



**John Munene v Kenya Wildlife Services & another (Cause E462 of 2021)
[2022] KEELRC 12731 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12731 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E462 OF 2021
JK GAKERI, J
SEPTEMBER 28, 2022**

BETWEEN

JOHN MUNENE STEPHEN CLAIMANT

AND

KENYA WILDLIFE SERVICES 1ST RESPONDENT

**THE DIRECTOR OF OCCUPATIONAL SAFETY & HEALTH
SERVICES 2ND RESPONDENT**

RULING

1. Before me for determination is a preliminary objection application dated May 20, 2022 by the 1st respondent who opposes the claim on the grounds that:
 - a) The honourable court lacks jurisdiction to entertain the suit having been filed contrary to the provisions of the [Work Injury Benefits Act](#), No 13 of 2007.
 - b) The jurisdiction to entertain claims for compensation is a preserve of the director of Occupational Safety and Health Services pursuant to section 23(1), 53 and appeals lie to the Employment and Labour Relations Court pursuant to section 52(2) of the [Work Injury Benefits Act](#), No 13 of 2007.
 - c) The honourable court lacks jurisdiction to entertain the suit and the same is time barred having been filed contrary to section 26(1) of the [Work Injury Benefits Act](#), No 13 of 2007.
 - d) The honourable court lacks jurisdiction to entertain the claim as it is fatally defective and a nullity *ab initio*.
2. The factual background of the suit is as follows:
3. The claimant was employed by the 1st respondent as a ranger from October 27, 2015.



4. It is the claimant's case that on September 6, 2017, while in the course of carrying out his duties at his duty station, he fell resulting in serious injury to his back. He was admitted to Nairobi Women's hospital for 10 days for tests and treatment.
5. That from the tests conducted, it was concluded that there was an impact on his spine and more specifically his L4-L5 disc with resultant bilateral compression on the traversing L5 nerve roots.
6. That on September 19, 2017, the claimant sought further treatment at Menelik Medical Centre where he was admitted for three days for lower back pains. That owing to the persistent nature of the injuries, he was forced to apply non-operative methods such as physiotherapy and the use of a corset for a period of over three months but to no avail.
7. The claimant avers that on January 3, 2018, upon further consultation on the state of the injuries, the claimant was referred to Kenyatta National Hospital over possible spinal surgery by Dr LN Gakuu.
8. On February 4, 2018, the claimant was taken in for spinal surgery at the Nairobi West Hospital where he was admitted for 3 days and was later instructed to continue with physiotherapy and be off duty for at least 21 days.
9. The claimant further avers that despite being notified of the injuries, the 1st respondent did not report the matter to the Director of Occupational Safety and Health as required by law.
10. That on or about July 8, 2019, the claimant was issued with a disability report by Dr Dennis Otworu of the National Spinal Injury Referral Hospital which stated that his injuries would interfere with his daily activities in the foreseeable future and was awarded 45% workman compensation in accordance with the *Work Injury Benefits Act, 2007*. He avers that he has been assessed by the Ministry of Health and accordingly registered as a person living with disability by the National Council of Persons with Disabilities.
11. The claimant avers that he has continuously suffered psychologically and financially since the 1st respondent has refused to pay him field allowances since 2019 and salary from June 2020.
12. With regard to the 2nd respondent, the claimant states that he lodged a claim but the 2nd respondent is yet to acknowledge or act on the same.

1st Respondent

13. In its amended response and counter-claim, the 1st respondent avers that the claimant was its employee from October 21, 2015 deployed at the Nairobi National Park until his alleged injuries on September 6, 2017 and was treated at the Nairobi Womens Hospital for treatment.
14. It is the 1st respondent's case that it notified the insurer but compensation cannot be paid because the claimant has not formally confirmed if he recovered from injury.
15. That the 1st respondent received a medical report from Dr SO Otieno on the need to allocate the claimant light duties for 6 months.
16. The 1st respondent avers that even after the claimant resumed duty on May 31, 2019, while deployed at the David Sheldrick Camp, he absconded duty from 1st June, to 17th and was taken through disciplinary for absconding duty. That he resumed duty on 1st July at the respondent's headquarters but again absconded duty and was unreachable.
17. The 1st respondent denies owing the claimant any salary or field allowances.



Counter-claim

18. Pursuant to a court order dated July 5, 2021, the respondent paid the claimant a sum of Kshs 447,293.10 as field allowances and salary from June 2019 and June 2020 respectively until October 2021 and continued doing so until March 21, 2022 when the orders were discharged after having paid a total of Kshs 590,033.10 yet the claimant absconded duty in June 2019.
19. The 1st respondent seeks a declaration that the salaries and allowances amounting to Kshs 590,033.10 paid to the claimant was unmerited and is thus recoverable and judgement be entered in its favour.

2nd Respondent

20. In response to the claim, the 2nd respondent filed a response dated July 30, 2021. It avers that it is yet to process the claimant's request for purposes of the provisions of the [Work Injury Benefits Act](#) as no claim had been received.
21. The 2nd respondent maintains that due process was not followed to warrant the directorate being named as a respondent in this suit.
22. It avers that the 1st respondent did not send/lodge a notice of the alleged accident involving the claimant as prescribed by section 22 of the Act. In addition, the 1st respondent did not lodge a claim arising from an alleged assessment by a primary doctor with the directorate at any time.
23. The 2nd respondent maintains that it has not been furnished with the alleged disability report by Dr Dennis Otworu issued on July 8, 2019.

Submissions

24. The 1st respondent identified two issues for determination by the court: whether the suit is time barred; and whether the court has jurisdiction to hear and determine this claim.
25. The 1st respondent submitted that according to the provisions of section 26(1) of the [Work Injury Benefits Act, 2007](#), a claim for compensation ought to have been filed within 12 months. That since the claim was filed on June 10, 2021, it is statute barred and the court must down its tools for want of jurisdiction to entertain a statute barred claim.
26. The 1st respondent submitted that this court is not the right forum to hear and determine the claimant's suit as it lacks jurisdiction to entertain work injury claims.
27. The 1st respondent argued that the operative law at the time of filing the suit was the [Work Injury Benefits Act, 2007](#) and that the claimant ought to have lodged the claim in accordance with the provisions of section 23(1) read together with section 53 of the Act. Reliance is made on the decisions in [Saidi Mohamed v Diamond Industries Ltd](#) (2018) eKLR and [Magot Freight Services Limited & another v Samson Mwakenda Mangale](#) (2021) eKLR to buttress the submission.
28. The 1st respondent concluded by submitting that due to the fact that the court lacks jurisdiction, it cannot as such arrogate unto itself jurisdiction exceeding that which is conferred to it by the law. Reliance is made on the Court of Appeal decision of [Kenya Airports Authority v Shadrack Abraham Kisongochi](#) (2016) eKLR.
29. The court was urged to dismiss the suit with costs.
30. The claimant, in response to the application submitted that this court is governed first by article 162 of the [Constitution of Kenya, 2010](#), the [Employment Act, 2007](#) and the [Work Injury Benefits Act](#) and



not vice versa. Therefore, it was submitted that any Act that purports to take away the jurisdiction of this court as granted by the Constitution is unconstitutional.

31. In addition, the claimant submitted that section 52 of the Work Injury Benefits Act grants him the right to appeal to this court from any action or omission of the 2nd respondents.
32. It is the claimant's submission that the 1st respondent cannot allege that it has been unable to process his insurance claim until the injuries sustained are assessed and at the same time state that his claim is time barred in reporting the same injuries that are allegedly yet to be assessed.
33. The claimant submitted that his claim is two-pronged based on the injuries that he sustained and on the failure by the 1st respondent to pay his salaries and field allowances. It is submitted that on the latter, only this court has jurisdiction to determine whether he is entitled to field allowances and salary during the course of the suit up to its determination. That if the objection by the 1st respondent is allowed, he would be left with no relief.
34. The claimant submitted that this suit was warranted by the 1st respondent's delay in reporting the accident to the 2nd respondent as provided for under section 22 of the Work Injury Benefits Act and the failure to report amounted to a criminal offence.
35. In conclusion, the claimant argued that under section 26 of the Act, a claim for compensation can be considered even after 12 months so long as it has been reported by the employer, in this case the 1st respondent. He maintained that the 1st respondent was relying on its own criminal conduct, or failing to report the accident in order to defeat its obligation under the law.

Analysis and Determination

36. I have carefully considered the preliminary objection as well as the oral and written submissions. The only issue for determination is whether this court has jurisdiction to hear and determine the suit before it.
37. It is now settled that jurisdiction is a threshold issue and must be disposed at the earliest instance when it arises. The urgency is informed by the fact that it has the potential to terminate the proceedings before the suit is heard and determined on merit. It thus determines the trajectory of the suit.
38. In Phoenix of EA Assurance Co Ltd v sM Thiga ¹/A Newspaper Service (2019) eKLR, the Court of Appeal expressed itself as follows on the question of jurisdiction

“In Common English Parlance, Jurisdiction donates the authority or power to hear and determine judicial disputes or even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae . . . Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied . . .”

39. It requires no emphasis that jurisdiction is everything and without it a court has no power to make one more step and must down its tools as explained by the Court of Appeal in the celebrated sentiments of Nyarangi JA in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) KLR.



40. As explained by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank & another*, a court derives its jurisdiction either from the *Constitution* or legislation or both and cannot arrogate jurisdiction unto itself in any other way. See also *Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR.
41. In a nutshell, a court of law either has or has no jurisdiction to hear and determine a particular matter.
42. By a memorandum of claim dated May 31, 2021, the claimant sued the respondent seeking various reliefs including field allowances, monthly salary from June 2020, special damages of Kshs 97,000/=, general damages for loss of amenities, workmens compensation, future medical expenses and costs of the suit.
43. The claimant's case is that on September 6, 2017, while in the course of discharging his duties at Kifaru court reception at the respondent's headquarters, he stumbled, fell and suffered serious injuries to his back and was admitted at the Nairobi Womens Hospital for 10 days.
44. Further treatments followed on September 19, 2017 at Menelik Medical Centre and later in January 2018 by Dr Julius Kiboi at the Kenyatta National Hospital who suggested possible spinal surgery by Dr Gakuu which was performed at the Nairobi Womens Hospital.
45. It is the claimant's case that despite being notified of the injuries, the respondent did not report the accident to the Director of Occupational Safety and Health Services (DOSHS) as required by law.
46. That on July 8, 2019, Dr Dennis Otworu issued a disability report to the claimant at 45% and the claimant has since then been registered as a person living disability.
47. In addition, the claimant sues for unpaid salaries and field allowances.
48. When the matter came up under certificate of urgency on June 10, 2021, the court certified it urgent and directed the respondent to pay the claimant/applicant field allowances from June 2019 until the hearing and determination of the claim and his monthly salary from June 2020 until the hearing and determination of the claim and the respondent complied.
49. Subsequently, the respondent filed a notice of motion application for stay of the orders dated July 5, 2021. The application was unopposed and was allowed.
50. In its response to the claim, the 2nd respondent states that it has not failed to process the claim by the claimant in respect of the alleged injuries.
51. It is the DOSHS's case that neither the claimant nor the 1st respondent lodged a notice of the alleged accident as prescribed by law and no claim had been lodged by the claimant or the 1st respondent.
52. Significantly, the claimant's suit is substantially a claim for compensation for injuries sustained at the workplace with a peripheral claim for field allowances and salaries. The court is being invited to determine issues germane to who was supposed to report the accident and attendant injuries to the director and follow up the process and within what time frame. It is being invited to make a determination on who is culpable and who is liable. It is being invited to determine whether the suit is statute barred or not under the provisions of *Work Injury Benefits Act, 2007*. Question is whether the court is amenable to the invitation.



53. It is common ground that compensation for death, injuries or diseases contracted in the course of employment is governed by the provisions of the [Work Injury Benefits Act, 2007](#) whose preambular provision states that it is
- “An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.”
54. Similarly, section 53 of the [Work Injury Benefits Act](#) (2007) (herein after WIBA) provides;
- (1) There shall be a director of Work Injury Benefits who shall be responsible for the management of this Act.
 - (2) The director of Work Injury Benefits shall perform the following functions;
 - (a) ...
 - (b) supervise the implementation of this Act
 - (c) ...
 - (d) ...
 - (e) ensure that employees who are injured are compensated in accordance with the provisions of this Act
 - (3) The director of Work Injury Benefits shall be assisted in the performance of the functions specified in subsection (1) by such other officers as are necessary for the proper administration of the Act.
55. The provisions lay it bare that the director of Work Injury Benefits is the institution that superintends over the management and administration of the WIBA, 2007.
56. Instructively, the provisions of section 53 are couched in mandatory terms.
57. Relatedly, the provisions of WIBA make no reference to any court of law other than under section 52(2) which empowers the Employment and Labour Relations Court to entertain appeals against decisions of the director [Work Injury Benefits Act](#) as opposed to his acts or omissions as submitted by the claimant.
58. Flowing from these provisions, it would appear to follow that this court has no other role under WIBA other than to hear appeals from decisions of the director [Work Injury Benefits Act](#).
59. It is not in dispute that the matters the court is being called upon to adjudicate are issues of notice to the director and related processes which is the domain of the director and are not being litigated on appeal. The claimant has not attached any decision of the DOSHS on which an appeal may be founded.
60. Contrary to the claimant’s submission that the court has jurisdiction to entertain the claim for compensation pursuant to the provisions of the [Constitution of Kenya, 2010](#), [Employment Act, 2007](#) and section 52 WIBA, the submission is not reinforced by any specific provision which gives this court power or authority to award compensation for injuries sustained by employees in the course of their employment or make other orders other than on appeal.
61. The provisions of WIBA, 2007 are clear that parliament intended that all claims relating to injury sustained at the work place be pursued in accordance with the provisions of the Act.



62. This position finds support in the Court of Appeal decision in *Attorney General v Law Society of Kenya & another* (2017) eKLR affirmed by the Supreme Court in *Law Society of Kenya v Attorney General & another* (2019) eKLR.
63. Similarly, in *Saidi Mohamed v Diamond Industries Ltd* (2018) eKLR, Rika J declined to hear the dispute because it had not been filed on appeal as provided by section 52(2) of WIBA, 2007.
64. The foregoing decision was relied upon by *Onesmus Makau J in Paul Mutuku Mulwa v Board of Management Mbooni Boys High School* (2020) eKLR where the court downed its tools on the premise that it had no primary jurisdiction in a WIBA matter.
65. A similar holding was made in *Manuchar Kenya Ltd v Dennis Odhiambo Olwete* (2020) eKLR.
66. These decisions establish beyond peradventure that the Employment and Labour Relations Court has no primary or original jurisdiction to entertain disputes under the *Work Injury Benefits Act, 2007*.
67. For the foregoing reasons, it is the finding of the court that it has no jurisdiction to entertain the claimant's claim for compensation for injuries sustained at the work place and proceeds to down its tools. This finding means that the claimant's case has substantially collapsed. However, as submitted by her counsel, the claimant may pursue the claim for field allowances and unpaid salaries if any.
68. In the end, the preliminary objection dated May 20, 2022 is partially successful.
69. There shall be no order as to costs.
70. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER, 2022.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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