



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. E535 OF 2020

1. JONATHAN NJUGUNA KIMANI

2. NANCY VUZIGWA AVIRE.....CLAIMANTS

VERSUS

SAFARICOM KENYA PLC LIMITED.....RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated 14th October 2020 against the Claimants' suit on the grounds that the claims made herein relate to and arise from work injury claims and that by virtue of Section 16 of the Work Injury Benefits Act 2007, this Court does not have jurisdiction to determine the same. It thus seeks for the claims to be struck out *in limine* with costs to the Respondent.

2. The Claimants did not file any response and the Preliminary Objection was canvassed via written Submissions. The Respondent/Applicant's submissions were to the effect that the Claimants voluntarily and mutually separated with the Respondent in line with a duly signed mutual separation agreement whose terms and conditions provided that they would discharge the Respondent from all claims and liabilities arising from or relating to their employment with it. That the Claimants who were consequently paid their full terminal dues as per the separation agreement and in line with the Respondent's related policies and procedures, are now alleging that the mutual separation agreement was a trick by the Respondent to avoid liabilities arising from the Claimants' work-related injuries and claims. The Respondent/Applicant submits that its Application meets the test and threshold for a Preliminary Objection as set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd, [1969] EA 696** given that it is an objection to the jurisdiction of this Court. The Respondent referred to paragraphs 5, 6, 7, 8, 11 and 16 of the Statement of Claim stating that the Claimants therein assert issues and claims relating to or arising from occupational sickness and work-related injuries from their relationship with the Respondent. That the Claimants have related the alleged occupational sicknesses with claims of unfair labour practice on the part of the Respondent and from which they seek among other claims, damages and compensation. The Respondent cites Section 16 of the Work Injuries Benefits Act, 2007 which provides thus: "*No action shall lie by an 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.*"(emphasis theirs)

The Respondent further submits that Section 16 of the Work Injuries Benefits Act, 2007 does not also give this Court the jurisdiction to hear and determine this suit at the primary stage. It cites the case of **Law Society of Kenya v Attorney General & Another [2019] eKLR** where the Supreme Court of Kenya held that:

"[61] a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under Section 52 an appeal mechanism to the then Industrial Court. As we previously stated in **Petition No. 33 of 2018, Sammy Ndungu Waity Vs I.E.B.C. and 3 others [2019] eKLR**;

"Where the Constitution or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly."

[62] We reiterate the above holding and in the present context therefore we further find that Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the courts, because by looking at the intention of Section 16, the purpose it fulfills is apparent. That purpose is revealed in Section 23 which calls for initial resolution of dispute via the

Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director? The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied.

.....

[64] The Director's inquiries are also essentially preliminary investigations. Such mechanisms, set out by statute must be left to run their full course before a court intervenes. Not only does this simplify procedures to ensure that courts focus on substantive rather than procedural justice, but also potentially addresses the problem of backlog of cases, enhances access to justice, encourages expeditious disposal of disputes, and lowers the costs of accessing justice. '[With emphasis]

3. The Respondent/Applicant further relies on the case of **Alfred Kiprono Kirui v James Finlay (K) Limited [2020] eKLR** where the Court upheld a Preliminary Objection on jurisdiction of the ELRC in determining a work injury related claim and affirmed the decision of the Supreme Court in **Law Society of Kenya v Hon. Attorney General & Others, Supreme Court Petition No. 4 of 2019**. The Respondent submits that this Court lacks the primary jurisdiction to entertain the suit herein and that a court has no power to make one more step where it has no jurisdiction (see **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**). The Respondent/Applicant submits that having demonstrated that this Court lacks jurisdiction to entertain the suit herein, it urges the Honorable Court to strike out the Claimants' claims dated 15th September, 2020 with costs to the Respondent.

4. The Claimants/Respondents' submissions were to the effect that they were unlawfully and unfairly terminated from employment by the Respondent through non-specific separation agreements dated 11th November 2019. That they had sought the Respondent's intervention to mitigate their conditions so as to ease their discomfort and fast track their healing but their requests were denied by the Respondent. That since they would not have been in a position to continue providing their services to the Respondent, they requested for retirement on medical grounds as had happened with other employees who had acquired occupational injuries. That the Respondent's rejection to retire both of them on medical grounds and or failure to indicate the reason for separation was unlawful and unprocedural and was a deliberate intention to protect itself from being found culpable for unfair labour practices i.e. failure to protect the Claimants from occupational sicknesses. They further note that the contents of the separation agreements resemble those of a retirement agreement except that the agreement did not disclose the reason for the separation. That as a result of this omission by the Respondent, they are left to treat orthopaedic conditions from their own pockets for the rest of their lives even though it was the Respondent's duty to protect them from such liability. In opposition to the Preliminary Objection, the Claimants/Respondents submit that the same is misadvised, incompetent and an abuse of precious judicial time because the Claimants are not claiming compensation for injury or disease contracted during their employment. That injury or diseases contracted are not the substratum of the Claim and are only mentioned in the pleading to support the allegation of unfair labour practice and discrimination as against them by the Respondent. The Claimants cited the case of **Allfayo Jagona Imbuya v Board of Management Ivugwi Secondary School [2018] eKLR** where Mbaru J. held that jurisdiction for all claims for work injury and the impact thereof lie with the lower court unless the claim is made to give emphasis on the unfair work conditions and termination. They also cited the case of **Mass Investments Limited v Stephen Masila Kyalo [2018] eKLR** where Chepkwony J. analysed the issue of jurisdiction of the High Court and affirmed that the Employment and Labour Relations Court has the jurisdiction to entertain a work injury related claim or appeal.

5. The Claimants/Respondents submit that since a Preliminary Objection can only be raised where facts are not disputed, the Respondent/Applicant is therefore not disputing the factual positions of the parties as raised in the Claim dated 15th September, 2020. That the nature of prayers sought in their claim can only be granted by the Court as provided under section 49 of the Employment Act, 2007. The Claimants urge the Honourable Court to dismiss the Preliminary Objection with costs and to order that the matter be set down for hearing of the suit on its merits.

6. The Court is being invited to determine a jurisdictional question through a preliminary objection raised by the Respondent. In the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** it was held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. In the instant case, the preliminary objection raises grounds on the jurisdiction of this Court to hear and determine work injury claims by virtue of Section 16 of the Work Injury Benefits Act, 2007. To this extent, the application herein meets the threshold of a Preliminary Objection since it raises a pure point of law, which is the jurisdiction of this Court. On the issue of jurisdiction, Mativo J. in the case of **Joyce Cherop Kaspondoy & 609 Others v Kenya Power and Lighting Company [2019] eKLR** held that Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case and cited The South African Constitutional Court (**In the matter between Vuyile Jackson Gcaba v Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC 26**) which had this to say:-

"... In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by...{another court}, the High Court would lack jurisdiction..." (emphasis mine)

7. A careful perusal of the Memorandum of Claim shows that the Claimants raise the issue of the work injuries in their claims for damages for unlawful termination, unfair labour practices and discrimination at the Respondent place and benefits that accrued to them while in the employ of the Respondent. The Claimants claim is thus anchored in the diseases they assert were contracted while in the employ of the Respondent. Without expressly saying so, their claim is the subject of Section 16 of the Work Injuries Benefits Act, 2007 and must of necessity fail. The suit is struck out and each party is to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2021

NZIOKI WA MAKAU

JUDGE