Jumbo North (EA) Limited v Omondi (Civil Appeal E015 of 2020) [2024] KEHC 3719 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3719 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E015 OF 2020

RN NYAKUNDI, J

APRIL 18, 2024

BETWEEN

JUMBO NORTH (EA) LIMITED .... APPELLANT

AND

JUMA OMOLLO OMONDI .... RESPONDENT

(Being an appeal from the judgement of Hon. R. Odenyo (SPM) in Eldoret CMCCC No. 474 OF 2018, delivered on 29/10/2020)

JUDGMENT

1. The Appellant herein is aggrieved by the Ruling of Hon. R. Odenyo, (PM) delivered on 29/10/2020, in Eldoret CMCC No. 474 of 2018 dismissing a Preliminary Objection challenging the jurisdiction of the said Court in view of the provisions of Section 16 and 58 of the Work Injuries and Benefits Act, 2007, Laws of Kenya. The learned trial Magistrate held that the Court had jurisdiction to hear and determine the suit. The ruling precipitated this appeal.
2. From the plaint dated 26/4/2018, it is alleged that on or about 26/8/2016, the Plaintiff while engaged in his usual employment under the direction, supervision and/ or control of the Defendant, it agent and/ or representatives as a general/casual worker labourer he was hit by a metal rod on the right lower jaw thereby sustaining him severe injury and as a result of which the Plaintiff suffered loss and damage for which he holds the Defendant directly and vicariously liable.
3. In response to the claim, the Defendant filed its Defence dated 18/5/2018, denying the allegations by the Plaintiff. In the alternative the Defendant blamed the Plaintiff for the said negligence.
4. Consequently, the Appellant filed a Notice of Preliminary Objection dated 4/2/2020, challenging the trial Court's jurisdiction to entertain the suit before it by virtue of the provisions of Section 16 and 58 of the *Work Injury Benefits Act*, 2007, Laws of Kenya.

5. The trial Court on 29/10/2020, made a Ruling dismissing the Appellant's Preliminary Objection and ordering that the matter proceeds to full hearing.

6. Aggrieved by the said decision, the Appellant on 3/11/2020 filed a Memorandum of Appeal citing the following grounds:

    i. That the learned trial Magistrate erred in law and fact in dismissing the Appellant's Preliminary Objection on jurisdiction.

    ii. That the learned trial Magistrate erred in law and fact in failing to correctly interpret the provisions of Section 16 and 58 of the *Work Injury Benefits Act*, 2007 Laws of Kenya hence an erroneous decision.

    iii. That the learned trial Magistrate erred in law and fact to appreciate, interpret and apply the provisions of Section 16 and 58 of the *Work Injury Benefits Act*, 2007 Laws of Kenya hence an erroneous decision.

    iv. That the learned trial Magistrate erred in law and fact in failing to hold and/or find that the decision of the Court of Appeal in Attorney General V Law Society of Kenya & Another (2017) eKLR delivered on the 17/11/2017 was binding this could not hold otherwise.

    v. That the learned trial Magistrate erred in law and fact in failing to hold that the Supreme Court decision delivered on 3/12/2019 in Petition No. 4 of 2019 was binding, directive and final with regard to the *Work Injury Benefits Act*, 2007 Laws of Kenya.

    vi. That the learned trial Magistrate erred in law and fact in failing to consider, appreciate and apply the finding of the Court of Appeal and Supreme Court with regard to jurisdiction hence an erroneous and unfounded decision in law.

    vii. That the learned trial Magistrate erred in law and fact in failing to appreciate and interpret the Court of Appeal and Supreme Court decisions correctly hence an erroneous decision.

    viii. That the learned trial Magistrate erred in law and fact in failing to hold that the Court lacked jurisdiction to entertain work injury claims and thus an erroneous decision not founded and/or backed with law.

    ix. That the learned trial Magistrate erred in law and fact in failing to hold that the Respondent instituted the suit in the wrong forum and thus the Court had no jurisdiction to handle it.

    x. That the learned trial Magistrate erred in law and fact in misinterpreting the Supreme Court decision with regard to the legitimate expectation of the Respondent taking into account the law in force at the time of institution of the suit.

    xi. That the learned trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and the authorities supplied to Court hence an erroneous decision.

xii. That the learned trial Magistrate erred in law and fact in misdirecting itself with regard to the Supreme Court decision delivered on 3/12/2019 hence an erroneous decision in the circumstances.

7. The Appellant prays for an order setting aside the whole of the Subordinate's Court's decision and/or ruling made on 29/10/2020 and in lieu thereof, there be and order striking out the suit for want of jurisdiction by the Subordinate Court to handle, entertain, hear and/or determine work injury related claims in line with the provisions of Section 16 and 58 of the *Work Injury Benefits Act*, 2007, Laws of Kenya.

Hearing of the Appeal

8. The appeal was canvassed vide written submissions. Pursuant to directions given, the Appellant filed Submissions on 8/1/2024 while the Respondent filed on 7/3/2024.

The Appellant's Submissions

9. Counsel for the Appellant submitted that the only issue for determination is whether or the Subordinate Court has jurisdiction to hear and determine work injury related matters that arose in the cause of employment. Counsel maintained that the Magistrate's Court has no jurisdiction to hear and determine work injury claims and the decision of the trial Magistrate to dismiss the Preliminary Objection herein was wrong and ought to be set aside. Counsel cited the case of Owners of Motor vessel "Lillian S vs. Caltex Oil (Kenya) Limited (1989) eKLR - Civil Appeal No. 50 of 1989.

10. Counsel further submitted that it is not in dispute that the Respondent's claim is a work injury claim. He argued that the claim therefore is governed by the WIBA, 2007. Counsel submitted that the claim in the subordinate Court was instituted in 2017 during the subsistence of the WIBA 2007.Counsel further submitted that the WIBA provides for a structure or framework on how to seek redress for work injury claims. Counsel cited Section 16, 22 and 58 of the WIBA. He argued that the statute has established a forum for litigating cases related to work injuries and therefore the institution of the case subject of this appeal in the regular Court in the subsistence of a substantive statute was wrong and the suit therefore ought to have been struck out. He cited the case of Republic V Independent Electoral and Boundaries Commission, Exparte National Supper Alliance (NASA) Kenya & 6 Others. Counsel maintained that the trial Court erred in law in dismissing the Preliminary Objection since the WIBA is the clear on the forum to litigate work injury matters. Counsel cited the Supreme Court in Petition No. 4 of 2019.

11. Counsel submitted that the suit in subordinate Court was instituted on 30/4/2018 vide a plaint dated 26/4/2016 and that this was way after the WIBA came into force. He added that the Court of appeal delivered its judgment on 17/11/2017 declaring the Act constitutional. Counsel maintained that the Appellant herein filed its Preliminary Objection challenging the Court's jurisdiction on the basis of the cited provisions of the law and the Court of Appeal decision and the Supreme Court's findings. Counsel argued that the Court of Appeal decision is binding to the Courts under it and the trial Magistrate having failed to abide by the said decision erred in and the decision thereof must be set aside. Counsel contended that the trial Magistrate even after being alerted of the said statute and the decisions aforesaid went ahead delivered the ruling on 29/10/2020 in contravention of the Court of Appeal and the Supreme Court judgement declaring the Act Constitutional.

12. Counsel cited the case of John Nyamawi Ndungo & 4 Others Vs. Atoorney General & Mombasa Law Society; Constitutional Petition No.196 of 2018, he argued that the Magistrate ought to be guided by the principle of stare decisis and judicial precedence. He maintained that the decision of the Magistrate

Court ought to be bound by the decision of the Supreme Court. He also cited Article 163(7) of *the Constitution* of Kenya, 2010 and the case of Jasbir Singh Rai & 3 Others Vs Tarlocham Sigh Rai & 4 Others (2013) eKLR to buttress his submissions on the principles of stare decisis and judicial precedents.

13. With regard to the doctrine of legitimate expectation, Counsel submitted that the Court misdirected itself in rendering a wrong interpretation as to what legitimate expectation is. Counsel relied on paragraphs 85 and 88 of the Supreme Court's decision with regard to the issue of legitimate expectation. Counsel maintained that the correct position is that those suits instituted before the WIBA, came in force (under the workmen Compensation Act) (now repealed, had the legitimate expectation that their cases would be completed under the same regime of law which is totally different the current situation.

14. In the end, Counsel submitted that in order of hierarchy, statute supreme, that is the WIBA, 2007 is clear that the Court is not the first port of call in addressing work injury claims.

The Respondent's Submissions

15. Counsel for the Respondent submitted that pursuant to Gazette Notice No. 3204 of 16th March, 2001 the Attorney General appointed a seven member task force to examine and review all labour laws and make recommendations for appropriate legislative intervention to replace or amend existing laws. The task force submitted a report that formed the basis of the enactment of the Work Injuries Benefits Act 2007 (WIBA)which came into force on 2nd June, 2008by Gazette Notice No. 60 of 23rd May, 2008.

16. He further submitted that after WIBA came into effect, LSK filed a Petition on 14th April, 2008, pursuant to Section 84 of the former constitution and Rule 12 of *the Constitution* of Kenya (supervisory jurisdiction and protection of fundamental Rights and freedoms of the Individual) High Court Practice and Procedure Rules, 2006 contesting *the Constitution* validity of the various provisions of the said Act. They particularly argued that Sections 7(1); 10(4); 16; 21; 52(1) and (3) and 58 (2) of the Act were inconsistent with Sections 60, 75(1), 77(1), 77(9), 77(10), 80(1)and 82 (1) of the Former Constitution. They thus sought a declaration sought a declaration from the High Court that the said Section of WIBA were null and void to the extent of that inconsistency. Counsel further submitted that the learned judge of the High Court J.B Ojwang J. (as he then was) considered the evidence on record and submissions of the parties and in his judgment declared as being inconsistent with the provisions of the retired constitution Section 4, 7(1)and (2); 16:21(1); 23(1); 25(1) and (3); 52(1) and (2); and 58(2) of WIBA.

17. However, Counsel added that aggrieved by the decision of the High court, the Attorney General filed Civil Appeal No.133 of 2011 arguing that the Learned Judge erred in law in declaring the nine Sections of WIBA inconsistent with the farmer constitution on 17th November, 2017, The Court of Appeal (Waki, Makhandia, Ouko JJA) allowed the Appeal only to the extent that it set aside the High Court's orders declaring Section 4, 16,4,16,21(1),23(123(1); 25(1)and.(3)52(1) and 2 and:58 (2) of the Act to be in consistent with the former constitution. That the Court therein found that Section 7 of WIBA (in so far as it provided for the minister's approval or exemption) and Section 10(4) therefore were in consistent with both the former and *the constitution* of Kenya 2010 and that with regard to Section 58(2) of the Act, the Court of Appeal found that although the consideration, to ensure smooth transition to WIBA from the workmen's compensation Act.

18. Aggrieved by the decision of the Court of Appeal, Counsel submitted that the Law Society of Kenya filed Petition No.4 of 2019 of the Supreme Court of Kenya and the Court on the 3rd day of December, 2019 the Supreme Court delivered its judgment and one of the key issue relevant to preliminary

objection filed by the Defendant is found at Paragraph 84 of the judgment which states that "in addressing this issue, the Court of Appeal in the present matter stated thus; "with respect, we agree that Claimants in those pending case have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. Indeed as a result of this concern,the learned judge in a rulingon an interlocutory application directed that; on the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the workmen's compensation Act......or the common law, shall continue to be prosecuted and,in a proper case, finalized on the basis of the operative law prior to the entry into force of the *Work Injury Benefits Act*,2007".

19. Counsel submitted that the legislative practice where a new judicial forum is created to replace an existing system is meant to ensure finalization of all proceedings pending in the previous system before the forum where they were commenced. According to Counsel the effect of the orders issued by Justice Ojwang were that all those pending matters under either the Workmen's Compensation Act or common law or of a combination of both regimes was meant to facilitate the legitimate expectation of the parties that upon appearing before the Court, they will be heard and a decision made. The orders given were pending the hearing and determination of the petition and the High Court, proceeded to allow the petition and proceeded to declare these provisions of Section 47(1) and (2); 10(4); 16; 21(1); 23(1); 25(1)and (3); 52(1) and (2); and 58(2)of WIBA as being inconsistent with the provisions of *the constitution*. And that the effect of this was that the orders given by the Court while waiting for the finalization of the Petition remained in force and all those matters that were filed under common law were rightly before the Court and the Court had jurisdiction. It also means to determine the same that all cases that were filed prior 17th November, 2017, this Court had jurisdiction to hear them since they were filed pursuant to the orders of the Court made by Justice Ojwang and this case being among the cases that were filed prior the judgment delivered by the Court of Appeal on the 17th November, 2017. Counsel argued that the Court of Appeal in dealing with this issue stated that "with respect, we agree that Claimants in those pending case have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked the supreme court at page 85'of its judgment stated that "in agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regime of law we thus agree with the Appellate Court that Claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such, legitimate expectation, WIBA, not being unconstitutional and even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid".

20. In the end, Counsel submitted that on 29th October, 2020 the Subordinate court delivered its ruling on the preliminary objection whereby the Preliminary Objection was dismissed and hence the filing of this appeal. According to Counsel this appeal has since been overtaken by events by the fact that the Chief Justice through official Gazette Notice No. 5476 of April, 24, 2023 and followed by the second set of April 28, 2023 gave out practice guidelines in the following manner.

    1. Claims filed before the implementation of the Workers' compensation Benefits Act (WIBA) shall be processed under the repealed workers' Compensation Act, Cap 236.

    2. Claims filed after the introduction of WIBA but prior to the supreme Court decision shall be pursued i the Employment and Labour Relations Court or the Magistrates court until

conclusion. However, claims filed after the Supreme Court decision must be presented to the Director of occupational Safety and Health Service.

21. Counsel submitted that the Supreme Court delivered it's Judgment on the 3rd December, 2019 in Petition no. 4of 2019 Law Society of Kenya -Vs-the Attorney General & Another.. The Respondent herein filed his plaint on the 1st August, 2017 and clearly it was filed prior the Judgment of the Supreme Court and hence the same ought to proceed before the Magistrate Court where it was filed. The practice directions have not been set aside and therefore supersede the Judgment of 3rd December, 2019. According to Counsel, the prudent way for the Appellant is to withdraw the Appeal and have the matter proceed before the trial Magistrate. Under Section 1A and 1B of the *Civil Procedure Act* parties and their Advocates are called upon to assist the Court in meeting its overriding objective. Based on the above stated, Counsel argued that this appeal lacks merit, overtaken by events hence rendered moot and the same should be dismissed with costs.

Analysis and Determination

22. This being a first appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In Selle –vs- Associated Motor Boat Co. [1968] EA 123:

> “ The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

23. In that regard, an appellate Court will only interfere with the judgment of the lower Court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> “ A Court on appeal will not normally interfere with the finding of fact by a trial Court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

24. I have carefully considered the evidence adduced before the trial Court by both parties, the grounds of appeal and submissions together with the authorities cited by the parties, it is this Court’s considered view that the only issue for determination is:

    a. Whether trial Court had jurisdiction to hear and determine the suit?

25. The Appellant herein has faulted the trial Magistrate for dismissing the Appellants Preliminary Objection on jurisdiction of the trial Court to handle the dispute before it. The Appellant maintains that the trial Magistrate erred in law and fact in failing to correctly interpret the provisions of Sections 16 and 58 of the *Work Injury Benefits Act*, 2007. The Appellant maintains that the claim herein was instituted on 30/4/2018. This was after WIBA had come to force and as such the proper forum to

litigate the claim Work Injury Benefit Act, 2007 was before the Director of Occupational Safety and Health Services.

26. The Respondent on the other hand has urged that the trial Magistrate in this instance was clothed with the requisite jurisdiction to here and determine the dispute at hand. The Respondent has maintained that suit was instituted on 1/8/2017 which was prior to the Supreme Court decision issued on 3/12/2019 in Law Society of Kenya Vs. Attorney General and Another, Petition No. 4 of 2019; (2019) eKLR.

27. Jurisdiction is everything and without which a Court must down its tools has held in the well celebrated case of Owners of Motor Vessel "Lilian S" V Caltex Oil (Kenya) Ltd (Supra) the Court held as follows;

> " 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

28. From the Plaint it is clear that the suit before the trial Court relates to compensation for injuries at the workplace an area of law dealt with by the *Work Injury Benefits Act*, 2007.

29. This Act came into force on 2/6/2008.

30. Section 16 of the Act provides that;

> No action shall lie by an employee or and 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.

31. Section 21 of the Act provides that:

> " Written or verbal notice of any accident provided for in Section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or notice of the verbal notice shall be sent to the Director within twenty four hours of its occurrence in the case of a fatal accident.

32. Section 58 of the Act provides that:

(1) 1) Any regulation or other instrument made or issued under the Workmen's Compensation Act and having effect before the commencement of this Act shall continue to have effect as if such regulation or other instrument were made or issued under this Act.

(2)Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act.

33. By a judgement delivered on 4th March, 2009, J.B. Ojwang J. (as he then was) in Law Society of Kenya –Versus- Attorney General & Another, Petition 185 of 2008 at Mombasa [2009]eKLR found the provisions of Section 4; 7(1) and (2); 10(4); 16; 33(1); 25(1) and (3); 52(1); and 58(2) of WIBA inconsistent with *the Constitution* and thus null and void.

34. In an appeal by the Attorney General in Appeal No. 133 of 2011, the Court of Appeal found the foregoing provisions of WIBA consistent with *the Constitution* other than Section 7 and 10(4), in its

judgement delivered on 17th November, 2017. With reference to Section 16 of WIBA, 2007, the Court of Appeal held that;

> "The section is to the effect that no employee or his dependants can institute a Court action against the employer to claim damages in respect of work-related accident or disease resulting in the disablement or death of such employee. The recourse provided for such an employee or his dependant is to notify the Director . . .Section 16 as read with Section 23(1) confer powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director and expressly bars institution of Court proceedings by the aggrieved employee."

35. The Court found no justification why Section 16 had been declared to be inconsistent with *the Constitution*. The Court set aside the High Court's holding that Sections 4, 16, 21(1), 23(1), 25(1) (3), 52(1) (2) and 58(2) were inconsistent with the former Constitution.

36. As regards Section 16 of the WIBA, 2007, the Court held as follows;

> "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 to the then Industrial Court . . ."

37. The Court further held as follows:

> That Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the Court because by looking at the intention of Section 16, the purpose it fulfils is apparent. That the purpose is related 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 . . ."

38. In particular, the Court of Appeal upheld the constitutionality of sections 4, 16, 21(1), 23(1), 25 (1) (3), 52 (1) (2) and 58 of the *Work Injury Benefits Act*, 2007 (WIBA). The provisions under WIBA require injuries under the WIBA to be adjudicated upon by the Director of Occupational Safety and Health Services (the Director) and expressly bars institution of Court proceedings by an aggrieved employee save under the provisions of the Act. The right to approach the Courts as of first instance is curtailed and the Employment and Labour Relations Court is designated as an Appellate Court from the decision of the Director per section 52 (2) of WIBA. The Supreme Court delivered its judgment in Law Society of Kenya –Versus- Attorney General & Another [2019]eKLR (Maraga CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ) on 03.12.2019 in which it dismissed the appeal and upheld the decision by the Court of Appeal.

39. Whistle it true that the *Work Injury Benefits Act*, 2007 has been subject to litigation, at the time the Court of Appeal and the Supreme Court delivered their respective judgments finding and upholding the constitutionality of Section of the *Work injury Benefits Act*, as constitutional, the suit subject of the present appeal had been instituted.

40. Regarding legitimate expectation by parties already before Court, the Appellant has argued that the trial Court in this instance misapprehended the doctrine of legitimate expectation. According the

Appellant, in contrast to the present case, parties who had filed their cases prior to the enactment of the WIBA had a right to anticipate that their cases would be resolved in accordance with the legal procedures they had invoked, as stated in paragraph 85 of the Supreme Court's decision. The Respondent on the other hand maintains that the doctrine of legitimate expectation applies to the instant case as the Supreme Court after rendering its judgment gave directions that the work injury related matters do proceed in Court based on the principle of legitimate expectation.

41. Both the Court of Appeal and the Supreme Court addressed the issue of legitimate expectation.

42. The Court of Appeal expressed itself as follows;

> " With respect, we agree that Claimant's in those pending case have legitimate expectations that upon the passage of the Act, their cases would be concluded under the judicial process which they had invoked. Indeed, as a result of this concern, the learned judge in a ruling on an interlocutory application directed that . . . The legislative practice where a new judicial forum is created to replace an existing system is to finalize all proceedings pending in the previous system before that forum where they are commenced. For instance, upon the establishment of the Employment and Labour Relations Court, Section 33 of the *Employment and Labour Relations Court Act* provided for what would happen to pending claims . . .

43. The Supreme Court addressed the issue of legitimate expectation in paragraph 85 of its judgment initially citing the sentiments of Court of Appeal above.

44. Paragraph 85 states as follows;

45. "In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed to the decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were

> being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that Claimants in those pending case have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional, and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid. The above proposition would be the most prudent way for a judicial system to operate."

46. From the foregoing it is clear that the legitimate expectation alluded to by the Court of Appeal and upheld by the Supreme Court in Law Society of Kenya v Attorney General & another [2019] eKLR vide Petition No. 4 of 2019, was with respect to pending litigation as stated by the Justice Ojwang sitting at the High Court while granting interim orders as follows:-

> " On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen's Compensation Act .... or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the *Work Injury Benefits Act*, 2007...."

47. The Court of Appeal position on the legitimate expectation was in tandem with the High Court interlocutory order by Justice Ojwang (as he then was) above. The Court of Appeal position on the

legitimate expectation was limited to pending cases at whatever stage filed under the legal regime prior to enactment of WIBA. This Court of Appeal position was upheld by the Supreme Court Law Society of Kenya v Attorney General & another [2019] eKLR vide Petition No. 4 of 2019 which held as follows:-

> "In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid."

48. Based on my understanding of the Supreme Court's judgment in Law Society of Kenya V. Attorney General & others [2019] eKLR via Petition No. 4 of 2019, all work injury-related claims after WIBA's entry into force rest with the Director, with the only exception made on the grounds of legitimate expectations in relation to litigation that was pending before the law's entry into force on 2/6/2008.

49. That being said, there is no question that this instant appeal was filed on 6/11/2020, this was in fact after the Supreme Court had rendered its judgment on 3/12/2019 in Petition No. 4 of 2019 (Supra). As such is subject to the Practice Directions issued by The Honourable Chief Justice, Martha K. Koome, on 28/4/2023 vide Kenya Gazette Vol. CXXV-No.99.

50. Under claims filed after commencement of WIBA but before the Supreme Court decision Rule 7 of the said Practice Directions provides as follows:

> "Taking into account that the High Court vide its judgment dated 4th March, 2009 in Law Society of Kenya V Attorney General & Another (2009) eKLR declared some of the provisions of WIBA including Section 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in Court. As such, litigants cannot be penalized for relying on the declaration of a nullity, as appreciated by the Supreme Court in Attorney general and 2 others v Ndii and 79 Others; Prof, Rosalind Dixon and 7 Others (Amicus Curiae) Petition 12, 11 and 13 of 2021 (consolidated) [2022] KESC 8 (KLR) to lodge their claims in Court.
>
> Therefore,
>
> (a) All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment Labour Relations Court or the Magistrates' Courts shall proceed until conclusion before the said Courts.
>
> (b) All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and Magistrates' Court shall be delivered by the same Court.

51. In view of the foregoing, I am in agreement with the Appellant's position that the first port of call when it comes to work related injuries and diseases should be the Director of Occupational Safety and Health Services and not Court. However, in view of Rule 7 of the Practice Directions relating to pending Court claims regarding compensation for work related injuries and diseases instituted prior to the Supreme Court's decision issued by the Honourable Chief Justice, the trial Court in this instance has jurisdiction to hear and determine to the work injury claim currently before it and as such shall continue the suit before it.

52. Section 16 and 17 of the *High Court (Organization and Administration) Act* 2015 mandates the Chief Justice as the head of the Judiciary to issue practice direction and written guidelines to Judges and Judicial Officers and to oversee the administration and management of the Court. In performing those duties, the Chief Justice is to uphold and ensure the application of Constitutional values and principles espoused in the spirit of Article 159 of *the Constitution* of Kenya, 2010.

53. In Ethics and Anti-Corruption Commission & another v William Baraka Mtengo & 4 others [2017] eKLR, Korir, J. had occasion to consider the argument that the Practice Directions have taken away the jurisdiction of the High Court. He observed:

> The Respondent contends that the said Practice Directions have taken away the jurisdiction of this Court and that the Chief Justice has no power to take away jurisdiction from the High Court. I entirely agree with the Respondent that the Chief Justice has no authority whatsoever to take away jurisdiction from any Court or to confer jurisdiction to any Court.

54. Korir, J. went on to say in the William Baraka Mtengo case (Supra):

> Whereas *the Constitution* at Articles 48 requires that justice be accessible, the same Constitution at Article 159(2)(b) demands that justice shall not be delayed. The right to access justice ought to be balanced with the need to ensure that justice should not be delayed. As already noted the Practice Directions, were among other things, intended to aid the efficient and timely disposal of the matters identified therein. A special Division was, in my view, therefore necessary in order to attain those goals. A judge engaged in hearing kinds of cases may not have room for prioritising the matters identified in the Practice Directions.

Final orders

55. In conclusion, the appeal lacks merit. It is accordingly dismissed with costs to the Respondent.

56. 15 days stay of execution

57. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF APRIL 2024

In the Presence of

Mr. Kiplagat for the Appellant.

…………………………………

R. NYAKUNDI

JUDGE

HCCA NO E015 OF 2020	0