



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 33 OF 2018**

**BENSON ONCHOKE OTONDI.....APPLICANT**

**VERSUS**

**CHINA ROAD&BRIDGE CORPORATION.....RESPONDENT**

**RULING**

1. This is an application by the Applicant dated 27.3.2018 seeking one main prayer, leave to file an appeal out of time against the decision in **Machakos CMCC No. 710 of 2015** and that the draft annexed memorandum of appeal be deemed as duly filed and served after payment of the requisite fees.
2. The intended appeal is from a judgement delivered on 8.2.2018.
3. The application was canvassed vide submissions, however in light of my reasoning below, I deemed it unnecessary to consider them.
4. Having looked at the draft memorandum of appeal annexed to the application, I deemed it necessary to examine the issue of jurisdiction and therefore as a consequence the issue for determination is whether the court has jurisdiction to entertain the intended appeal.
5. According to the memorandum of appeal annexed to the application, it is clear that the intended appeal is in respect of a dispute related to a work injury claim and there have been considerable developments with regard to the law that governs such disputes that shall guide me in this ruling.
6. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **Owners of Motor Vessel "Lilian S" V Caltex Oil (K) Ltd [1989] KLR 1** that:-

***"Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction."***

7. In the case of **Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR**, the operation of Section 16 of the Work Injury Benefits Act that barred actions for recovery of damages for occupational accident was stayed. In the case of **Saidi Mohammed v Diamond Industries Ltd (2018) eKLR** the court observed that the Employment and Labour Relations Court has appellate jurisdiction in disputes relating to work injury. The consequence thereof is that appeals in relation to work injuries are handled by the Employment and Labour Relations Court and it is patently clear from the interpretations of this case that I find that this court has no jurisdiction to entertain the intended appeal in the first place.

8. With regard to the legal effect of the finding in the case of **Saidi Mohammed v Diamond Industries Ltd (2018) eKLR**, I am guided by the case of **A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88**, (at paragraph 36) where Murray CJ, stated as follows:

***"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the***

*retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position”.*

9. Similarly in In the South African case of *Sias Moise v. Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Krieger (for the majority) held:*

*“If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution.”*

*“Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.”*

10. Further, In India, Mahajan J, in *Keshavan Madhava Menon v. The State of Bombay [1951] INSC* held that:

*“If a statute is void from its very birth then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law.”*

11. In light of the foregoing authorities, I safely conclude and hereby find that it is not the function of this court to entertain any appeal in disputes relating to work injury. I note that the civil registry has allocated a civil appeal number to this matter yet the appeal is yet to be filed. The proper way was to give a miscellaneous number and once the application to lodge appeal out of time succeeds then a civil appeal number is allocated. As at now the applicant’s appeal is yet to mature and as noted above the same ought to have been lodged before the Employment and Labour Relations Court and not this court.

12. In view of the afore-going analysis the applicant’s application dated 27.3.2018 and the intended appeal is dismissed for lack of jurisdiction. Each party to bear their own costs.

It is so ordered.

Dated and delivered at **Machakos** this 25<sup>th</sup> day of **September, 2019**.

**D. K. Kemei**

**Judge**