Color Label Limited v Walubengo (Civil Appeal E560 of 2021) [2024] KEHC 3964 (KLR) (Civ) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3964 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E560 OF 2021

CW MEOLI, J

APRIL 18, 2024

BETWEEN

COLOR LABEL LIMITED .... APPELLANT

AND

RUTH NASIMIYU WALUBENGO .... RESPONDENT

(Being an appeal from the Ruling of A.N. Makau (PM) delivered on 6th August 2021 in Nairobi Milimani CMCC No. 1360 of 2018)

JUDGMENT

1. This appeal emanates from the ruling delivered on 06.08.2021 in Nairobi Milimani CMCC No. 1360 of 2018. The events leading to the ruling were as follows. In 2018, Ruth Nasimiyu Walubengo, the plaintiff before the trial court, (hereafter the Respondent) filed a suit against Color Label Limited, the defendant before the trial court, (hereafter the Appellant) seeking general and special damages as a result of an accident that occurred on 07.11.2017.

2. The gist of the Respondent's averments in her plaint was that on the material date she was in the course of her lawfully assigned duties at the Appellant's premises on its instructions, or those of its agent and or servant ; that the having Appellant failure to provide a safe system of work resulted in a machine malfunctioning and injuring the Respondent's hand causing her grievous injuries. That the said accident arose out of the negligence and or breach of duty by the Appellant. In the alternative, and without prejudice the Respondent pleaded that the Appellant was liable for breach of the terms of employment between the parties.

3. The Appellant filed a statement of defence on 06.12.2018 denying the key averments in the plaint and averred in the alternative, without prejudice to the denials therein, that the Respondent was wholly to blame for the accident through her own negligence or that she substantially contributed to the same.

On 10.08.2020, the suit proceeded for hearing ex-parte and on 04.09.2020 the trial court having found the Appellant wholly liable for the accident awarded damages and entered judgment in favour of the Respondent against the Appellant in the sum of Kshs. 403,000/- plus costs of the suit and interest.

4. Subsequently, the Appellant moved the trial court by a motion dated 26.10.2020, expressed to be brought inter alia under Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Section 16 and 23 of the *Work Injury Benefits Act* and Order 12 Rule 2 & 7 of the Civil Procedure Rules (CPR) seeking inter alia to set aside the ex-parte proceedings of 10.08.2020 and the consequential judgment, and that the plaint and consequently the suit be struck out.

5. The grounds on the face of the motion were amplified in the supporting affidavit sworn by Judith Onyango, who asserted being the Legal Manager of APA Insurance Ltd, the insurer of the Appellant against claims of the nature presented by the Respondent. The gist of her deposition was that having parted ways with previous counsel handling the matter, the insurance company had requested the return of their file to enable them instruct another advocate to take over the matter; that they did not receive the file in respect of the claim before the onset of the Covid-19 Pandemic and the resulting lockdown which disrupted their operations and change over process; that on 10.08.2020 she received a phone call from erstwhile counsel informing that the suit was scheduled for hearing but counsel could not attend on account of the earlier disagreement; and that she quickly contacted counsel presently on record with instructions to take over and attend to the matter.

6. Further that by the time counsel logged in to the virtual session, the suit had already been heard ex-parte. She stated that failure to have an advocate attend the matter on 10.08.2020 was not willful but due to the erstwhile advocate's failure to timeously advice on the hearing date and return the subject file. That due to the foregoing the Appellant was denied the opportunity to be heard and the omission of erstwhile counsel ought not be visited on the Appellant which had a good defence.

7. She further stated that the Respondent's claim was founded on common law for negligence and breach of contract resulting in injuries sustained in the course of employment , yet the *Work Injury Benefits Act* provided an exclusive mechanism for compensating employees from injuries sustained. Therefore, by dint of Section 16 of the Act an employee injured in the course of duty did not have the option of suing his employer under common law for negligence, breach of duty and or breach of contract but could only seek compensation under the Act. She further cited the Court of Appeal decision in CA No. 133 of 2011 upholding the constitutionality of Section 16 of the *Work Injury Benefits Act*, which decision had not been stayed and was eventually upheld by the Supreme Court in Petition No. 4 of 2019.

8. In summation, she deposed that the suit filed on 27.02.2018, disregarded both the Court of Appeal decision and Section 16 of the *Work Injury Benefits Act*. She asserted for the foregoing reasons that the trial court lacked jurisdiction to hear and determine the Respondent's suit.

9. The Respondent opposed the motion through a replying affidavit dated 28.10.2020. Thereafter, the parties canvassed the said motion by way of written submissions. The lower court's ruling dismissing the Appellant's motion provoked the instant appeal, which is based on the following grounds as listed in its amended Memorandum of Appeal: -

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> " 1. The learned magistrate erred in both in fact and in law by failing to appreciate that Section 16 as read with Section 23 (1) of the *Work Injury Benefits Act* 2007 confers powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director of Occupational Safety and expressly bars institution of court proceedings by the aggrieved employee.

2. The learned magistrate erred in both fact and law by misinterpreting the principles of legitimate expectation and holding that it applied to all claims that were already filed before the Magistrates Court.

3. The learned magistrate erred in both fact and law by disregarding the fact that the two superior courts, i.e. the Court of Appeal in Civil Appeal No. 133 of 2011 and Supreme Court in Petition No. 4 of 2019 were clear that the principle of legitimate expectation in work injury claims applied to the matters that were pending in court prior to the enactment of the *Work Injury Benefits Act* 2007.

4. The learned magistrate erred in both fact and law by holding that the magistrates court has jurisdiction to hear and determine work injury claims

4A. The learned magistrate erred in both fact and law by failing to appreciate that the mistake of an advocate should not be visited on an innocent litigant such as the Appellant.

4B. The learned magistrate erred on both fact and law by abdicating her judicial responsibility where she failed to pronounce herself on the issue of setting aside of the ex-parte proceedings and all consequential orders thereto.

5. The learned magistrate erred in both fact and law by basing her ruling on irrelevant considerations." (sic)

10. The appeal was canvassed by way of written submissions. Counsel for the Appellant opened his submissions by citing the decision of Mbogo v Shah [1968] EA, regarding principles governing the appellate court's review of the discretion exercised by an inferior court. Addressing the trial court's jurisdiction to entertain the suit as filed, counsel submitted that while the present appeal was pending hearing, the Hon. Chief Justice had published Practice Directions in the Kenya Gazette Notice No. 5476 of 2023 concerning claims for compensation for work related injuries pending before courts.

11. It was however posited that with great deference to the said Gazette Notice, it is trite that jurisdiction is donated to the Courts by *the Constitution* and or statute, hence a Court cannot validly take any step without jurisdiction. The Supreme Court decisions in Petition No. 33 of 2018, Matter of Interim Independent Electoral Commission [2011] eKLR, Sammy Ndungu Waity Vs I.E.B.C. and 3 others [2019] eKLR and Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others, S.C Petitions 13A of 2013 as consolidated with Petition 14 & 15 of 2013 [2014] eKLR were cited in the latter regard.

12. Further citing Section 16 and 23(1) of the *Work Injury Benefits Act*, the decisions in Law Society of Kenya v Attorney General & Another – Petition No. 4 of 2019 [2019] eKLR, Civil Appeal No. 133 of 2011 Attorney General –v- Law Society of Kenya & Anor [2017] eKLR, The Speaker of the National Assembly -v- Karume (2008) 1 KLR 426 and Narok County Council -v- Trans Mara County Council and Another, Civil Appeal No. 25 of 2000 counsel submitted that the Court must allow the mechanisms provided for under the Act to be first exhausted. That the *Work Injury Benefits Act* creates a statutory mechanism through which a claim by an employee under the Act is initially processed and award made by the Director of Occupational Safety and Health Services. Further an appeal mechanism to the Employment and Labour Relations Court is prescribed, so that a claimant could not approach the Court under common law or otherwise for work related injuries.

13. Consequently, regarding the question of legitimate expectation, it was argued that it only applies in respect of suits that had been filed prior to the enactment of the *Work Injury Benefits Act*, 2007; that the Respondent's suit was filed over 10 years after enactment of the *Work Injury Benefits Act*; that both

the Supreme Court and Court of Appeal have held that the doctrine applies to only suits filed before the enactment of the [*Work Injury Benefits Act*](); and that the practice directions by the Chief Justice could not confer jurisdiction upon the Magistrates Courts as they did not enjoy statutory force.

14. Therefore, counsel calling to aid the decisions in Manuchar Kenya Limited -v- Dennis Odhiambo Olwete [2020] eKLR, Longonot Horticulture Limited -v- James Wakaba Maina [2019] eKLR, Saidi Mohamed -v- Diamond Industries Ltd [2018] eKLR and Nakuru ELRC Appeal No. 57 of 2017; Paul Ng'ang'a v Sinopec International Petroleum Services Corporation Limited asserted that without jurisdiction, the trial court ought not have entered judgment. He urged that the judgment be set aside and the plaint struck out for being filed in the wrong forum.

15. Concerning the ex parte proceedings before the trial court, it was summarily submitted that the Appellant's failure to attend and or appear in Court on 10.08.2020 was not intentional but rather due to the reasons advanced in depositions. Citing the overriding objective, counsel urged the court not to visit the mistakes of erstwhile counsel upon the innocent Appellant. Counsel here citing the decisions in Edney Adak Ismail v Equity Bank Limited - HCCC No. 27 of 2012, Stephen Boro Gitiha v Family Finance Building Society & 3 Others - Appl. No. Nai.263 of 2009, FM v EKW [2019] eKLR, Belinda Murai & Others v Amoi Wainaina [1978] KLR , Phillip Chemwolo & Another v Augustine Kubede [1982-88] KLR as cited in Harrison Wanjohi Wambugu v Felista Wairimu Chege & Another [2013] eKLR, Ghehona v Seventh Day Adventist Church of East Africa Union [2013]eKLR and Shah –Vs- Mbogo & Another [1967] EA . The court was urged to allow the appeal as prayed.

16. The Respondent naturally defended the trial court's findings. In addressing the Appellant's grounds of appeal, counsel for the Respondent condensed his submissions around two key issues. Concerning whether the trial court erred in finding that the only issue for determination in the Appellant's motion was the issue of jurisdiction, he relied on the decisions in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, Owners of Motor Vessel 'Joey' v Steve B [2007] eKLR, Owners of Motor Vessel 'Lillian S' v Caltex Oil Ltd [1989] KLR Rose, Moturi Mwene v Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR and Rajput V Barclays Bank of Kenya Ltd & 3 Others [2004] 2 KLR 393. To contend that trial court could not pronounce itself on the merits or otherwise of the motion without first determining the question of jurisdiction.

17. On whether the trial court was vested with jurisdiction to hear and determine the suit, counsel cited the decision in Civil Appeal No. 133 of 2011 (supra) to contend that prior to the judgment delivered on 17.11.2017 by the Court of Appeal and judgment in the further appeal in the Supreme Court, namely, Petition No. 4 of 2019 (supra), no stay orders were issued regarding the original decision of the High Court Nairobi HC. Petition 185 of 2008. Thus, the trial magistrate had jurisdiction to hear and determine the work injury claims lodged in court between 22.05.2008 to 03.12.2019.

18. Thus, placing reliance on the decision in West Kenya Sugar Co. Ltd v Lucheli Tangale [2021] eKLR, counsel argued that the Respondent had a legitimate expectation that the trial court was clothed with the requisite jurisdiction to entertain the suit as filed in 2018. That the Practice Directions vide Gazette Notice No. 5476 of 2023 were consistent with that expectation. He also relied on Section 29(3) of the Employment and Labour Relations Court as read with Article 48 of [*the Constitution*]() and the Gazette Notice No. 9243 of 2011 by the emeritus Chief Justice Mutunga, as granting the trial court with jurisdiction to entertain the suit as filed by the Respondent.

19. Further citing the case of Juma Nyamawi Ndungi & 5 Others v Attorney General; Mombasa Law Society (Interest Party) [2019] eKLR, counsel argued that Section 9 of the Magistrates Court Act was enacted to give effect to Article 23(2) and 169 (1)(a) of [*the Constitution*]() by conferring jurisdiction on Magistrates Courts to hear and determine such matters envisaged under these Articles. Moreover, that

the Appellant had admitted the jurisdiction of the trial court at paragraph 10 of its defence and hence its motion was an afterthought intended to obstruct the course of justice. The Court was therefore urged to dismiss the appeal with costs.

20. The court has considered the record of appeal, the original record of proceedings as well as the submissions by the respective parties. As rightly submitted by the Appellant, the duty of this Court as a first appellate Court is to re-evaluate the evidence adduced before the trial court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See Peters v Sunday Post Ltd (1958) EA 424; Selle (supra); William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278. The Court of Appeal in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR stated that:

> “ This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

21. The trial court in its ruling delivered on 16.08.2010 inter alia stated as follows: -

... “Above all I am required to determine if this court has jurisdiction or not to deal with this matter.......

This court is well guided by decisions of the superior court in the issues herein and finds that during the pendency of the appeal filed by the honorable Attorney General against Hon. J.B Ojwang’s decisions, up to 3/12/2021 claimants had a chance to pursue their filed matter and other were at liberty to file theirs in courts. It was not until the Court of Appeal pronounced itself on the issue of jurisdiction that the courts could not proceed with the matters.

As at the time the Supreme Court made its decision in the appeal on this issue, the WIBA matters had stalled. It however upheld the Court of Appeal decision on legitimate expectation by Claimants which this court finds was well stated. Therefore, as it stands and being guided by the decisions herein quoted, I find that this matter having been filed during pendency of the appeal of Hon. J.B Ojwang’s decision, the claimant had a legitimate expectation that his case would be concluded under the judicial process he had invoked. I therefore hold that this court has jurisdiction to hear and determine the matter before it.

The defendant is found to have challenged the jurisdiction of the court and at the same time seeks orders from a court that it feels has no jurisdiction. I direct it not now moves the court accordingly and address its case” .... (sic)

1. It is evident from the issues canvassed before the trial court and this Court by the Appellant that the challenge to the impugned decision of the trial court is based on two (2) planks, namely, the lower court’s jurisdiction to entertain the proceedings before it; and its refusal to set aside the ex parte proceedings before it. The Court proposes to first deal with the question of jurisdiction upon which, in the court’s view, this appeal turns.

2. The Appellant’s challenge to the trial court’s jurisdiction was premised on the provisions Section 16 and 23 of the *Work Injury Benefits Act*. The locus classicus on the question of jurisdiction is the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

> “ I think that it is reasonably plain that a 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."

24. Section 16 and 23 of the *Work Injury Benefits Act* provides that;-

    16. 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.

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    23. (1) After having received notice of an accident or having learned that an employee has been injured in an accident the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.

    (2) An inquiry made under subsection (1) may be conducted concurrently with any other investigation.

    (3) An employer or employee shall, at the request of the Director, furnish such further particulars regarding the accident as the Director may require.

    (4) A person who fails to comply with the provisions of subsection (3) commits an offence.

25. These provisions have been the subject of protracted litigation before our superior courts. The litigation commenced in the High Court vide Nairobi HC. Petition 185 of 2008 [2009] eKLR in which the above sections were declared unconstitutional. This decision was set aside in the appeal subsequently preferred in the Court of Appeal vide CA No. 133 of 2011 [2017] eKLR . Ultimately the matter was settled by the decision of the Supreme Court in Petition No. 4 of 2019 [2019] eKLR. The Supreme Court decision resulted in the issuance by the Chief Justice of Practice Directions vide Kenya Gazette Notice No. 5476 of 2023, which happened during the pendency of this appeal, as rightly submitted by the Appellant.

26. Thus, no purpose would be served by this court reconsidering issues relating to the effect of Section 16 and 23 of the *Work Injury Benefits Act*. The history of the litigation and pronouncements by the Court of Appeal in CA No. 133 of 2011, Attorney General v Law Society of Kenya & another [2017] eKLR and the Supreme Court in Petition No. 4 of 2019 need no elucidation. Significantly, the decision of the Court of Appeal upheld by the Supreme Court ended with the following order:

    > "In the end, we allow the appeal to the extent that we set aside the learned Judge's orders declaring sections 4, 16, 21 (1), 23(1), 25 (1) (3), 52 (1) (2) and 58(2) to be inconsistent with the former Constitution. The result is that only Sections 7 (in so far as it provides for the

Minister's approval or exemption) and 10 (4) are inconsistent with the former and current Constitution."

27. The Supreme Court while upholding the decision of the Court of Appeal, on its part pronounced itself in part as follows: -

"

"(61) 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. As we previously stated in Petition No. 33 of 2018, Sammy Ndungu Waity Vs I.E.B.C. and 3 others [2019] eKLR;

"Where *the Constitution* or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can 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."

(62) We reiterate the above holding and in the present context therefore 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.

(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) There is also the added benefit that inquiries by the Director inevitably means that work injuries and accidents are well captured and understood by his office. He can for example take measures or instruct his officers to hasten remedial administrative measures to avoid further occurrence of similar incidents.

(66) ....

(67) ....

(68) The next issue to address is whether Section 16 is an ouster clause. ....

(69) We have stated that Section 16 cannot be read in isolation because if read with Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. It cannot, therefore, be the case that section 16 amounts to an ouster clause. It is in fact merely facilitative of what may eventually end up in Court.

[70] Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed under Section 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers' compensation. When read in whole with Section 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to resort to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court.

(71) We must in concluding on this issue also acknowledge, that this is a system that has been operational without complaint from employees through their union as divulged in court by the COTU for over a decade and we therefore find no reason to interfere with an already efficient system. It is our finding, therefore, that neither Section 16, 23, nor 52(1) of WIBA can be said to be inconsistent with the former Constitution or *the Constitution* 2010." (sic)

28. The final orders were to the effect that; -

"

"(93) Consequently, upon our findings above, the final orders are that;

(i) Petition of Appeal No 4 of 2019 dated 1st February 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)...." (sic)

29. The Appellant's contestation here is that, as of 17.11.2017, when the Court of Appeal decision was delivered, the operative statute was the *Work Injury Benefits Act* (WIBA). The suit in the lower court was filed in 2018, after the Court of Appeal decision which was never stayed during the pendency of the Petition in the Supreme Court. Undoubtedly, the Chief Justice's Practice Directions of 2023, in respect of work-related injury claims were not in force in the period when the instant dispute was before the lower court, and prior to the filing of the appeal. Equally, the Practice Directions of 2011 had been overtaken by the decision of the Court of Appeal in 2017.

30. All courts are bound by the dicta in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, that a court's jurisdiction flows from either *the Constitution* or legislation or both.

Thus, it would appear that pursuant to the Court of Appeal decision, as of 17.11.2017, the operative statute regarding work injury claims was the Work Injury Benefit Act, and specifically, Section 16 and 23. The trial Court's invocation of legitimate expectation and the Respondent's reliance on Section 29(3) of the Employment and Labour Relations Court as read with Article 48 of *the Constitution* and the Gazette Notice No. 9243 of 2011 and Section 9 of the Magistrates Court Act as read with Article 23(2) and 169 (1)(a) of *the Constitution*, as well as the Chief Justice's Practice Directions of 2011 as conferring jurisdiction on Magistrates Court's in 2018 could not provide succor to the Respondent's case.

31. Further, the trial court's finding that "this matter having been filed during pendency of the appeal of Hon. J.B Ojwang's decision, the claimant had a legitimate expectation that his case would be concluded under the judicial process he had invoked" was based on a misapprehension of a key event in the protracted WIBA litigation.

32. This is because, in the Court's understanding, legitimate expectation as addressed by the Court of Appeal and the Supreme Court, specifically at Paragraphs 82 to 88 of the judgment of the latter Court, applied to;- (1) claims filed prior to the commencement of the Work Injury Benefit Act; (2) claims filed and pending upon commencement of the Work Injury Benefit Act; and (3) claims filed and pending prior to the judgment of the Court of Appeal on 17.11.2017. This despite the pronouncement at Paragraph 88 wherein the Supreme Court observed that:

> "In stating so, we presume that the property rights referred to include compensation for injuries or disease contracted in the workplace. Even if so, all matters pending resolution under the previous legal regime were to be continued under WIBA and we have seen no evidence of denial of any right by that fact alone. Indeed, our courts and quasi-judicial tribunals have routinely applied the law in such a manner as to protect existing rights and therefore while we agree with the Appellate Court that a party has the legitimate expectation to have a dispute resolved under the invoked legal regime, we see nothing unconstitutional in WIBA being applied in a manner that is consistent with its provisions but taking into account the invoked legal regime…"

33. The pronouncement cannot be read in isolation from the entire decision of the Court essentially upholding the decision of the Court of Appeal, which categorically pronounced itself on the constitutionality of the impugned Sections of the Work Injury Benefit Act. Thus, as of 17.11.2017, neither the decision in the High Court in Nairobi HC. Petition 185 of 2008 nor the Practice Directions in Gazette Notice No. 9243 of 2011, could be read as conferring jurisdiction on the Magistrates Courts to entertain fresh work injury related claims. Because firstly, the asserted legitimate expectation did not extend to claims filed after the Court of Appeal judgment; secondly, jurisdiction automatically reverted to the Director of Occupation Safety and Health Services by dint of the *Work Injury Benefits Act* on account of the forestated decision; and thirdly, there were no interim stay orders of the Court of Appeal decision, pending hearing and determination of the Supreme Court Petition. See Law Society of Kenya v Attorney General & another (Application 4 of 2019) [2019] KESC 30 (KLR) (Civ).

34. Therefore, the trial court clearly had no jurisdiction to entertain the Respondent's suit as presented in 2018. It would therefore be moot for the court to consider other issues canvassed in grounds 4A and 4B of the memorandum of appeal concerning the trial court's refusal to set aside the exparte judgment against the Appellant. The appeal succeeds on the question of jurisdiction.

35. In conclusion, however, it is not lost on the court that the protracted litigation regarding the *Work Injury Benefits Act* resulted in a great deal of confusion in the processing of work injury claims, leading

to the issuance of various Practice Directions to give direction. As this case demonstrates, the effects of the confusion may yet linger for some time. While the court is not without sympathy for the Respondent who had timeously filed her claim arising from alleged work-related injuries, albeit in the wrong forum, only one course is open to this court. That is, having allowed the appeal, to issue an order setting aside the ruling of the trial court delivered on 6.08.2021 and substituting therefor an order allowing the Appellant's motion in the lower court, dated 26.10.2020, in terms that, the Respondent's suit in the lower court is struck out. In view of the circumstances of this case, the Court directs that the parties shall bear their own costs on this appeal and in the lower court.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 18TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Ndegwa h/b for Mr. Mege

For the Respondent: Ms. Kisiangani

C/A: Erick