



**Gitundu v Othaya Mukurweini Water Services Company; Trident Insurance Company Limited (Interested Party) (Employment and Labour Relations Claim E010 of 2022) [2022] KEELRC 3956 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3956 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**EMPLOYMENT AND LABOUR RELATIONS CLAIM E010 OF 2022**  
**DKN MARETE, J**  
**SEPTEMBER 16, 2022**

**BETWEEN**

**ANTHONY WARUI GITUNDU ..... CLAIMANT**

**AND**

**OTHAYA MUKURWEINI WATER SERVICES COMPANY ..... RESPONDENT**

**AND**

**TRIDENT INSURANCE COMPANY LIMITED ..... INTERESTED PARTY**

**RULING**

1. This is an application by way of notice of motion dated May 25, 2021 and seeks the following orders of court;
  - a) That the application be certified as urgent and heard *ex-parte* in the first instance.
  - b) That this honourable court be pleased to order stay of court proceedings herein pending the hearing and determination
  - c) That this honourable court be pleased to review, vary and/or set aside judgment *ex debito justitiae* entered against the third party herein, the proceedings thereto and all consequential orders.
  - d) That this court be pleased to grant the third party herein unconditional leave to file a response to the application dated December 10, 2021 in terms of the draft copy of grounds of opposition annexed to the third party's/applicants' supporting affidavit hereto be deemed as duly filed and served upon payment of the requisite court fees.



- e) That the court be at liberty to make such other or further orders as it deems expedient to meet the ends of justice.
  - f) That cost of this application be in the suit.
2. It is grounded as follows;
- a) That the third party was not served with the outcome before DOSH, the application dated December 10, 2021 but has a good defence to the claimant's claim.
  - b) That the third party stands to suffer irreparable loss, if the judgment is let to stand without being afforded an opportunity to defend themselves.
  - c) That the defendant/applicant has a viable defence to the plaintiff's claim and it is only fair and just that he be afforded the opportunity to call witnesses so as to enable this honourable court reach a just and fair finding based on the merit of the matter.
  - d) That there is a sufficient cause, it is just and equitable that this application be heard and dispensed with on its merits.
3. The claimant in a replying affidavit sworn on June 13, 2022 opposes the application and prays that this be dismissed with costs.
4. It is his case that counsel for the applicant is misleading his client in total abdication of his duty as an officer of this court and a purveyor of justice. This is as follows;
5. That this honourable's court jurisdiction in WIBA matter is secondary. Therefore, the third party/applicant is misplaced as to the right venue to defend any wiba claim.
6. In support we cite Halsbury's Laws of England, volume 10 page 319 where it was stated that a tribunal with exclusive jurisdiction had been specified by a specific statute to deal with claims arising under a statute, the county court's jurisdiction to deal with these claims is ousted, for where an act creates an obligation to, and enforces the performance of it, it cannot be enforced in any other manner.
7. Further, section 23 of the same act then provides;
- 23. After having received notice of an accident or having learned that an employee
    - (1) has been injured in an accident, the director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this act.
    - (2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.
    - (3) An employer or employee shall, at the request of the director, furnish such further particulars regarding the accident as the director may require.
- The director sufficiently discharged this duty and deemed it fit that the claim before the tribunal warranted compensation to the claimant.
- The claimant/respondents further buttresses his case in opposition to the application as follows;
8. That this hilarious circus is predicated on the fallacious allegation that the third party/applicant was not aware of the proceedings before the Directorate of Occupational Safety & Health services as well as those before this honourable court. For instance, in ground (1) of the third party/applicant's



motion, the third party applicant claims that they were not served with the outcome before DOSH. To controvert this allegation, we invite the unequivocal attention of this honourable court to the annexure in the third party/applicant's motion, which is marked GG2..., annexure marked GG2, which is the Dosh outcome, bears the third party/applicant's stamp in the middle acknowledging receipt on May 19, 2020. Further, That the third party/applicant acknowledged annexure marked GG2, which is the Dosh outcome, by stamping at the middle. It is at this point if not earlier whereupon the third party/applicant should have instructed it legal counsel. That I am advised by judicial precedence that "legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.

9. That claimant/respondent further submits as follows in opposition to the application;
10. That this hilarious circus is also predicated on the fallacious allegation that the third party/applicant was not served with the third party notice in time.
11. That further, equity aids the vigilant, not those who slumber on their rights. Given that sufficient service was effected upon the third party/applicant, it is therefore apparent on the face of it that no amount of service would have guaranteed a response by the third party/applicant, hence on account of want of response, any party assessing the facts herein would easily arrive at the conclusion that the third party /applicant was notoriously unwilling to partake in any proceedings involving the parties herein.
12. The respondent answer through the replying affidavit sworn on June 13, 2022 avers that the institution this suit is an afterthought on the part of the counsel for the claimant. It is an attempt at perversion of justice.
13. The respondent further avers that this court's jurisdiction on WIBA is secondary, a fact that is well known to the parties and therefore this third party application is misplaced and not rightly placed for adjudication. This is because the director has sufficiently discharged his duty by awarding relief and compensation to the claimant.
14. I am therefore inclined to dismiss the application with costs to the respondents and claimant.

**DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.**

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

- 1. Mr. Maingi instructed by Oenga, Maingi & Omondi Advocates for the Claimant/Applicant.**
- 2. Mr. Wachira Muturi instructed by Wachira Muturi & Co. Advocates for the Respondent.**
- 3. Mr. Achieng instructed by Kinyua & Maingi Advocate for the 3rd Party.**

