



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.110 OF 2018

ALFRED KIPRONO KIRUL.....CLAIMANT

VERSUS

JAMES FINLAY (K) LIMITED.....RESPONDENT

RULING

The Respondent filed Notice of Preliminary Objections on 8th February, 2019 on the grounds that;

The court lacks jurisdiction to entertain this claim in the first instance and the jurisdiction lies with the Director of Occupational Safety and Health Service under the Work Injury Benefits Act as per section 16, 23(1), 52(1) and (2) and 58(2) of the Work Injury Benefits Act, 2007

The claimant's suit is incompetent and bad in law.

The court directed both parties to file written submissions. Only the respondent complied.

The respondent submitted that jurisdiction is everything and without it the court must stop.

The claimant's claim is that on 14th June, 2012 while at work with the respondent he sustained injury to his right eye when he was hit by a slug while welding steel at the power generator room. He filed his claim on 6th December, 2018 seeking damages.

Under the provisions of section 58 of the Work Injury Benefits Act, 2007 (WIBA) no suit relating to work injury can commence with the court as the place of first instance but with the director of Occupational Safety and Health Services (Director) as held in **Saidi Mohamed versus Diamond Industries Ltd [2018] eKLR** that the claimant has to exhaust the procedures laid down under WIBA before approaching the court.

Without jurisdiction, the court as moved by the claimant should dismiss the claim.

The claimant as noted above did not attend or file any written submissions on the objections raised by the respondent.

In the Memorandum of Claim filed on 5th December, 2018 the issue in dispute is that on 14th June, 2012 the claimant suffered work injury and attributes the same to the breach of statutory duty and negligence on the part of the respondent and thus seeks the payment of general and special damages.

As correctly submitted by the respondent, the WIBA is the statutes which regulate work injury claims with the principle objective of;

An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.

Section 16 thereof provides that;

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.

All claims relating to work injury lie with the Director at the first instance. Upon receipt of any complaint of work injury the Director must address thereof and make a decision and only then, where aggrieved can a party move the court through an appeal as held by the Court of Appeal in the Case of **Hon. Attorney General versus Law Society of Kenya & others Civil Appeal No.133 of 2011**. This position is not affirmed by the Supreme Court in the case of **Law Society of Kenya versus Hon. Attorney General & others Supreme Court Petition No.4 of 2019** that;

[69] We have stated that Section 16 cannot be read in isolation because if read with Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. It cannot, therefore, be the case that section 16 amounts to an ouster clause. It is in fact merely facilitative of what may eventually end up in Court.

In this case, where the cause of action arose on 14th June, 2012 to file the same with the court on 5th December, 2018 is way out of time even with the best effort to have the matter referred to the appropriate forum as this court lacks the original and statutory jurisdiction to hear the matter which relates to work injury.

Accordingly, the objections by the respondent are found with merit and are hereby allowed. As the claimant failed to attend and address as directed, the respondent is hereby awarded costs.

Delivered at Kericho this 2nd day of March, 2020.

M. MBARU

JUDGE

In the presence of: