

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

CAUSE NO. E003 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

JOHN NJIRU MWANIKI..... CLAIMANT
VERSUS

AM TRAILER MANUFACTURING KENYA LTD.....RESPONDENT

RULING

1. Vide a notice of preliminary objection dated 11th January, 2021 the Respondent seeks to have the claim herein struck out on the following grounds.
 - a. The suit is a non-starter having been filed contrary to sections 10(1), 16 and 230) of the Work Injury Benefits Act, No. 13 of 2007.
 - b. The suit is time barred having been filed twelve months after the alleged accident contrary to section 26(1) of the Work Injury Benefits Act, No. 13 of 2007.
 - c. The Honorable Court is a court of Appellate jurisdiction pursuant to section 52(2) and does not have jurisdiction to entertain the claim in the first instance as it is a preserve of the Director of Work Injury Benefits pursuant to section 53 of the Work Injury Benefits Act, No. 13 of 2007.
 - d. The claim as framed and pleaded is fatally defective, frivolous, vexatious and an abuse of the processes of the court as it discloses no cause of action against the Respondent having been filed contrary to section 3(1) of the Employment Act 2007.

- e. The Honorable Court does not have jurisdiction determine or to extend time for statutory barred suits or entertain the claim as it is fatally defective and a nullity ab initio.
- 2. The preliminary objection was disposed of by way of written submissions. Only the Respondent filed submissions.
 - 3. In the submissions the Respondent has extracted the issues for determination as follows:
 - a. Whether the Honorable Court has jurisdiction to determine claims under the WIBA Act 2007
 - b. Whether the claim for damages for alleged injuries sustained by the Claimant is time barred and filed contrary to the WIBA Act 2007
 - c. Whether the claim as framed and pleaded, discloses any cause of action against the Respondent and ought to be struck out.
 - 4. The Respondent submits that this court lacks jurisdiction to hear and determine work injury claims as Section 16 of the Work Injury Benefits Act as read with Sections 23,26, 36, 51, 52 and 53 provide for such claims to be lodged with the Director of Work Injury Benefits. That this court can only hear appeals against the decision of the **Registrar** as provided in Section 52 of the Act.

5. The Respondents cites and relies on the decision of the Court of Appeal in ATTORNEY GENERAL V. LAW SOCIETY OF KENYA as confirmed by the Supreme Court in SOCIETY OF KENYA .V. ATTORNEY GENERAL.
6. The Respondent further submits that the suit is defective and a *nullity ab initio* citing the decision in MACFOY .V. UNITED AFRICA CO. LTD.
7. It submits that this court has no jurisdiction to hear the case relying on the decision of the Supreme Court in SAMUEL KAMAU MACHARIA .V. KENYA COMMERCIAL BANK LIMITED & 2 OTHERS.
8. It is further the Respondent's submission that the claim is time barred contrary to the mandatory provisions of WIBA.
9. On the second issue the Respondent submits that the suit having been filed contrary to section 3(1) of the Employment Act, it ought to be struck out. That this court has power to strike out the suit.
10. The Respondent further submits that the claimant was an independent contractor as is evident from his Mpesa statement in his bundle of documents which reflects only one-off payments. It further submits that the claim is frivolous,

vexatious and an abuse of court process. He relies on the decision in KIVANGA ESTATES LIMITED .V. NATIONAL BANK OF KENYA LIMITED.

Analysis and Determination

11. I have considered the pleadings, the notice of preliminary objection and the Respondents submissions in support of the preliminary objection. As pointed out above, the Claimant did not respond to the notice of preliminary objection.
12. I also note that although the Respondent has referred to a notice of motion application dated 11th January, 2021, the same is not on the court record nor in the affidavit of Mudasar Chaudry sworn on 22nd January, 2021 in support of the application.
13. The respondent has not in its submissions set out the prayers in the said application. I will therefore only make a determination on the preliminary objection dated 11th January, 2021.
14. A preliminary objection was defined in **Mukisa Biscuit Manufacturing Company Ltd .V. West End Distributors** by Law JA as

“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.”

At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

15. From the above definition, it is clear that a preliminary objection can only be raised on a pure point of law on the assumption that all facts pleaded by the other side are correct. A preliminary objection cannot be raised where any facts have to be ascertained.
16. In the instant case, the claimant alleges that his employment was terminated by the Respondent after he was injured while in the course of employment. In the defence the Respondent denies that the claimant was its employee or that any accident occurred at which the claimant was injured as alleged. On a **without** prejudice basis, it avers that the claimant was responsible for the injuries that he sustained.
17. From the forgoing it is clear that the court will have to ascertain whether or not the claimant was an employee of the Respondent, whether or not he was injured in the course of

employment of the Respondent, whether or not the injury was caused by the claimant's own negligence and whether the claimant's employment if any, was unfairly terminated by the Respondent.

18. All these factors disqualify this suit from consideration by way of preliminary objection as the determination thereof require the court to consider evidence from the parties.
19. For the foregoing reasons, I find no merit in the preliminary objection and dismiss the same. Since the claimant did not defend the preliminary objection, there shall be no orders for costs.

**DATED AND DELIVERED VIRTUALLY IN ELDORET
THIS 25TH DAY OF APRIL 2023.**

**MAUREEN ONYANGO
JUDGE**