



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 202 OF 2019

CYRUS OMBUNA MACHINA.....CLAIMANT

VERSUS

SAFARICOM LIMITED.....RESPONDENT

RULING

1. The application before me is the respondents Notice of Motion dated 11.4.2019. It is brought under section 1A and 12 of the Employment and Labour Relations Court (ELRC) Act, section 90 of the Employment Act, section 38,51,52 & 53 of the Work Injury Benefit Act (WIBA) and Rule 17 of the ELRC Rules and it seeks the following orders:

- (a) The court to strike out the plaint dated 1.2.2017.
- (b) Dismiss the said claim against the respondent.

2. The main grounds upon which the application stands are that the claim is time barred by dint of section 90 of the Employment Act; and that the court lacks original jurisdiction to hear and determine the claim by dint of section 52 and 53 of WIBA.

3. The claimant has opposed the application contending that he obtained the leave of the court before filing the suit. On the other hand he has proposed to the court to refer the claim to the Director for hearing and determination under section 52 of WIBA instead of dismissing it.

4. I have carefully considered the application, affidavits and submission by both sides. The issues for determination are:

- (a) Whether the claim is time barred by dint of section 90 of the Employment Act.
- (b) Whether the court lacks original jurisdiction to hear and determine the claim by dint of section 52 of WIBA.
- (c) Which orders should the court grant.

Whether the suit is time barred under section 90 of the Employment Act

5. Section 90 provides that:

“Notwithstanding the provisions of section 4(1) of the Limitation of Action Act (Cap.22) no civil action or proceedings based on arising out of this act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of in the case of a continuing injury or damages within twelve months next after the cessation thereof.”

6. The claim herein arises from an employment relationship between the claimant and the respondent. However the claim is not governed by the provisions of the employment or contract of employment generally but by the provision of WIBA as per section 16 of WIBA

“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. It follows that section 90 of the Employment Act does not apply the work injury claims under WIBA. Consequently, I return that the objection grounded on section 90 of the Employment Act is without merits and must fail.

Whether the court lacks original jurisdiction under section 52 of WIBA

8. Section 52(2) of WIBA provides that:

“(i) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the Directors reply, being received by him, appeal to the industrial court against such decision.”

9. The Court of Appeal has dealt with the issue of jurisdiction in WIBA claims in **Hon. Attorney General v Law Society of Kenya & another [2017] eKLR** where it held that:

“Section 51 and 52 provides for an appellate system. By the former, any aggrieved person by a decision of the Director may lodge an objection with the Director against the decision. . . It is subsection (2) which allows the objector to appeal the decision of the Director to the Industrial Court.”

10. The Industrial Court was replaced by this court under the current Constitution of Kenya and flowing from the foregoing Court of Appeal decision this court only enjoys appellate jurisdiction over Work Injury Claims under section 52 (2) of WIBA. The forum with original jurisdiction to adjudicate over work injury claims is therefore the Director.

11. In **Saidi Mohamed v Diamond Industries Limited[2018]eKLR** Rika J upheld a preliminary objection raised on the ground that this court lacks original jurisdiction to adjudicate over work injury claim and held that :

“The E&LRC therefore has jurisdiction under the Work Injury Benefits Act to deal with dispute related to work injury as confirmed by the Court of Appeal. This jurisdiction however, is not a primary jurisdiction but an appellate jurisdiction.”

Which orders should issue

12. The claimant has urged the court to spare the claim and refer it to the 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 it 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 of the High Court in Petition 15 of 2008. I therefore refer the dispute to the Director under WIBA to hear and determine it under the relevant provisions of WIBA.

13. Each party shall bear his/her own costs.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE