



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 382 OF 2015**

**DICKSON OTIENO NDAGA.....CLAIMANT**

**v**

**CHINA JIANGSU INTERNATIONAL.....RESPONDENT**

**RULING**

1. Dickson Otieno Ndaga (the Claimant) sued China Jiangsu International (the Respondent) on 22 October 2015, alleging negligence/breach of duty of care, and the Respondent filed a Replying Memorandum on 6 January 2016, denying negligence or breach of duty of care.
2. On the same day, the Respondent filed a Notice of Preliminary Objection contesting the Court's jurisdiction in light of section 12 of the Employment and Labour Relations Court Act.
3. On 15 March 2017, the Court directed that the Cause proceeds to hearing on the merits on the ground that the preliminary objection was vague. The scheduled hearing(s) did not take off due to varying reasons.
4. On 26 February 2020, the Respondent filed another Notice of Preliminary Objection contending that the Court lacked jurisdiction by virtue of sections 10(5), 16, 23(1) and 53 of the Work Injury Benefits Act.
5. Since no action had been taken to prosecute the Cause from 11 March 2020, the Court issued a Notice to Show Cause why the suit should not be dismissed on 30 December 2020.
6. The Claimant filed a replying affidavit in opposition to the Notice on 10 May 2021.
7. On the return date of the Show Cause, the Respondent again raised the question of jurisdiction.
8. Pursuant to further Court directions, the Respondent filed its submissions on 8 July 2021 on the jurisdictional question, while the Claimant filed his submissions on 19 August 2021.
9. In challenging the Court's jurisdiction, the Respondent firstly contended that section 12 of the Employment and Labour Relations Court Act made no explicit reference to work injury suits and, therefore, such suits did not belong to the category of disputes envisaged under the Act. The Respondent cited *Abyssinia Iron & Steel Ltd v Douglas Momanyi Ondara* (2015) eKLR for the proposition.
10. Secondly, the Respondent took the view that under the Work Injury Benefits Act, the first instance jurisdiction over work injuries disputes was given to the Director of Occupational Health and Safety, and this Court's jurisdiction could only be invoked at an appellate level.
11. On the case law revolving around the constitutionality of various provisions of the Work Injury Benefits Act from the High Court to the Supreme Court, the Respondent made reference to the Supreme Court decision in *Law Society of Kenya v Attorney General & Ar* (2019) eKLR.
12. The Respondent further urged that since the Claimant commenced action in 2015, then by dint of Gazette Notice No. 9243 of 2011, the jurisdiction had been delegated to the Senior Resident Magistrates Court, and thus this Court should not have been moved directly.
13. For the Claimant, the view was taken that in light of the decision of this Court in *West Kenya Sugar Co Ltd v Tito Lucheli Tangale* (2021) eKLR, the Courts had jurisdiction over work injury benefits disputes which had been filed in the Courts from 22 May 2008, when the High Court issued an interim conservatory order suspending the operations of section 16 of the Work Injury Benefits Act to 3 December 2019, when the Supreme Court found the provision was compliant with constitutional norms.

14. The Court has considered the Objection and submissions.
15. The jurisdiction of this Court is primarily set out in section 12 of the Employment and Labour Relations Court Act.
16. However, it is not only the Employment and Labour Relations Court Act that bestows jurisdiction upon this Court.
17. There are other primary statutes that grant this Court jurisdiction, and these include the Work Injury Benefits Act, the Employment Act, the Labour Institutions Act and the Labour Relations Act.
18. Of particular interest in the present circumstances is the Work Injury Benefits Act.
19. The Chief Justice, through the Gazette notice already alluded to by the Respondent, delegated jurisdiction over work injury claims to the Senior Resident Magistrate Court (and above). But the jurisdiction still remains with this Court.
20. The Court, therefore, finds the objection by the Respondent that the Claimant should have moved the Magistrates Court not determinative of the Cause before a hearing on the merits.
21. On the merits, by the time the Claimant was moving the Court on 22 October 2015, the declaratory order issued by the High Court on 4 March 2009, invalidating Section 16 of the Work Injury Benefits Act was still in existence (there is no evidence indicating that the Court of Appeal granted any stay of the declaration).
22. The judge declared law at the time was that the requirement to approach the Director of Occupational Safety and Health was not part of the laws of Kenya, and this remained so until 17 November 2017, when the Court of Appeal reversed the declaration by the High Court (Supreme Court affirmed the decision by the Court of Appeal).
23. The decision of the Claimant to move the Court was therefore underpinned by the existing state of the law (judge-declared law), and therefore the objection of first instance jurisdiction being reposed in the Director did not reflect the correct legal position.

#### **Orders**

24. This Cause has been pending since 2015, nearly 6 years ago. In consideration of that factor and the reasons given hereinabove, the Court makes the following orders:

- (i) The Cause be transferred to the Chief Magistrates Court sitting in Kisumu for expeditious hearing and determination.
- (ii) The parties to appear before the Chief Magistrates Court on 14 December 2021 for directions on hearing on a priority basis.
- (iii) The Deputy Registrar to notify the parties of these orders forthwith.

25. Costs in the cause.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8<sup>TH</sup> DAY OF DECEMBER 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant Kimanga & Co. Advocates

For Respondent Kibichiy & Co. Advocates

Court Assistant Chrispo Aura