



REPUBLIC OF KENYA



KENYA LAW
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Odhiambo & another v Quale Holdings Ltd t/a Guyana Guest House (Cause E068 of 2021) [2022] KEELRC 13010 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 13010 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E068 OF 2021
AK NZEI, J
OCTOBER 27, 2022

BETWEEN

MILLICENT AKINYI ODHIAMBO 1ST CLAIMANT

SHARON ANYANGO ODHIAMBO 2ND CLAIMANT

AND

QUALE HOLDINGS LTD T/A GUYANA GUEST HOUSE RESPONDENT

RULING

1. The Claimant herein sued the Respondent on July 14, 2021 vide a Memorandum of Claim dated the same date and pleaded:-
 - a. that they were the legal representatives of Joseph Odhiambo[deceased] and had instituted the suit as dependants of the deceased's estate for damages under both the *Fatal Accidents Act* and the *Law Reform Act*.
 - b. that on May 8, 2018, whilst the deceased was walking on a pavement at the rooftop in the course of his employment and in obedience of instructions given by the Respondent, the pavement cracked and the deceased fell from the rooftop to the ground, sustaining fatal injuries.
 - c. that the accident was reported to the Director Occupational Health and Safety Services within the prescribed period as set out under Sections 22 and 26 of the *Work Injury Benefits Act*, and a Dosh/Wiba Form was duly filled and compensation assessed at Ksh 1,926,144 on February 8, 2019.
 - d. that on October 2, 2019 the Deputy County Commissioner, Nyando Sub-county, issued a certificate of dependency naming the deceased's widow and three children as dependants.
 - e. that on October 11, 2019, the Director of Occupational Health and Safety Services made a demand of the assessed compensation, but the Respondent did not settle the assessed



compensation; necessitating the Director's follow-up letters dated March 23, 2021 and May 5, 2021 to the Respondent.

- f. that the Respondent did not appeal against the Director's assessment and did not raise any objection thereto pursuant to Section 51 and/or Section 52(2) of the [Work Injury Benefits Act](#).
 - g. that the Respondent has failed to pay Ksh 1,926,144.00 and interest to the Claimants contrary to provisions of Section 26(4) of the [Work Injury Benefits Act](#) which obligates the Respondent to settle the claim within 90 days.
2. The Claimants prayed for a declaration that the Respondent is obligated to pay to the Claimants the said sum of Ksh 1,926,144.00 assessed by the Director, an order directing the Respondent to pay the said sum, costs of the suit and interest.
 3. The Respondent entered appearance on August 19, 2021 and subsequently filed Response to the claim on September 8, 2021. The Respondent pleaded:-
 - a. that the contract of service between the Respondent and the deceased commenced on June 1, 2018, and that it was untrue that the deceased was in the course of an alleged employment by May 8, 2019 as averred by the Claimants. The Respondent denied the occurrence of an accident on May 18, 2018 and put the Claimants to strict proof of their allegations.
 - b. that the deceased's relationship with the Respondent was of an independent contract whereby the deceased had his own tools of trade which enabled him to execute the job of plastering and painting exterior parts of the Respondent's building known as Guyana Guest House along Mnazi Mmoja Road, Mombasa.
 - c. that the deceased was not an employee of the Respondent and that the [Work Injury Benefits Act](#) did not apply.
 - d. that the Claimants filed Civil Suit No 2078 of 2019 in the Senior Resident Magistrate's Court against the Respondent, which suit is still pending in the said court; and that the Director's assessment on February 8, 2019 was irregular as the Director could not validly deal with a claim that was and is still pending in a court of law.
 - e. that by a letter dated May 28, 2021, the Respondent disputed the validity of the statement made by the Director.
 - f. that the Respondent disputes that this Court has jurisdiction to deal with the suit herein in view of the fact that the deceased was not an employee of the Respondent, and the pendency of Mombasa SRMCC No 2078 of 2019, which was on October 7, 2020 remitted back to the said Court's Registry to await further directions.
 - g. that without prejudice, the Respondent, at the time of the accident involving the deceased, maintained a Work Injury Benefits Insurance Policy which expressly covered one employee involved in the maintenance of the Respondent's building and a public liability policy insuring the Respondent against liabilities that may arise following injuries to visitors to the Respondent's building known as Guyana Guest House.
 - h. that should the court find that the deceased qualifies either as an employee of the Respondent or a person constituting members of the public in terms of the policy taken by the Respondent, then the Insurance company issuing the particular policy (Metropolitan Cannon General Insurance Limited or The Jubilee Insurance Company Limited) should be directed by the court to fully settle the liability.



4. On March 14, 2022, the Respondent filed a Notice of Preliminary Objection, dated the same date, objecting to the hearing of the suit and stated as follows:-
 - a. the court has no jurisdiction to hear the suit as the Claimants allege that the same is a work injury benefits claim whereby the Employment and Labour Relations Court is not vested with jurisdiction to hear such a matter unless expressly via Section 52 of the [Work Injury Benefits Act](#) (Cap 236 Laws of Kenya), of which the matter does not fall under the said Section.
 - b. Mombasa Srm Ccc No 28 of 2019 (between the parties herein) is still pending and the same raises the question of compensation with regard to the death of the late Joel Odhiambo following a fall as he was executing a contract in favour of the Respondent. Accordingly, the filing of the suit herein while the aforesaid suit is still pending amounts to an abuse of the process of the court, and the defendant prays that the suit be struck out with costs to the defendant.
5. The foregoing is the preliminary objection that has been raised before me.
6. The Respondent challenged this court's jurisdiction by dint of the provisions of the [Work Injury Benefits Act](#), and in view of the suit alleged to be pending in the subordinate court over the injuries sustained by the deceased.
7. So, what is a Preliminary Objection? It was stated as follows in the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696:-

“so far as I am aware, a Preliminary Objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if urged as a preliminary point may dispose of the suit. Examples are an objection to 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 the dispute to arbitration.”
8. While the objection to the Court's jurisdiction falls within the purview of matters that may be urged as a preliminary objection, the allegation of a suit pending in the lower court and the nature of the subject matter therein does not, as such an allegation will have to be ascertained. Once an otherwise clear point of law becomes clouded with matters of fact, it ceases to be a point of law. It becomes an allegation of fact on which evidence must be presented before a determination thereon can be made by the court.
9. Sir Charles Newbold stated as follows in the *Mukisa Biscuits case* (supra):-

“...a Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was urged on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion...”
10. I will proceed to address and to determine the issue of whether this court has jurisdiction to entertain and to hear the suit herein in view of the provisions of the WIBA. It is pleaded that pursuant to the fatal injuries sustained by the deceased on May 8, 2018, the Director of Occupational Safety and Health Services assessed the compensation payable thereon, and indeed made a demand for payment thereof by the Respondent. The Claimants pleaded that the assessment was done on February 8, 2019 and a demand for payment was thereafter made on October 11, 2019.



11. Section 51 of the *Work Injury Benefits Act* 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.”
12. The Respondent is not shown to have objected to the Director’s decision within the time prescribed under Section 51(1) of the *WIBA*, either in the manner prescribed or at all.
13. In interrogating the issue of whether this court has jurisdiction to enforce the Director’s decision that was not objected to by the Respondent pursuant to Section 51 of *WIBA*, the provisions of Section 16 and 23 of the said *Act* must be considered. Section 16 of the *Work Injury Benefits Act* provides as follows:-
- “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.”
14. Section 23 of the said *Act* provides as follows:-
- “(1) after having received notice of an accident or having learned that an employee has been injured in an accident, the director shall make such enquiries 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.
 - (4) a person who fails to comply with the provisions of Subsection (3) commits an offence.”
15. It is evidently clear from the foregoing Sections of the *WIBA* that determination of liability and assessment of compensation payable thereon in work injury claims is the preserve of the Director of Occupational Safety and Health Services and that this Court does not have primary and/or original jurisdiction over these two issues.
16. Section 23 of the *Act* is specific that the Director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with the Act. Determination of liability and assessment of damages payable in work injuries claims is therefore strictly within the statutory domain of the Director, as the statute expressly takes away the Court’s jurisdiction to deal with the same.



17. I recently stated as follows in the case of *Amir Swaleb Omar v Mackenzie Maritime [e.a] Limited* [2022] eKLR:-

“ 17. The Act (WIBA) is silent on how the awards of compensation made by the Director in favour of employees involved in occupational accidents or who suffer occupational diseases are to be enforced. At the same time, the Act does not expressly divest this Court of jurisdiction to enforce such awards; and especially where the award of compensation by the Director has not been objected to and the employer has refused to pay the assessed compensation. Did parliament intent that an employee caught up in such a situation would be left at the mercy of an employer who may choose either to pay or not to pay the assessed sum? I do not think so.

18. What would be the purpose of the Director making or undertaking inquiries in order to determine the issue of liability and proceeding to assess the compensation payable if the compensation assessed by the Director was not meant to be paid to the injured employee? In my view, once the Director assesses the compensation payable and the same is not objected to pursuant to Section 51 of the WIBA, the assessed sum becomes the injured employee’s right and entitlement regarding which the employee can move to Court and seek enforcement of that right by seeking entry of judgment in terms of the Director’s assessment, and issuance of a decree which can then be executed to realize that right.

19. Indeed, failure by an employer to pay a demanded compensation that has been assessed by the Director and to which no objection has been lodged creates a dispute over a liquidated claim, which this Court can entertain and determine. Article 50(1) of the Constitution of Kenya 2010 provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body.”

18. The foregoing position applies to the present case. In my view, this court has jurisdiction regarding enforcement of the Director’s decision, but the Court cannot interrogate and or determine any issues of liability between the employer and the employee which either of them may attempt to place before this Court for determination. Such matters ought to have been raised with the Director in accordance with the provisions of the *Work Injury Benefits Act*.

19. I find no merit in the Preliminary Objection dated March 14, 2022. The same is overruled, and is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 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

