



REPUBLIC OF KENYA



KENYA LAW
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Makokha v Nila Pharmaceuticals t/a Daima Pharmacy Limited (Civil Appeal E137 of 2021) [2023] KEHC 1398 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1398 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E137 OF 2021
JM CHIGITI, J
FEBRUARY 28, 2023**

BETWEEN

ABRAHAM WAFULA MAKOKHA APPELLANT

AND

**NILA PHARMACEUTICALS T/A DAIMA PHARMACY
LIMITED RESPONDENT**

(Being an appeal from the Ruling of the Chief Magistrate's Court at Gatundu (Hon. Letizia Wachira CM) delivered on 5/07/2021 in Gitundu CMCC No. 198 of 2016)

JUDGMENT

Brief Background:

1. The appellant filed the suit in the trial court on August 18, 2016 seeking general damages for pain and suffering, special damages of KShs 5,000/= as a result of an accident that occurred at his workplace.
2. Parties proceeded for the hearing and the matter was assigned a judgment date. However, on the day that the judgment of the was to be delivered, the court issued an order declining to deliver judgment.
3. Aggrieved by the trial court orders the appellant filed a memorandum of appeal on August 2, 2021.

Analysis And Determination:

4. This court is invited to determine whether or not the trial magistrate erred in not delivering the judgment. In order to appreciate the appeal, it is important to highlight the following chronology of events:
 1. The [Work Injury Benefits Act](#) came into force on June 2, 2008 through gazette notice No 60 of May 23, 2008.



2. The cause of action arose on October 21, 2015 and the appellant filed the suit on August 18, 2016.
3. The trial magistrate allowed the case to proceed between August 18, 2016 through to the December 10, 2018 when the suit was scheduled for judgment.
4. The Law Society of Kenya filed a suit around the issue of work injuries benefits on April 14, 2008, being High Court petition No 185 of 2008. The judgment was delivered on March 4, 2009.
5. The judgment was challenged in the Court of Appeal in civil appeal No 131 of 2011. The Court of Appeal delivered its judgment on November 17, 2017. The outcome was challenged at the Supreme Court.
6. The Supreme Court rendered its judgment on December 3, 2019 in the *Law Society of Kenya v Attorney General and another* (2019) eKLR where in the apex court issued the following orders;
 - (i) Petition of appeal No 4 of 2019 dated February 1, 2019 is hereby dismissed.
 - (ii) For the avoidance of doubt the determination in civil appeal No 133 of 2011 (Waki, Makhandia, Ouko JJ.A) is hereby upheld.
 - (iii) Each party shall bear their costs of the Appeal.
5. The effect of the Supreme Court judgment was that only matters filed before the enactment of the *Work Injury Benefits Act* would be concluded.
6. I am in agreement with the findings of Justice Radido in ELRC No 4 of 2019 that all suits filed between May 22, 2008 and December 3, 2019 were filed by innocent litigants who acted in the firm belief and a legitimate expectation that their suits would be prosecuted to conclusion.
7. The respondent filed submissions on November 14, 2022 and according to the respondent, the trial magistrate did the right thing in not delivering the judgment.
8. The *Work Injury Benefits Act* came into operation on June 2, 2008. The Court of Appeal preserved all the suits that had been filed before then.
9. The CMCC No 198/2016 was filed on August 18, 2016 (after the *Work Injury Benefits Act*).
10. All suits filed after June 2, 2008 must be referred to the director of Work Injury Benefits. The courts lack primary jurisdiction to entertain any suits like the instituted by the appellant herein.
11. The Chief Magistrate cannot be faulted for refusing to render judgment.
12. I take judicial notice of the confusion that unfolded since the filing of the Law Society of Kenya suit to the date when the Supreme Court rendered its final judgment that settled the issue of the jurisdiction of the court. The trial magistrate must have allowed the matter to proceed in the said state of affairs.
13. The ruling of court was issued on December 10, 2018 when the matter was alive in the Supreme Court.
14. Section 16 of the *Work Injury Benefits Act*, 2007 (WIBA) provides that no action shall lie by an employee or any dependent 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'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.



15. The foregoing is in keeping with the doctrine of exhaustion as enunciated in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR wherein the court held that the exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.
16. The doctrine of exhaustion accords with article 159 of the *Constitution* which seeks to promote alternative dispute resolution.
17. Jurisdiction is everything and once it is established that the court lacks jurisdiction, then the court must down its tools. That which is done without jurisdiction is a nullity. The court considers that the issue of jurisdiction is preliminary and a crucial point of law which every decision maker must bear in mind and where appropriate, address and decide upon its prior to substantively embarking to consider merits of the dispute at hand. The trial court lacked jurisdiction to determine the suit.

Disposition:

18. I find no fault in the trial magistrates ruling dated July 5, 2021.

Order:

19. The upshot is that the appeal is hereby dismissed with costs.

DATED AND DELIVERED AT KIAMBU THIS 28TH DAY OF FEBRUARY, 2023.

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JOHN CHIGITI (SC)

JUDGE

