



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

MISCELLANEOUS APPLICATION NO E002 OF 2020

PATRICK MAELO TULUKA.....APPLICANT

VS

COAST SECURITY LIMITED.....1ST RESPONDENT

INTERPEL INVESTMENT LIMITED.....2ND RESPONDENT

RULING

1. This ruling streams from the Applicant's Notice of Motion dated 31st August 2020, which seeks transfer of *Mombasa SRMCC No 3055 of 2007: Patrick Maelo Tuluka v Coast Security Services*, from Mombasa Senior Resident Magistrate's Court to this Court.
2. The application is supported by an affidavit sworn by the Applicant's Counsel, Joyce Chesaro, and is based on the ground that the Magistrate's Court before which the suit was filed, is devoid of jurisdiction to handle the matter.
3. The 1st Respondent opposes the Applicant's Motion and states that this Court lacks jurisdiction to entertain the Motion. The 1st Respondent further states that as far as work injury claims are concerned, this Court is only clothed with appellate jurisdiction.
4. In its written submissions filed on 9th February 2021, the 1st Respondent made extensive reference to the Court of Appeal decision in *Attorney General v Law Society of Kenya & another [2017] eKLR* and the subsequent affirming decision by the Supreme Court in *Law Society of Kenya v Attorney General & another [2019] eKLR*.
5. The effect of the decisions by the two superior courts is that an earlier decision by the High Court (**Prof. J.B Ojwang J** [as then was]), which had declared sections of the Work Injury Benefits Act (WIBA) unconstitutional, was set aside.
6. Of relevance to this application is Section 16 of WIBA which provides:

16. 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.
7. This provision, which has now been restored, ousts initial jurisdiction in work injury claims, from the courts and vests i in the Director for Occupational Safety and Health.
8. A legitimate question is however this; want happens to claims, such as the current one, which were already in the court system prior to the decisions by the Court of Appeal and the Supreme Court?
9. At paragraph 85 of its decision, the Supreme Court stated the following:

“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-injuries had gone on and a number of suits had progressed up to decree stage, some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those 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. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute as we have shown above, we opine that it is best that all matters are finalised under Section 52 aforesaid.”

10. My understanding of the foregoing pronouncement by the Supreme Court is that, work injury claims arising before the enactment of WIBA, could be processed in the courts at which they had been filed. Looking at the plaint filed in the trial court, the cause of action arose on 20th April 2007, before enactment of WIBA.

11. It seems to me therefore that the trial court could go ahead and conclude the matter as filed before it.

12. As it stands, the Employment and Labour Relations Court only exercises appellate jurisdiction over WIBA matters and is therefore without original jurisdiction. For this reason, the Applicant's Motion dated 31st August 2020 is disallowed.

13. Each party will bear their own costs.

14. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Mrs. Chesaro for the Applicant

Mr. Bosire for the 1st Respondent

No appearance for the 2nd Respondent