



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CIVIL SUIT NO 131 OF 2017

MULAKU CHEKATA LUKE.....PLAINTIFF

VERSUS

TIMESALES LIMITED.....DEFENDANT

RULING

Introduction

1. This ruling is on the preliminary objection raised by the Plaintiff by notice dated 15th January, 2021 through the firm of Gertrude matata, Waithaka and associates. The substance of the objection is as follows:

1) That this Honourable Court does not have jurisdiction to hear and determine this matter pursuant to the provisions of sections 16 and 52 of the Work Injury Benefits Act and the Supreme Court's Judgment in Supreme Court Petition No. 4 of 2019.

2) That the plaintiff's suit amounts to an abuse of the Court process and ought to be struck out with costs to the defendant.

2. The defendant in opposition to the preliminary objection filed a replying affidavit sworn by its advocates on Record Mr. D.W. Muyundo on 26th January, 2021 on the following grounds;

a) That, the high Court petition number 185 of 2008 declared section 16 and 52 of the Work Injury and Benefits Act unconstitutional, the basis upon which the plaintiff filed this suit on 22nd March, 2017.

b) That, on 17th November, 2017, the Court of Appeal set aside the orders in High Court Petition Number 185 of 2008 which Orders were upheld by the supreme Court decision in Petition Number 4 of 2019, which in essence meant that all work injury claims would lie with the directorate of occupational safety and health services at the first instance.

c) That, the plaintiff herein filed this suit pursuant to the Court orders of Petition 185 of 2008 with legitimate expectation that the same would be determined meritoriously.

d) That, the section 16 as read with section 52 vest original jurisdiction of hearing and determining work injury claims with the directorate of occupational safety and health services and this Court is vested with appellate powers. However, the plaintiff indicates that no person had been elected/ appointed to the said office leaving them with no option but to seek redress from this Court.

e) That, this court do decline the Preliminary objection as upholding it will be a travesty of justice and that it will deny the plaintiff justice when this Court is empowered by the oxygen principle to give Orders to meet the ends of justice.

f) That, if this Court directs parties to file a suit at the said directorate, then it means justice will be delayed as the said office is not yet in operation and justice delayed is justice denied contrary to the tenets guiding this Court.

3. This Court directed parties to dispense with the preliminary objection by way of written submissions with the defendant/ Applicant filing on 12th February, 2021 and the Plaintiff on 22nd March, 2021.

Defendant/ Applicant's submissions

4. The Applicant submitted that, section 16 as read with section 23(1) of the Work Injury Benefits Act 2007 confers powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director of occupational safety and health services and expressly bars institution of court proceedings by the aggrieved party save for appeal to this Court. He buttressed his argument by citing the Court of Appeal case, **Civil Appeal No. 133 of 2011 Attorney General –vs- Law Society of Kenya & Another**.
5. Counsel further directed this Court to Supreme Court **Petition Number 4 of 2019; Law Society of Kenya –VS- Attorney General and another[2019] eklr** where the Apex Court upheld the Court of Appeal decision in Civil Appeal 133 of 2011 and maintained that the institution of claims for work related injuries and diseases lies with the director of occupational safety and health services as provided under section 16 as read with section 23 of the Work Injury and benefits Act and Appeal shall lie to this Court as provided for under section 52 of the said Act.
6. Accordingly, Counsel submitted that, the plaintiff should have followed the proper procedure provided for by the said act and instituted the claim properly with the director of occupational safety and health services as directed by the Act. Further that, doing contrary to the provisions of the said act will be contrary to the Constitution and the supreme Court's decision in **Sammy Ndungu Waity –vs- I.E.B.C & 3 Others [2019] eklr**.
7. It was further submitted that, when an Act has given directions and procedure of proceeding with a particular issue, every person is mandated to follow such procedure as was held in the case of **Longonot horticulture limited –vs- Jamas wakaba maina[2019] eklr**. Additionally that, access to justice, though a right, may be limited by law that confer powers to such court such as the Constitution, statute or both as was held in **Saidi Mohamed –vs- diamond industries ltd [2018] eklr**.
8. The defendant/ applicant therefore urged this court to uphold the preliminary objection and strike out this suit with no orders to costs.

Plaintiff's Submissions

9. The plaintiff in response to the Preliminary objection submitted on whether this Court is clothed with the requisite jurisdiction to hear and determine this suit. It was submitted that indeed the supreme Court decision in petition 4 of 2019 upheld the decision of the Court of Appeal, Appeal No. 133 of 2011 which reversed the decision of Nairobi High Court petition number 185 of 2008 which had declared inter alia section 16 of the Work Injury and Benefits Act unconstitutional.
10. However, the plaintiff argues that, the suit herein was filed on 22nd March, 2017 when the operative law was the decision in High Court Petition number 185 of 2008. The decision in Appeal 133 of 2011 was rendered on 17th November, 2017 long after they had filed their suit, further that the said decision became subject of Appeal in petition 4 of 2019 therefore cannot be faulted in relying on the court decision in filing this suit in this Court as they had legitimate expectation that their issues would be resolved by this court.
11. It was further submitted that section 1A and 3A of the Civil Procedure Act, provides for the just, expeditious, proportionate and affordable resolution of the civil dispute and therefore impressed upon this court to give a just determination and not dismiss or strike out the suit but make an order referring this matter to the director as established under the work injury and benefits Act of 2007 as was equally ordered by this Court when faced with similar issue in the case of **Cyrus Ombuna Machina –versus- Safaricom Limited [2020] eklr** which court held that;
- “the claimant has urged the court to spare the claim and refer it to director under WIBA. The respondent prays that I dismiss the claim against her, dismissing the claim without considering its merits would be a miscarriage of justice. I will also not strike out because as at 2017 when the suit was filed, the law in place allowed him to file the suit in court by dint of the judgment in High Court petition number 185 of 2008. I therefore refer the dispute to the director under WIBA to hear and determine the dispute under the relevant provisions of WIBA.”**
12. The plaintiff submitted that this Court has powers on the application of any party or on its own motion under section 18(1)(a) of the civil Procedure Act cap 21 of the laws of Kenya to at any stage, transfer any suit, appeal or any proceedings before it for trial or disposal at any court subordinate to it and competent to dispose the same. Therefore, the plaintiff, while conceding to the lack of jurisdiction by this Court, urged this court to transfer the suit to the director of WIBA *suo moto* to meet the ends of justice.
13. On whether this suit amounts to an abuse of court process, the plaintiff submits that it filed this suit on 22nd March, 2017 when the operative law was that in the holding of Nairobi High Court 185 of 2008 which was only overturned by Appeal No. 133 of 2011 on 17th November, 2017 long after this suit was filed as such cannot be said to have abused the court process. on the contrary he submitted that the plaintiff acted on legitimate expectation that his suit could be heard and determined in a court of law as directed in the said judgment. He reinforced his position by citing the case of **Muchanga investment limited –versus- safaris unlimited (Africa) ltd & 2 others [2009] KLR 229** which defined what amounts to an abuse of Court process.
14. The plaintiff further submitted that the events leading to the objection herein do not in any way speak of an abuse of Court process, if so the defendant could have raised this Objection as soon as the received the pleading of this suit in March, 2017. That the defendant only raised this Preliminary objection after the decision of Supreme Court in Petition number 4 of 2019 was delivered.
15. In conclusion the plaintiff submitted that it has been defeated by a change in law, on technicalities at no fault of his own, therefore urged this Court to be guided by the decision in **Premchand Raichand ltd- versus- quarry services of East Africa Ltd [1972] EA 162** as to award of costs and decline to award the defendant any costs.

16. He thus prayed that the Court transfers this suit to the director under the Work Injury and Benefits Act of 2007 and make no orders as to costs.

17. I have examined the averments of the parties herein. The contention in this case is whether this court has jurisdiction to handle this matter.

18. The respondent has submitted that such matters should be filed with the Direction of WIBA and not before this court as held by the Supreme Court of Kenya in **Petition 4 of 2019 LSK –VS- AG & Another (2019)** eKLR upholding the Court of Appeal decision in CA No.133 of 2011.

19. Indeed the Court of Appeal and the Supreme Court of Kenya in the cited cases held that work injury related matters should be filed with the direction of WIBA. The decision of the Court of Appeal was rendered on 17/11/2017 and the Supreme Court decision on 3/12/2019.

20. In the Supreme Court decision the learned JJSCO rendered thereunder as follows;-

“85 in agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work injury had gone on and a number of the suits had progressed up to decree stage, some which were still being heard, while others were still at the preliminary stage. All such matters were being dealt with under their existing and completely different regiments of law. We thus agree with the appellate court that claimants in these pending cases have legitimate expectation that upon the passage of the Act, their cases would be concluded under the judicial process which they had invoked...”

21. This claim was instituted on 22/3/2017. This was before the Judgments in the Court of Appeal and Supreme Court of Kenya were rendered.

22. It is therefore the claimant’s legitimate expectation that the claim will progress and be concluded under the regime under which it was commenced.

23. It is therefore my finding based on the above analysis that the preliminary objection raised by the respondent has no merit and I dismiss it accordingly and allow this claim to continue and be concluded before this court.

24. Costs in the cause.

Ruling delivered virtually this 27TH day of MAY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Amihaga for respondent – present

Amimo for applicant – present

Court Assistant - Fred