Law Society of Kenya v Attorney General & another*, held that the Court has no jurisdiction in work injury claims.
  - b) that the suit herein was filed in 2017 after the WIBA came into force.
  - c) that the suit should be dismissed with costs pursuant to Section 16 of the WIBA as read with Section 23.
9. On their part, Counsel for the Claimant urged the Court to look at the (show cause) affidavit filed and to make an appropriate order.
10. The Work Injury Benefits Act (WIBA) came into force long before the suit herein was filed. Section 16 of the Act 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.”
11. 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” v Caltex Oil [kenya] Limited* Civil Appeal No. 50 of 1989, 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.”
12. 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 a nullity. Many cases have established that, the most famous being *Kagenyi v Musirambo*[1968] EA. 43...”
13. The suit herein was filed in 2017, long after the Work Injury Benefits Act 2007 was enacted and subsequently operationalized. The suit was filed in a Court without jurisdiction by dint of Section 16 of the WIBA. It is a nullity.
14. In the case of *Samuel Kamau Macharia v KCB & 2 others* Civil Application No. 2 of 2011, the Supreme Court of Kenya stated as follows:-
- A Court’s jurisdiction flows from *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.”



15. The Claimant's Counsel deponed that failure by the claimant to prosecute the suit herein arose from the fact that the suit was filed in a Court without jurisdiction. I find and hold that the suit herein was a nullity at its inception. It is a suit that never was. Rule 16 of the Employment and Labour Relations Court (Procedure) Rules 2016 envisages a situation where there is a valid suit on record, a suit that is capable of being prosecuted. In the present case, there is no suit that is capable of being prosecuted.
16. Consequently, the Claimant's suit herein is hereby struck down with no orders as to costs. 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 the Work Injury Benefits Act (WIBA).
17. For avoidance of doubt, the Court file herein is hereby ordered closed.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF MAY 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:**

.....for Claimant

..... for Respondent

