



Sheikh v Inspector General of Kenya Police & another (Miscellaneous Civil Application E821 of 2022) [2024] KEHC 835 (KLR) (Civ) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E821 OF 2022

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

ROBLE ABDIKADIR SHEIKH APPLICANT

AND

THE INSPECTOR GENERAL OF KENYA POLICE 1ST RESPONDENT

THE HONORABLE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. For determination is the originating summons dated 20.12.2022 by Roble Abdikadir Sheik (hereafter the Applicant) seeking *inter alia* that the Applicant herein be granted leave to file suit out of time. The application is expressed to be brought under section 27 & 28(1) of the [Limitation of Actions Act](#), section 3A of the [Civil Procedure Act](#) (CPA), order 37 rule 6 and order 50 of the [Civil Procedure Rules](#) (CPR) and is premised on the grounds thereon as amplified in the supporting sworn of Joyce Kangogo, counsel on record for the Applicant.
2. The gist of her depositions is that she received instructions from the Applicant on April 15, 2018 to file a suit as against the INspector General of Police and the honorable Attorney General (hereafter the 1st & 2nd Respondent/Respondents); that at the time of the Applicant's visit to her chambers while still under medication for severe injuries he sustained in an incident/accident and , his movement from Wajir to Mombasa was prevented by the Covid-19 Pandemic and government restrictions on movement; and that he was only able to travel in October 2021 upon review of the restrictions. She further asserts that the delay was not intentional and no prejudice that shall be caused to the Respondents, having already been served with notice of intention to sue dated 15.02.2018, pursuant to section 13A of the [Government Proceedings Act](#). In summation, she deposes that it is in the interest of justice to avert irreparable loss and damage to the Applicant for the court to grant the motion as prayed.



3. The Respondents oppose the summons by way of grounds of opposition dated April 13, 2023. To the effect that application is statutorily barred by the provisions of section 16 of the [Work Injury Benefits Act](#) which prevents an employee from instituting a court action for recovery of damages in respect of injuries arising from an occupational accident or ailment; that by virtue of section 16 of the [Work Injury Benefits Act](#) this court lacks jurisdiction to hear the suit and the application; that the Applicant's suit is barred by the provisions of section 3 (1) of the [Public Authorities Limitation Act](#); that Section 27 of the Limitations of Actions Act does not contemplate nor provide for the orders sought in the application and are as such incapable of being granted; that by dint of section 27 of the [Limitation of Actions Act](#) as read with section 6 of the [Public Authorities Limitation Act](#), the court lacks jurisdiction to grant the orders sought by the Applicant; that the application is bad in law and an abuse of the court process; that the Applicant has not satisfied the principles to merit the orders sought and has failed to give sufficient reasons for the inordinate delay of over 6 years; and that equity aids the vigilant and not the indolent.
4. Directions were issued to dispose of the application by way of written submissions. Counsel for the Applicant began her submissions by conceding the fact that the intended suit is statutorily time barred but asserts that unless the instant summons is allowed, the Applicant is unlikely to receive compensation from the Respondents. It was further submitted that an explanation for the delay has been proffered in the application. Here counsel reiterating the Applicant's asserted medical condition. Placing reliance on section 3A of the [CPA](#), the Supreme Court decision in *Law Society v Attorney General & Another* [2019] eKLR and Gazette Notice No. 5476 dated 24.04.2023, counsel challenged the Respondents' objection regarding section 16 of the [Work Injury Benefits Act](#) and asserted that this court is vested with jurisdiction to entertain the Applicant's intended suit. It was further contended that notwithstanding the provision of section 3(1) of the [Public Authorities Limitation Act](#), the instant application is justified by the Applicant's right to health and that the law exists to aid and not to curtail justice. In conclusion, the court was urged to allow the application as prayed.
5. Despite being accorded ample opportunity, the Respondents failed and or neglected to file submissions.
6. The Court has considered the application, the Respondents grounds in opposition and the Applicant's submissions. Ordinarily, an application of this nature is heard exparte. See order 37 rule 6 of the [CPR](#), the decisions in *Cozens v North Devon Hospital Management Committee and another* [1966] 2 All E. A. 799 as cited in [Wambui Kabugu v Kenya Bus Service Limited](#) EA. [1997] eKLR and the decision in [Oruta & another v Nyamato](#) [1988] eKLR. However, given the Respondents' participation pursuant to service of the originating summons, the court will proceed to consider their pleadings.
7. The Respondents opted to file grounds of opposition in response to the application. As outlined above, the Respondents in their grounds of opposition have raised various legal objections, based on the provisions of section 16 of the [Work Injury Benefits Act](#), section 3 (1) of the [Public Authorities Limitation Act](#); and section 27 of the [Limitations of Actions Act](#) as read with section 6 of the [Public Authorities Limitation Act](#). The court is of the considered view that the summons turns on the Respondents' jurisdictional challenge raised pursuant to section 16 of [Work Benefit Injuries Act](#).
8. The respondents contend that by dint of section 16 of the [Work Injury Benefits Act](#) this court lacks jurisdiction to hear the intended suit, and therefore jurisdiction to entertain the summons. The said section 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".

9. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

10. As held in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR a court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Paragraphs 4, 5 & 6, of the Applicant's draft plaint are to the following effect particularized as follows; -

"4. At all material times to this suit, the Plaintiff was employed by the 1st Defendant as a police reservist identification number Force/No:MDR/E. 172. Rank. Constable.

5. It was an express or implied term of contract of employment between the Plaintiff and the Defendant and or it was the duty of the Defendants to take all reasonable precaution of the safety of the Plaintiff while engaged with the said job not to expose him at risk of danger, damage or injury of which they know or ought to have known as to provide and maintain an adequate and suitable plan to enable the Plaintiff carry out the said job in safety.

6. That on or about the 3rd July, 2016 the Plaintiff was in the ordinary course of his employment within his authorized duty of guarding and escorting passenger service vehicle bus car ferrying passengers along Elwak Mandera Road when suddenly and without warning bullets shots were shot by strangers from the bush and the Plaintiff sustained serious injuries as a result of gunshot and or bullets piercing into his body and one of the bullet shot got hedged on his lung next to his heart and could not be removed to date. Hence causing the Plaintiff pain, loss and damage." (sic)

11. The foundation of the Applicant's cause of action can easily be discerned from his pleadings and requires no further examination. His intended suit against his asserted employer is a claim for compensation for work related injuries. The High Court draws its original jurisdiction to entertain disputes from article 165 (3) of the *Constitution* as read with section 5 of the *High Court (Organization and Administration) Act*. On the other hand, the Employment and Labour Relations Court draws its original jurisdiction to entertain disputes from article 162(2)(a) of the *Constitution* as read with Section 87 of the *Employment Act*, section 52 of the *Work Injury Benefit Act* and section 12(1) of the *Employment and Labour Relations Court Act*, the latter which provides that;-

"(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the



Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —

- (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade unions organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.”
12. Section 16 of the Work Injury Benefits Act has been the subject of protracted litigation resting with the decision of the Supreme Court in Law Society of Kenya v Attorney General and another, Petition No 4 of 2019; [2019] eKLR. I find it useful to quote in extenso from this decision:

“

“(61) Furthermore, this Court should consider the Constitution 2010’s provisions to help deduce whether or not the impugned provisions, when read alongside the purpose of WIBA would assist in bringing clarity and justice to the issues in contest. In doing so, a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under section 52 an appeal mechanism to the then Industrial Court. As we previously stated in Petition No. 33 of 2018, Sammy Ndungu Waity vs I.E.B.C. and 3 others [2019] eKLR;

“Where the Constitution or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.”

(62) We reiterate the above holding and in the present context therefore we further find that Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the courts, because by looking at the intention of Section 16, the purpose it fulfils is apparent. That purpose is revealed in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director? The answer to that question lies in Section 52 of the Act which allows aggrieved



parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied.

- (63) Having so held, it is evident that by granting the Director authority to make inquiries that are necessary to decide upon any claim or liability in accordance with WIBA, the jurisdiction of the High Court to deal with constitutional questions and violations that may arise from such claims under Article 165 of the *Constitution* 2010 is not ousted at all. Similarly, the appellate mechanism to the Industrial Court, in the circumstances, cannot be legitimately questioned.
- (64) The Director's inquiries are also essentially preliminary investigations. Such mechanisms, set out by statute must be left to run their full course before a court intervenes. Not only does this simplify procedures to ensure that courts focus on substantive rather than procedural justice, but also potentially addresses the problem of backlog of cases, enhances access to justice, encourages expeditious disposal of disputes, and lowers the costs of accessing justice.
- (65) There is also the added benefit that inquiries by the Director inevitably means that work injuries and accidents are well captured and understood by his office. He can for example take measures or instruct his officers to hasten remedial administrative measures to avoid further occurrence of similar incidents.
- (66)
- (67)
- (68) The next issue to address is whether Section 16 is an ouster clause.
- (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.

[70] Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed under Section 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers' compensation. When read in whole with Section 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to resort to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court.

- (71) We must in concluding on this issue also acknowledge, that this is a system that has been operational without complaint from employees through their union as divulged in court by the COTU for over a decade and we therefore find no reason to interfere with an already efficient system. It is our finding, therefore,



that neither Section 16, 23, nor 52(1) of WIBA can be said to be inconsistent with the former Constitution or the Constitution 2010.” (sic)

13. Pursuant to this decision, the Chief Justice issued practice directions vide Gazette Notice No. 5476 of April 28, 2023, regarding the filing and handling of claims for compensation for work related injuries. Paragraph 8 therein directed as follows; -

“Claims Filed after the Supreme Court Decision

8.

(a) All claims with respect to compensation for work related injuries and diseases shall commence before the Director of Occupational Safety and Health Services.

(b) All appeals emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court.

(c) Such appeal shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy.” (sic)

14. The applicant is seeking leave to file a suit for compensation for work related injuries out of time. Coming after the Supreme Court decision, the motion is caught up by Paragraph 8 of the Practice Direction in Gazette Notice No. 5476. The motion does not lie; this court has no jurisdiction to entertain the intended suit and by extension the application presented in that regard. Accordingly, the originating summons is hereby struck out with no orders as to costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondents: N/A

C/A: Carol

