



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karisa v Kitui Flour Mills Limited & another (Cause  
35 of 2021) [2022] KEELRC 58 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 58 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**CAUSE 35 OF 2021**  
**B ONGAYA, J**  
**MAY 13, 2022**

**BETWEEN**

**RAYMOND KINGI KARISA ..... CLAIMANT**

**AND**

**KITUI FLOUR MILLS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY DIRECTOR OF OCCUPATION, HEALTH AND SAFETY**

**(MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The claimants filed the memorandum of claim on 01.04.2021 through Onyango Onunga Advocates. The claimant pleaded that he had worked for the respondent for three years and he suffered incapacity by reason of an injury while on duty and resulting into his unfair termination. He claimed compensation for unfair termination as follows:
  - a. One-month salary in lieu of the notice Kshs. 17, 030.00.
  - b. Leave for three years' worked Kshs. 51, 000.00.
  - c. Severance pay for 3 years at half monthly salary per year Kshs. 25, 545.00.
  - d. Compensation for unfair termination 12 months' x 17, 030 = Kshs. 204, 360.00.
  - e. Total Kshs. 298, 025.00.
2. The claimant further alleged that he had suffered serious injuries while on duty but the 2<sup>nd</sup> respondent had failed to undertake assessment of his due compensation for injuries per provisions of section 53 of WIBA, 2007. The claimant therefore prayed for judgment against the respondent for:
  1. An order directing the 2<sup>nd</sup> respondent to carry out an assessment of the claim and fill the WIBA Form 4 and in alternative furnish the claimant with the decision or award on the accident.



2. An order compelling the 1<sup>st</sup> respondent to compensate the claimant for the injuries sustained.
  3. The 1<sup>st</sup> respondent be condemned to pay a fine of Kshs. 500, 000.00 to the claimant for failing to compensate the claimant for the injuries sustained.
  4. Payment of terminal dues Kshs. 298, 025.00 as claimed.
  5. Interest on the sum awarded at the rate of 14% per annum from the date of filing the suit.
  6. Costs of the suit to be awarded to the claimant.
  7. Any other relief that the Honourable Court may deem fit and just to grant.
3. The 1<sup>st</sup> respondent filed the response to the memorandum of claim on 02.06.2021 through Sherman Nyongesa & Mutubia Advocates. The 1<sup>st</sup> respondent admitted employing the claimant on casual basis at a daily wage of Kshs. 655.00. The 1<sup>st</sup> respondent's case is that the claimant was a casual worker and he was not terminated from employment at all. The respondent further raised a preliminary objection that the suit had been filed in contravention of sections 16 and 51 of the *Work Injury Benefits Act* (WIBA) 2007, the *Employment Act*, 2007 and it was sub-judice because there was another suit CMCC No. 2163 of 2019 between the same parties and pending hearing and determination in the lower Court. The respondent filed the notice of preliminary objection on 12.11.2021 praying that upon those grounds the suit should be struck out with costs.
  4. On 17.03.2022 by consent of the claimant and the 1<sup>st</sup> respondent, prayer 1 in the memorandum of claim was granted and the 2<sup>nd</sup> respondent was directed to carry out an assessment of the injury claim and complete WIBA Form 4 and, furnish the claimant with the award on the accident injury in accordance with the provisions of the WIBA, 2007. Parties were also directed to file submissions on the preliminary objection now subject of this ruling. Submissions were filed for the parties.
  5. By reason of the consent order of 17.03.2022, it is obvious that parties are in agreement that the injury claim by the claimant should be determined as per section 16 and 51 of WIBA, 2007 and the Court upholds the 1<sup>st</sup> respondent's submission in that regard. The claim and prayer on the injury claim having been determined by the consent order and having been about refusal or reluctance of the 2<sup>nd</sup> respondent to assess the compensation, it cannot be said that the claimant had been misguided in seeking prayer 1 which was granted per the consent order. The claimant's suit partially succeeded in that regard and the preliminary objection as relates the injury claim being determined under WIBA and not by this Court is thereby determined as unfounded. The claimant's suit was clear that the 2<sup>nd</sup> respondent be compelled to undertake the statutory assessment of the compensation under WIBA and nowhere was the Court moved to usurp that statutory authority vested in the 2<sup>nd</sup> respondent. That limb of preliminary objection must collapse.
  6. The claimant has pleaded in paragraph 22 of the memorandum of claim that due to his incapacity as a result of the accident he was unfairly terminated without notice or payment of terminal dues which he claims as outlined earlier in this ruling. The Court has considered that the parties by their pleading agree that CMCC No. 2163 of 2019 between the same parties about the same transaction is pending hearing and determination in the lower Court. The issues about prayer 1 in the claimant's present suit having been resolved by the consent order on record and the claimant's monthly salary being Kshs. 17, 030.00, the Court considers that it is proper for the claimant to prosecute the suit in the lower court with or without amendments in view of his residual claims of unfair termination as claimed in paragraphs 22 and 23 of the memorandum of claim. The parties did not file the pleadings of the suit pending in the lower Court and the scope of that suit not having been demonstrated and submitted



upon, it is difficult for the Court to find that the instant suit was indeed trapped by the sub-judice rule as urged for the respondent.

7. The Court considers that the consent order was directed at the 2<sup>nd</sup> respondent and even if the preliminary objection has not strictly succeeded, it has served to shape the parties' further steps in the dispute. The instant suit will therefore stand determined with orders each party to bear own costs of the suit.
8. In conclusion the preliminary objection is hereby determined with orders:
  1. The instant suit is marked determined subject to the consent order given on 17.03.2022.
  2. Each party to bear own costs of the preliminary objection and the suit.
  3. A decree to issue accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13<sup>TH</sup> MAY, 2022.**

**BYRAM ONGAYA**

**JUDGE**

