



**Kibor v China Far East Construction Company & another (Civil Appeal
42 of 2019) [2024] KEHC 16772 (KLR) (14 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 16772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 42 OF 2019
NIO ADAGI, J
AUGUST 14, 2024**

BETWEEN

WILSON KIPCHIRCHIR KIBOR APPELLANT

AND

CHINA FAR EAST CONSTRUCTION COMPANY 1ST RESPONDENT

JOHN KIMANI 2ND RESPONDENT

*(Being an Appeal from the Judgment of Hon. D. N. Bosibori
(RM) in Nyeri CMCC. No. 311 of 2018 delivered on 31/05/2019)*

JUDGMENT

Factual background

1. The Appellant herein filed a Plaint in the lower court dated 6/11/2018 where he averred that on 15/7/2018 he was involved in a road traffic accident and sustained bodily injuries resulting to loss and harm. The accident occurred along Munyu Soweto road at Tigithi bridge at Naromoru area while he was a passenger on board motor vehicle registration number KCP 351T IKOM. The 2nd Defendant drove, managed, steered and or controlled the said motor vehicle so negligently and permitted the same to lose control, roll several times and land off the road as a result of which he sustained serious injuries, loss and harm. The 1st and 2nd Defendants failed to enter appearance and a request for judgment was filed against them as per page 22 where interlocutory judgment was entered. PW1, adopted his statement and stated that he was working with the 1st Defendant. He further stated that he wished to rely on his documents as his evidence as well. Bundle of documents PExhibit 1-11. He stated that he got involved in an accident and lost a lot of time because of it. He stated that his former employer did not compensate him. He prayed that his claim be allowed as indicated in the plaint.
2. The Appellant filed his submissions after he was heard as per page 4 line 19 and 20. Judgment was delivered where the court at page 38 line 30 and page 39 line 1, downed its tools for lack of jurisdiction.



3. Being aggrieved by the said judgment the Appellant preferred the appeal herein raising 6 grounds

The Appeal

4. The Appellant filed the appeal herein on the grounds that:-
 1. The trial magistrate erred in law and in fact in coming to a conclusion that it had no jurisdiction to determine the matter after fully hearing the same.
 2. The trial magistrate erred in law and in fact in misapprehended the law in arriving at an erroneous decision.
 3. The trial magistrate erred in law and in fact in arriving at a decision that is injurious to the appellant after disregarding the law.
 4. The trial magistrate erred in failing to assess damages that ought to be awarded were the Plaintiff's case proved.
 5. The trial magistrate erred in arriving at a decision based on no pleadings evidence or submissions by the Respondent who had never entered appearance.
 6. The trial magistrate erred in failing to appreciate that the suit was premised on the tort of negligence for which the court had jurisdiction to hear and determine.
5. The Appellant seeks for the following orders
 - (i) That the appeal herein be allowed,
 - (ii) That the decision of the trial court be set aside and this court do proceed to assess damages.
 - (iii) That costs of this appeal and of the lower court matter be granted to the Appellant.
6. The Appellant filed his submissions dated 4/2/2023 on the appeal. The Respondent has not filed any submissions.

Analysis and Determination

7. I have considered the grounds of appeal, the pleadings in the lower court, the evidence adduced before the trial court, the written submissions filed by counsel for the Appellant in the absence of the Respondent's submissions and the authorities cited.
8. The appeal presents one issue for determination being: Jurisdiction.

Did the trial have or lack Jurisdiction to adjudicate on the matter?

9. Jurisdiction is defined in Halsbury's Laws of England (4th Ed.) Vol. 9 as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.".
10. Black's Law Dictionary, 9th Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.
11. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor



Vessel "Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction:-

“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...”

12. So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

13. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No. 103 of 2016[2018] eKLR stated as follows:-

“Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal. ”

14. On the source of a Court's jurisdiction, the Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR stated as follows:-

“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. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

15. The claim before the trial court was for an injury sustained during the employment of the Appellant with the Respondent company as per his examination in chief.



16. This being a matter falling under the purview of the Work Injury Benefit Act, by dint of Section 2 of the Act as was rightly appreciated by the trial court. This court is not only bound by the hierarchy of court but also benefits from the superior courts pronouncements that touch on matters before it. The Work Injury Benefit Act has been addressed by the supreme court in Petition No. 4 of 2019 in Law Society of Kenya vs Attorney General and Central Organization of Trade Unions where the Supreme court held,

“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.”

17. Section 16 of the Act (WIBA) states 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”

18. The intention of section 16 of WIBA was not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act was subjected, initially, to a process of dispute resolution starting with an investigation and award by Director of Occupational Safety and Health Services (the Director). Thereafter, under section 52 of WIBA an appeal mechanism to the Industrial Court (defunct) was provided. Where *the Constitution* or any other law established an organ, with a clear mandate for the resolution of a given genre of disputes, no other body could lawfully usurp such power, nor could 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.

19. Section 16 of WIBA should not be read in isolation. Section 23 of WIBA which calls for initial resolution of dispute via the Director of Occupational Safety and Health Services. Where one is still aggrieved by the decision of the Director, section 52 of WIBA allows him or her to seek redress in a court process. The Supreme court in Petition 4 of 2019 stated that

“...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..."

20. The Supreme court went on to say:

(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] ...

(66) In addition, the Director is in essence performing a quasi-judicial function under Section 23 and by dint of Article 165(6) "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function." His actions and decisions, even without review or appeal, are therefore still subject to the over-riding authority of the High Court.."

21. From the Record of Appeal, it is apparent that the Appellant did not lodge his claim before the Director of Occupational Safety and Health Services in following due process for injuries sustained while under the employment of the 1st Respondent.

22. The Supreme court further established that the Director's inquiries were also essentially preliminary investigations. The Superior court opined that such mechanisms, set out by statute ought to be left to run their full course before a court intervened.

23. In the absence of the decision reached by the Director of Occupational Health and Services, this court sitting on appeal in this matter is determining issues that were never determined by the first statute-based port of redress. I opine that the trial court was legally sound in rendering itself without jurisdiction as it could not have sat in adjudication in the first place given the Supreme court holding in Petition No. 4 of 2019 and the conjunctive reading of Sections 16, 23 and Section 52 of the Work Injury Benefit Act 2007 in the first place.

24. Accordingly, the appeal is dismissed with no order as to costs.

DATED, SIGNED & DELIVERED VIRTUALLY at MACHAKOS this 14TH AUGUST 2024

NOEL I. ADAGI

JUDGE

