



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 894 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

JOHNSON WAWERU KAMAU CLAIMANT

VERSUS

SAFARICOM LIMITED RESPONDENT

RULING

By notice of preliminary objection dated and filed on 18th December 2018, the respondent seeks to have the memorandum of claim herein struck out and the suit dismissed on the following grounds that –

1. The alleged dispute herein does not fall within the ambit of Section 12(1) to (4) of the Employment and Labour Relations Court Act, (Chapter 234B of the Laws of Kenya).
2. The issues raised in the instant proceedings are neither within the purview of employment and labour relations as contemplated by Article 162(2)(a) of the Constitution of Kenya nor do they fall under employer – employee relationship as contemplated under Section 12 of the Employment and Labour Relations Court Act, (Chapter 234B of the Laws of Kenya) by which reason this Court lacks jurisdiction to entrain this suit as this is a work injury benefit claim clothed as an unfair termination claim.
3. The remedies sought in the memorandum of claim dated 27th April 2018 are misconceived and do not lie as against the respondent as the overall claim relates to compensation for an occupation disease issues this Court has no jurisdiction to deal with as the same ought to be dealt with by the Director of Occupational Safety and Health Services as per procedure laid down in the Work Injuries Benefits Act, 2007.
4. The court only has appellate jurisdiction as prescribed under Section 51 and Section 52 of the Work Injury Benefit Act, 2007 and Section 12(5)(b) Employment and Labour Relations Court Act, (Chapter 234B of the Laws of Kenya) but does not have the original jurisdiction to handle the claim as presented before the court.
5. The entire claim/suit is therefore bad in law untenable and in breach of the express provisions of Section 12 of the Employment and Labour Relations Court Act, (Chapter 234B of the Laws of Kenya) and Section 16 of the Work Injuries Benefit Act, 2007 consequently this suit and/or claim ought to be dismissed with costs to respondent.

When the preliminary objection came up for hearing on 4th September 2019, the parties agreed to dispose of the same by way of written submissions.

In the respondent's submissions dated 13th and filed 15th November 2019, it is submitted that this is a claim for occupational disease as pleaded in paragraphs 23, 25 and 26 of the memorandum of claim. That this court does not have jurisdiction to determine the claim under Section 12 of the Employment and Labour Relations Court Act which limits the jurisdiction of this court to employer – employee disputes, that the primary jurisdiction lies with the Director of Occupational Health and Safety as provided under the Work Injury Benefits Act. That the jurisdiction of this court under WIBA Section 52 is appellate.

It is the respondent's submission that the claimant's ailment was reported to the Director of Occupational, Safety and Health as pleaded by the respondent under paragraph 7 of the memorandum of reply.

It is therefore the submission of the respondent that the claim herein is defective in terms of both substance and jurisdiction and the damages sought are contrary to Section 16 of WIBA.

The respondent has relied on the decision in the case of **Owners of the Motor Vessel "Lillian S" –V- Caltex Oil (Kenya) Limited (1989)** as cited in **Mombasa HCCC No. 171 of 2011 in Mutunga Tea and Coffee Company –V- Shikara Limited**

and Another (2010) eKLR where the court held as follows

"I think that it is reasonably plain that the 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The respondent further relied on the **Court of Appeal decision in Nairobi Civil Appeal No. 133 of 2011, Hon. Attorney General –V- Law Society of Kenya and Another (2017 eKLR** where the court set aside a decision which declared Sections 16 and 52(1) and (2) of WIBA to be unconstitutional.

The respondent submitted that the preliminary objection raises pure points of law as was held in the case of **Mukisa Biscuits Manufacturing Company Limited –V- West End Distributors Limited (1969) EA 696** as cited in Mutunga Tea and Coffee Company Limited case as follows

"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

The respondent prays that the court upholds the preliminary objection and dismisses the entire suit with costs.

For the claimant it is submitted in the submissions dated 18th and filed on 19th November 2019 that the issues raised in the claim are unlawful and unprocedural termination and the ancillary claim of injuries sustained during the course of employment. That it is minimalistic for the respondent to mislead the court that the claim is a work injury benefits claim.

The claimant submits that Section 2(a) of the Employment and Labour Relations Court Act gives this court jurisdiction in matters arising out of employment between an employer and employee. That in the case of **Mukisa Biscuits** (supra) as cited in **Nzele David Nzomo –V- Moses Namayi Anyangu and Another (2009) eKLR**, the court held –

"A preliminary objection consists of a point of law which has

been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

The improper raising of points by way of preliminary objection does nothing but bring unnecessarily costs and on occasion, confirm the issues. The is improper practice must stop." As per Sir Charles New Bold"

It is submitted that the preliminary objection would not dispose of the prayers for wrongful dismissal, unfair termination and remedies for wrongful dismissal as captured in the memorandum of claim together with the prayers for remedies for work related injuries.

The claimant urges this court to further consider the provisions of Order 2, Rule 15 of the Civil Procedure Rules which provide –

[Order 2, rule 15.] Striking out pleadings.

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

The claimant further submits that the court's power to strike out pleadings is to be exercised sparingly and cautiously as was held in the case

of *D. T. Dobie and Company (Kenya) Limited -V- Muchina (1982) KLR 1* at page 9 where the court stated as follows –

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

It is the submissions of the claimant that the claim herein is properly before this court and striking out the same would not be only punitive but would deny the claimant his day in court. The claimant urges the court to dismiss the preliminary objection.

Determination

The memorandum of claim filed herein has two causes of action. The first is unfair termination of employment. The second is damages for injuries sustained in the cause of employment. The prayers are

as follows –

- (a) A declaration that claimant’s dismissal from the respondent’s employment was unprocedural, unfair and unlawful.
- (b) Compensation equivalent to 12 months’ salary Kshs.1,101,069.36
- (c) Punitive and aggravated damages.
- (d) General damages for injuries suffered while in employment.
- (e) Costs of this suit.
- (f) Interests on (b) to (e) from the date of filing the suit.
- (g) Any other relief that the court may deem appropriate to grant

It is obvious from the pleadings that the suit as filed cannot be heard under the provisions of WIBA. Only a portion of the claim can be heard under WIBA. The suit is what would be commonly referred to as a mixed grill suit. Should this court agree with the respondent and strike out the entire suit, the claimant would be left with no remedy for the claim in respect of unfair termination

of his employment.

As was stated in *Mukisa Biscuit* case, a preliminary objection ought to be raised only where it is likely to dispose of the entire suit. The preliminary objection raised by the respondent herein would not address the claim for unfair termination.

On the issue of jurisdiction, it is not true that this court has no jurisdiction to handle work injury cases in the context argue by the respondent. Work injury cases are by nature disputes relating to compensation for injuries at work arising between an employer and an employee. In the context in which the memorandum of claim is framed, the termination of employment claim cannot be divorced from the injury claim as according to the claimant, the termination of employment arose as a consequence of the occupational injury. It would thus not be proper use of judicial time and resources for the claimant to be required to file one suit in this court in relation to the termination of employment where the issue of occupational disease would arise while at the same time file another dispute with the Director of Occupational Safety and Health over the occupational disease. What this court would do is send the claimant for assessment of compensation in respect of the injury and then pronounce one judgment in respect of the entire suit.

For these reasons the preliminary objection fails and is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE