



Obango v Platinum Outsourcing and Logistics (E.A) Ltd (Miscellaneous Case E081 of 2022) [2022] KEELRC 13026 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 13026 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E081 OF 2022
JK GAKERI, J
OCTOBER 31, 2022

BETWEEN

SAMWEL OKECH OBANGO APPLICANT

AND

PLATINUM OUTSOURCING AND LOGISTICS (E.A) LTD RESPONDENT

RULING

1. Before the court for determination is a Notice of Preliminary Objection (herein after PO) by the Applicant dated 24th June, 2022.
2. The Applicant states that the court has no jurisdiction in the matter before it in that the [Work Injury Benefits Act, 2007](#) was enacted for the purpose of providing compensation to employees for work related injuries and diseases contracted in the course of employment and for connected purposes.
3. The Applicant submits that the court has no jurisdiction to adopt the decision of the Director of Occupational Safety and Health Services (DOSHS) as its judgement as requested by the Notice of Motion Application dated 30th May, 2022.
4. When the matter came up for hearing of the Notice of Motion Application, counsel for the Respondent informed the court that he had filed a Preliminary Objection and that the same be disposed of first. The Respondent had already received a copy of the Preliminary Objection.
5. Parties agreed that the Preliminary Objection be disposed of by way of written submissions to be confirmed on 26th July, 2022 by which date both parties had filed and a ruling date was given as 31st October, 2022.



Applicant/Respondent's submissions

6. The Applicant submits that the jurisdiction of the court is challenged on the basis of provisions of law declared unconstitutional by the High Court in Mombasa and thus the Preliminary Objection was a non-starter.
7. That section 16 of the *Work Injury Benefits Act* (WIBA), 2007 declared unconstitutional in *Juma Nyamwayi Ndungo & 5 others v Attorney General: Mombasa Law Society of Kenya Interested Party* (2019) eKLR.
8. That in light of the foregoing, the Preliminary Objection by the Respondent is unlawful and unconstitutional since its anchorage is itself unconstitutional.
9. It is further submitted that it is trite that unconstitutional law is unconstitutional. Reliance is made on the decision in *Law Society of Kenya v Kenya Revenue Authority & another* (2017) eKLR where the court held that a law that has been found to be inconsistent with *the Constitution* ceases to have any legal consequences. The Court of Appeal decision in *Otieno & another v Council of Legal Education* (2021) is relied upon to buttress the submission.
10. It is urged that the Preliminary Objection should be dismissed for lack of a legal basis as it must consist of a matter of law which ought to have been pleaded and the Respondent had not pleaded any law as the provision relied upon has been declared to be unconstitutional.
11. The court is urged to decline the invitation and dismiss the Preliminary Objection.

Determination

12. I have considered the Preliminary Objection together with the Replying Affidavit and submissions on record.
13. The issues for determination are whether there is a competent Preliminary Objection before the court and whether the same is sustainable in the circumstances of this case.
14. The essence of a Preliminary Objection has been explained in several decisions. The most cited articulation is that of the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where Law JA stated as follows;

“So far I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer dispute to arbitration.”
15. In the words of Newbold P:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion . . .”
16. The meaning of Preliminary Objection has been restated in countless decisions including by the Supreme Court in *Independent Electoral & Boundaries Commission V Jane Cheprenger & 2 others*



- (2015) eKLR and the Court of Appeal in Hassan Ali Joho & another V Suleiman Said Shabal & 2 others (2014) eKLR and Nitin Properties Ltd V Singh Kalsi & another (1995) eKLR.
17. It requires no belabouring that a Preliminary Objection raises a threshold issue and must be disposed of at the earliest possible instance as it has the potential to dispose of the suit in its entirety.
 18. In this case, the Applicant/Originator contends that the court has no jurisdiction as the same is ousted by section 16 of the *Work Injury Benefits Act*, 2007 which provides that No action shall lie by an employee or and dependant of an employee for the recovery of damages 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.
 19. The Applicant/Respondent contends that the Preliminary Objection has no legal basis since section 16 of the WIBA was declared unconstitutional in Juma Nyamawi Ndungo & 5 others V Attorney General (Supra).
 20. Instructively, the foregoing decision by E.K Ogola J. was rendered on 10th June, 2019 before the Supreme Court of Kenya rendered its decision in Law Society of Kenya V Attorney General & another, Petition No. 4 of 2019 (2019) eKLR on 3rd December, 2019.
 21. The Supreme Court had this to say;

“We are greatly dismayed that the learned judge (E.K Ogola) did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgement . . . As we perceive it, his judgement has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may (may or is) also contrary to this judgement. The findings and orders expressed in that judgement must therefore be read in the context of the decision of the Court of Appeal and our finding and orders in this Appeal. That is all there is to say on that matter.”
 22. Since the Supreme Court upheld the decision of the Court of Appeal in the Attorney General v Law Society of Kenya & COTU (2017) eKLR which overruled the High Court's decision declaring section 16 of WIBA among other provisions unconstitutional, it is arguable that section 16 of WIBA is not unconstitutional.
 23. The court is guided by the Supreme Court and Court of Appeal decisions on the matter.
 24. More significantly, because the Preliminary Objection herein raises the issue of jurisdiction of this court, the gateway to the seat of justice, it behooves the court to interrogate the issue to satisfy itself that it indeed has jurisdiction.
 25. It requires no belabouring that as explained in the Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd (1989) eKLR

“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 continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction . . . Where a court take it upon itself to exercise jurisdiction which it does not possess, its decision amount to nothing. Jurisdiction must be acquired before judgement is given.”



26. Jurisdiction is plainly a pure point of law as enunciated by the Court of Appeal in *Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors Ltd (Supra)*.
27. For the foregoing reasons, it is the finding and holding of the court has the Preliminary Objection before it is competent.
28. As to whether the Preliminary Objection is merited, the starting point are the facts of this case encapsulated elsewhere in this judgement.
29. It is not in dispute that the Applicant was injured in the course of his employment by the Respondent, completed the necessary DOSHS Form, submitted his claim to the DOSHS and an award was made by the DOSHS which the Respondent appear to have been unhappy with at the behest of its insurers who suggested a second medical examination which queried the permanent total disability as stated in the earlier report.
30. According to the Respondent, the DOSHS advised that the Claimant be examined by the doctors attached to DOSHS, a request the Applicant has not honoured.
31. The facts of this case reveal that the employer referred the Applicant to a medical doctor for a second opinion without approval of the Director as provided by section 25(1) of WIBA. This explains the advisory from the DOSHS that the Applicant subjects himself for a 3rd medical examination by the DOSHS doctors.
32. As apparent from the provisions of WIBA, the only jurisdiction this court has under the Act is to hear appeals against decisions of the director as ordained by the provisions of section 52(2) of the *Work Injury Benefits Act, 2007*.
33. The court is aware of the persuasive decisions in *Richard Akama Nyambane V ICG Maltauro SPA (2020) eKLR*, *Ruth Wambui Mwangi & another V Alfarah Wholesalers Ltd (2017) eKLR* and *Jared Ingling Obuya V Handicap International (2021) eKLR* where the court held that it had jurisdiction to enforce awards of compensation by the DOSHS.
34. Having entertained and determined appeals from the DOSHS, in exercise of appellate jurisdiction conferred by section 52(2) of the *Work Injury Benefits Act, 2007*, this court is reluctant to arrogate unto itself additional jurisdiction of adopting decisions of DOSHS as its own, a position that the courts finds unpalatable.
35. The court is further guided by the decisions in *Peter Mutua Kaloki v China State Construction & Engineering (Kenya) & another (2022) eKLR* and *Lameck Nyakundi Anyona v W.J.J Kenya Construction Co. Ltd (2022) eKLR*.
36. Finally, section 51 of the *Work Injury Benefits Act, 2007* provides as follows;
 1. Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision lodge an objection with the Director against such decision.
 2. The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.
37. Section 52(2) of the Act provides;

An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision.



38. Having found that this is an appellate court for purposes of the decisions of the Director of Occupational Safety and Health Services, the Preliminary Objection herein is merited and the Application herein is dismissed.
39. There shall be no orders as to costs.
40. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF OCTOBER 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

