



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC NO. 262 OF 2017

TIMOTHY KINYUA NYAGA.....CLAIMANT

-VERSUS-

LANGFIELD SYSTEMS LIMITED.....1ST RESPONDENT

KENYA POWER & LIGHTING CO. LTD.....2ND RESPONDENT

RULING

1. The claimant herein filed his memorandum of claim dated 20th June, 2017 on the 21st June, 2017 seeking for compensation for alleged injuries sustained at his work place sometimes on 3rd October, 2014. The 1st Respondent entered Appearance and filed a response to the claim on 21st August, 2017, while the 2nd Respondent filed its response on 1st November, 2017.

2. The matter was mentioned severally for compliance with Order 11 and on 14th January, 2019 the 2nd Respondent filed a preliminary Objection based on the following grounds;

1) That the suit herein as against the 2nd Respondent is incompetent and that the court herein lacks jurisdiction to entertain the claim because there is no employer-employee relationship between the claimant and the 2nd Respondent.

2) That notwithstanding the lack of employer-employee relationship between the claimant and the respondent, the Honourable Court still lacks jurisdiction to preside over the instant suit by virtues of section 16 of the Work Injury Benefits Act 2007 and the decision in Nairobi Court of Appeal no.133 of 2011 Attorney General –v- Law society of Kenya and another [2011].

3. While the above Preliminary objection was pending for directions, the 1st Respondent filed another preliminary objection on the following grounds;

1) That this is a work injury claim governed by the work injuries and Benefits Act 2007.

2) That this Honourable court has no jurisdiction to hear and determine this claim, which as framed, invites this Honourable Court to conduct full trial and determine the issues of liability and negligence and assess damages for an alleged work injury.

3) The Supreme Court in its judgment in Supreme Court Petition No. 4 of 2019 law Society of Kenya –v- The Attorney General & COTU upheld the decision of the Court of Appeal in Civil Appeal No. 133 of 2011 and confirmed that the Courts never had jurisdiction to handle work Injuries related matter and filed after the Work injuries Benefits Act, 2007 came to force, (WIBA was commenced on 2nd June, 2008 by Gazzatte Notice No. 60 of 23rd May, 2008) which act had donated jurisdiction to handle work injury related matters to the director of Occupational Safety and Health services envisaged under the Work Injuries Benefits Act 2007.

4) The Chief Justice in his circular dated 15th September, 2020, made it clear that only matters still pending in Court, which were already filed in the Court before the Work Injuries Benefits Act 2007 came into force,[WIBA was commenced on 2nd June, 2008 by Gazette Notice No. 60 of 23rd May, 2008] were to be concluded in those Courts.

5) In other words, only matters filed in Court before the 2nd June, 2008 still pending in Court shall be concluded in those Courts.

6) The Employment and Labour Relations Court in Mombasa ELRC Civil Appeal no. 5 of 2019, Manuchar Kenya Limited-v- Dennis Odhiambo Olwete has since interpreted the Supreme Court Judgment and confirmed the above position.

7) This suit was therefore bad in law from the onset for want of jurisdiction and should be struck out forthwith.

4. In response to the preliminary Objections filed, the claimant filed a replying affidavit deposed upon on 18th May, 2021 contending that the Preliminary objection raised are not on pure points of law as it has issues of facts which will require the interrogation of this Court to come to a determination. He stated that he lodged a work injury claim with the directorate of Occupational safety and health services sometimes in the year 2015 as evidence by annexure TKN-A & B and was paid therefore the claim pending for determination before this Court is on negligence of the Respondents under section 17 (1) of the Work Injury and Benefits Act.

5. This Ruling therefore is in respect of the above preliminary Objections which objections were disposed of by way of written submissions.

Claimant's Submissions

6. The claimant submitted that the 2nd Respondent was sued for the reason that the 2nd Respondent had sourced services of the 1st Respondent, the claimant's Employer at its Nakuru- Lanet substation, where the claimant was required to conduct soil topography for construction purposes where he was struck by an electric current from the humid air leading to the accident. He argues that as much as the 2nd Respondent was not the claimant's employer, it still owed a duty of care to the 1st Respondent's employee, which included the claimant and thus sued the 2nd Respondent pursuant to Section 17 of the Work Injury and Benefits Act and cited the locus classicus case of **Donoghue -v- Stevenson (1932)**.

7. It was submitted that the 2nd Respondent was duty bound to inform its agents of any unforeseen danger to avert any accident as was held in **Eric Omuodo Ounga -v- Kenya Commercial Bank Limited [2017] eKLR**.

8. It is the claimant's submissions that this Court has discretion to struck out any party wrongly joined in a suit pursuant to Order 1 Rule 10 of the Civil Procedure Rules. He further submitted that this Court has been clothed with power under Section 18 of the Civil Procedure Act, to transfer suit *suo moto* to the appropriate subordinate Court and or Tribunal for determination on Merit and therefore prayed that if the Court finds it lacks jurisdiction, to transfer this Suit to the appropriate forum for determination.

2nd Respondent's submissions

9. The respondent herein submitted from the onset that this Court lack jurisdiction to hear and determine the issue at hand and urged this Court to down its tools as was held in **Owners of Motor vessel Lillian 'S' -v- Caltex Oil Kenya Limited [1989] eKLR**. He argues that there is no employer-employee relationship between the claimant and the 2nd Respondent therefore the jurisdiction of this Court granted under section 12 of the Employment Act does not cover the relationship between the claimant and the respondent herein and cited the case of **Mwalimu Kalimu Gamumu & 35 others -v- coastline safaris limited and 2 others [2013] eKLR** where the Court restated the test of control of employee by an employer as a determinant of an existence of an employment relationship.

10. It was submitted further that, notwithstanding the above, the Court still lacks jurisdiction to hear the claim, it being an industrial accident governed by the Work injuries and Benefits Act, which provides under section 16 as read with section 23 that the original jurisdiction of industrial accidents vests with the Director of Occupational safety and the Appellant jurisdiction upon this Court, therefore he argues that this Court lacks jurisdiction to proceed with this case. He reinforces his argument by citing the case of **Attorney General -v- Law society of Kenya and another [2017] eKLR**.

1st respondent's Submissions

11. It is submitted on behalf of the 1st Respondent, that this court lack original jurisdiction to hear this matter it being a WIBA matter, and that this Court can only adjudicate on the same on an Appeal and cited the Supreme Court **Petition No. 4 of 2019 law Society of Kenya -v- The Attorney General & COTU** which upheld the decision of the Court of Appeal Civil Appeal Number 133 of 2011. He argued further that the Supreme Court decision only allowed matters that had been filed before commencement of the Work Injury and Benefits Act on 23rd May, 2008 to continue in the courts filed and be concluded.

12. It was submitted that since the claimant's case was filed after the enactment of WIBA Act, this Court lack jurisdiction to hear it and thus sought for the suit to be struck out.

13. I have examined the averments of the parties herein. In determining the preliminary objection, I note that this claim relates to injury at work and was filed in this court on 21/6/2017. As at 21/6/2017, the legality of WIBA had been contested by the parties in High Court Pet. No.185/2008.

14. The High Court agreed with the petitioner and held that various sections of WIBA were unconstitutional to the retired constitution.

15. Aggrieved by the decision of the High Court, the Attorney General appealed the decision vide Court of Appeal CA No.133 of 2011. AG VS LSK & Another.

16. The Supreme Court of Kenya on 3/12/2019 upheld the Judgment of the Court of Appeal noting that the impugned provision did not infringe the former constitution.

17. The 2 superior courts also made a determination that matters already commenced must proceed under the legal regime that they were instituted. The Supreme Court of Kenya stated as follows;-

“85 We note that it is not in dispute that prior to the enactment of the Act, litigation relating to work injuries has gone on and a number of the 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..... The claimants in these pending cases have legitimate expectations that upon the passage of the Act, their cases would be conducted under the Judicial process which they had invoked.”

18. By virtue of the decree of the Supreme Court of Kenya, these matters having been filed in the intervening period before determination of the appeals and counter appeals filed by the parties in the matters that were determined on WIBA, the expectation of the claimant is that this matter would be determined under the legal regime where the matter was filed.

19. That is my understanding and clear direction given by the Court of Appeal and Supreme Court of Kenya.

20. In the circumstances the issue of whether this court had jurisdiction to hear this matter in 2017 is not material at the moment.

21. I therefore, find the preliminary objection has no merit.

22. I dismiss it and order the claimant to proceed.

23. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 15TH DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mushindi holding brief for Wandaka for claimant present

Respondents – absent

Seth & Wathigo & Co. for 2nd Respondent – Absent

Court Assistants – Fred and Wanyoike