Kipkoech v Lexis International Limited (Civil Appeal E055 of 2021)
[2024] KEHC 7516 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7516 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E055 OF 2021

JRA WANANDA, J

JUNE 21, 2024

BETWEEN

ISAAC KIPKOECH ..... APPELLANT

AND

LEXIS INTERNATIONAL LIMITED ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling delivered on 6/05/2021 by the trial Court in Eldoret CMCC No. 1098 of 2017 on a Preliminary Objection and by which Ruling the suit was struck out.

2. The suit was commenced vide the Plaint filed on 10/10/2017. In the Plaint, the Appellant pleaded that he was a casual worker with the Respondent, that on 13/09/2017, while the Appellant was undertaking his usual employment, as he was offloading gypsum boards, one slipped and hit his foot and as a result, he sustained bodily injuries. He alleged that the accident occurred due to the Respondent's negligence and he therefore sought compensation.

3. The Respondent filed its Defence on 6/11/2017 denying the allegations made in the Plaint. Subsequently, 3 years later on 29/10/2020, the Respondent filed a Preliminary Objection arguing that the trial Court did not possess the jurisdiction to handle the matter in light of the provisions of Section 16 and 53 of the Work Injury and Benefits Act (WIBA).

4. As aforesaid, on 6/05/2021, the trial Court delivered its Ruling upholding the Preliminary Objection and thus struck out the suit. Aggrieved with the Ruling, the Appellant on 28/05/2021, instituted this Appeal. By the Memorandum of Appeal filed herein, the following 8 grounds were raised:

    i. That the learned trial court misdirected itself and failed to put into consideration the Appellants' submissions on allowing the preliminary objection.

ii. That the learned trial court erred in law in failing to direct itself to the principles of justice in respect to work in jury matters filed in court pursuant to judgment of the High Court in Petition no.185 of 2008 – Law Society of Kenya vs Attorney General & Anor (2009) eKLR.

iii. That the trial court erred in law and facts in dismissing the Appellant suit which was filed on 2017 when the law in place then allowed the filing of the same by dint of the judgment of the High Court in Petition no.185 of 2008 – Law Society of Kenya vs Attorney General & Anor (2009) eKLR.

iv. That the honourable trial court erred in law and in fact in misapprehending the principles governing retrospective application of the law and thus arrived at an erroneous decision with the regard to the Preliminary Objection raised by the Respondent.

v. That the learned trial magistrate erred in law and fact in arriving at a decision occasioning miscarriage of justice to the Appellant for reasons beyond the Appellants' control.

vi. That the learned trial magistrate erred in law and fact in striking out the Appellants' suit as against the Respondent when the Respondent had not demonstrated that the suit was filed on court when the law on place did not allow the same.

vii. That the learned trial magistrate failed to apply judicial discretion in a matter that so deserved and thereby arrived at a decision unsustainable in law.

viii. That the honourable court failed to put into consideration the legitimate expectation of the Appellant to have the matter concluded on its merit while arriving at its decision and thus failed to carry out justice as is expected of courts of law.

Hearing of the Appeal

5. The Appeal was canvassed by way of written Submissions. The Appellant, through Messrs Alwanga & Co. Advocates, filed his Submissions on 20/01/2023. On its part, the Respondent filed its Submissions on 24/01/2024 through Messrs Nyairo & Co. Advocates.

Appellant's Submissions

6. The Appellant's Counsel submitted that the grounds of Appeal revolve around the superior Courts' decision in petitions brought before them at various dates and their effect on the application of certain sections of the Work Injury and Benefits Act (WIBA). He submitted that the lower Court failed to consider the Appellant's submissions which outlined clear justification as to why the Court ought to have arrived at a different determination, that the lower Court failed to direct itself on the principles relating to work injury matters filed in Court pursuant to the judgment of the High Court in Petition No. 185 of 2008 - Law Society of Kenya vs Attorney General & Another [2009] eKLR, that in the Ruling of the lower Court, the ratio decidendi of the Magistrate was that the suit was filed long after WIBA 2007 had come into force and that therefore, the Court's jurisdiction was ousted. He argued that the lower Court was however silent on the effect of the said judgment of the High Court in which several provisions of the Act were declared unconstitutional.

7. Counsel urged that at the time that the suit was filed on 10/10/2017, the Court had the requisite jurisdiction bestowed upon it by the judge declared law in the said Petition No. 185 of 2008. He contended further that in that judgment, certain provisions of WIBA were rendered unconstitutional and the decision then became valid law at that time, and that on the premise of the judgment, the Appellant filed the suit in the Magistrates' Court.

8. He submitted further that the challenge that has been presented follows the Supreme Court decision in Petition No. 4 of 2019 - Law Society of Kenya vs Attorney General & Another [2019] eKLR where the retrospective application of WIBA by dint of Section 58 thereof was upheld and that the concern then became; what happens to suits whereby the jurisdiction of the court is ousted during the pendency of trial?"

9. Counsel urged further that the said question was conclusively addressed by the Supreme Court while agreeing with the Court of Appeal decision in Petition No. 185 of 2008 where it held that "claimants in pending cases have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked". He cited the case of *West Kenya Sugar Co. Ltd vs Tito Lucheli Tangale - Kisumu Appeal No. 4 of 2019* and urged that in applying the text in theat said case to the present case, it is clear that the suit the subject hereof was filed within the timelines in which the judge declared law existed, that to the extent that the Magistrate did not pronounce himself on the effect of the judge made law in force at the time of filing the suit, it is a clear indication that the lower Court failed to direct itself on those principles and legitimate expectation and that there is therefore justification for interference with the decision.

Respondent's Submissions

10. On her part, Counsel for the Respondent submitted that the lower Court was correct in holding that it did not have jurisdiction to determine work injury claims. On jurisdiction, she cited the case of Owners of Motor Vessel "Lilian S vs Caltex Oil (Kenya) Limited [1989] eKLR and also submitted that the claim was instituted on 10/10/2017 after WIBA came into force and which provides a structure or framework on how to seek redress for work injury claims under Section 22 and 23 thereof and which explicitly provide the forum for such claims, and that the provisions confer power to the Director of Occupational Safety and Health Services to handle such claims She also cited Section 16 and 58 of the Act and also the case of Republic vs Independent Electoral and Boundaries Commission, ex parte National Super Alliance (NASA) Kenya & 6 Others on the requirement to adhere to the forum stipulated by statute. She, too, cited excerpts from the same Supreme Court decision in Petition No. 4 of 2019 (supra) and also submitted that the Court of Appeal decision upheld by the Supreme Court was binding upon the Courts under it. She also cited the case of John Nyamawi Ndungo & 4 Others vs. *Attorney General & Mombasa Law Society - Constitutional Petition No. 196 of 2018* and also the case of Jasbir Singh Rai & 3 Others vs. Tarlocham Singh Rai & 4 Others (2013).

11. According to Counsel, the correct position is that only those suits that were instituted before WIBA under the repealed statute have the legitimate expectation to be concluded in the Courts where they were instituted, and that the Court is not the first port of call in work injury claims. She also cited Article 163(7) of *the Constitution* and maintained that the Magistrate correctly applied the law in upholding the Preliminary Objection, and that he correctly interpreted the Supreme Court decision as to what legitimate expectation is.

Determination

12. The question in this Appeal is "whether the trial Court had jurisdiction to hear and determine the suit before it in light of the provisions of Sections 16 and 58 of the *Work Injury Benefits Act*, 2007" and therefore "whether the trial Court acted correctly in upholding the Preliminary Objection challenging its jurisdiction".

13. From the onset, I must mention that jurisdiction is everything and without which a Court must down its tools as was held in the celebrated case of Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd in which it was 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"

14. Coming to the matters arising herein, Section 16 of WIBA provides as follows;

> "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."

15. Section 58 then provides that:

> "(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."

16. I had occasion to determine an almost similar matter, namely, Eldoret High Court Civil Appeal No. E121 of 2021 - Elisha Otieno Owaa v Western Steel Mills, in which I delivered a Judgment on 1/12/2023. Coincidentally, the same firm of Nyairo & Co. Advocates was also involved in that case.

17. In this instant Appeal, it is not in dispute that the suit was filed on 10/10/2017. It is also not disputed that by that date, WIBA had already come into force on 2/06/2008. Under WIBA, the primary or original jurisdiction to handle matters concerning compensation to employees for industrial or workplace injuries was divested from the Courts and bestowed upon the Director of Occupational Safety and Health Services (hereinafter referred to as "the Director"). The Courts were then only left with appellate jurisdiction.

18. The constitutionality of the said provisions was then challenged at the High Court in *Law Society of Kenya –Versus- Attorney General & Another, Petition 185 of 2008* at Mombasa [2009] eKLR in which on 4/03/2009, Ojwang J, (as he then was) ruled that the provisions were unconstitutional and struck them out. This decision was however reversed by the Court of Appeal 8 years later in the case of Attorney General v Law Society of Kenya & another [2017] eKLR and those impugned provisions of WIBA therefore reinstated. That decision was delivered on 17/11/2017 and which then reinstated the impugned provisions that had been struck out by the High Court. With reference to Section 16 of WIBA, the Court of Appeal ruled as follows:

> "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."

19. This position left in limbo the fate of numerous industrial accident suits that were filed after the High Court decision delivered on 4/03/2009 and before the Court of Appeal decision delivered on 17/11/2017. What then was the position regarding such cases?

20. To answer the above question, since as aforesaid the Supreme Court subsequently on 3/12/2019 in *Law Society of Kenya vs. Attorney General and another, Petition No. 4 of 2019*, upheld the decision of the Court of Appeal, it is important to recite what the Supreme Court stated. At paragraph 85 of the decision, the Court 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.

21. From the above passage, it is clear that all pending industrial accident cases that had already been filed in Court before the enactment of WIBA were all to proceed before the Courts where they had been filed. But what about suits that were, as herein, filed after the High Court had, on 4/03/2009, struck out the provisions of WIBA which had ousted the jurisdiction of the Courts to handle work injury claims?

22. In this case, WIBA having come into force on 2/06/2008, the suit the subject of this Appeal was filed on 10/10/2017, 8 years after the High Court had on 4/03/2009 struck out the provisions of WIBA which had ousted the jurisdiction of the Courts to handle work injury claims and about 1 month before the Court of Appeal subsequently on 17/11/2017, reversed the decision of the High Court. As at the time of filing the suit therefore, the judicial position, pursuant to the High Court decision, was that Courts had jurisdiction to handle industrial accident cases. What then was the fate of suits filed after WIBA had already come into force thus ousting jurisdiction of the Courts and after the relevant provisions thereof were struck out by the High Court and jurisdiction of the Courts restored and thereafter, while the suit was still pending in Court, the Court of Appeal reversed the decision of the High Court and again reinstated jurisdiction of the Courts?

23. In answering the above question, I again refer to the Supreme Court decision in which even after declaring that all industrial accident cases must be filed before the Director, and being alive to the confusion brought out by the situations such as the one recounted above, it went ahead and guided that parties who had pending cases before the Courts during the subject period had a legitimate expectation that their suits were validly before the Courts. In my view, it is this spirit set out in the Supreme Court decision that any Court determining the rights of parties arising out the confusion referred to above ought to be guided.

24. My interpretation of this general spirit is that all industrial cases instituted in the wrong fora (Courts) during the period between the date of the enactment of WIBA on 2/06/2008 and the date of the

Supreme Court decision on 3/12/2019 should all be allowed to remain in the Courts up to their determination. I do not therefore find any justification to penalize the Respondent for instituting its suit at the Magistrate's Court, rather than before the Director of Occupational, Safety and Health Services. By dint of the High Court decision (Ojuang J, as he then was), the suit was properly filed in that Court.

25. I am also persuaded by the findings of Radido J, in West Kenya Sugar Co. Ltd v Tito Lucheli Tangale[2021] eKLR where, faced with a similar situation, he held as follows;

> "
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> " 42. Therefore, in this Court's view, those citizens or employees who lodged their claims with the Courts from 22 May 2008 when the High Court issued stay orders to 4 March 2009 when a final declaration of inconsistency was made were acting on the strength of the law.
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> .....
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> 46. In the Court's respectful view, bar any stay orders, all claims which were lodged with the Courts from 22 May 2008 to 3 December 2019 being claims underpinned by judge-made or judge declared law were validly within the jurisdiction of the Courts.
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> Access to justice
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> 47. The judicial part of the state is not the only arbiter and/or adjudicator of justice. Article 48 of *the Constitution* now recognises access to justice, but it has not limited the dispensation of the right to the Courts since Article 159(2)(c) requires the promotion of alternative dispute resolution.
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> 48. In light of this, in this Court's view, subscribing to the position taken by the Appellant that all claims lodged with the Courts after 2 June 2008 should not be entertained because of jurisdiction would be antithetical to the right to access justice since the litigants who moved the Court after 22 May 2008 did so on the assurance of judge declared law that they could present their disputes to the Courts.
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> 49. The Court says so because the employees who moved the Court on the strength of judge declared law would be met with an insurmountable plea of limitation because section 26 of the *Work Injury Benefits Act* has prescribed time within which an accident should be reported to the Director of Occupational Safety and Health.
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> 50. Sending these Claimants from the seat of justice under these circumstances would, therefore, be a source of great injustice for reasons beyond their control.
>
> Legitimate expectation
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> 51. The doctrine of legitimate expectation has its roots in administrative law. In this jurisdiction, it emerged with the establishment of a permanent Constitution Court in the 1990s. It is now well entrenched in the jurisprudence of the Country.
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> 52. The Court of Appeal and the Supreme Court invoked the doctrine to give life and therefore render justice to the Claimants who had lodged their work-injury

claims with the Courts prior to the coming into effect of the *Work Injury Benefits Act*.

53. In the view of this Court, these litigants who filed their disputes with the Courts from 22 May 2008 to 3 December 2019 on the firm belief that the judge declared law was the valid law in place then, are entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before the Courts where they had been lodged."

26. Radido J reiterated the above position in his decision in the subsequent case of Linet Osebe Momanyi & another (suing as personal representatives & legal administrators of the estate of Douglas Onsario Mageto) v Kisii County Government [2021] eKLR. The Judge also followed the same logic in several other of his decisions in various subsequent cases.

27. I also cite the decision of O. Makau J in the case of Cyrus Ombuna Machina v Safaricom Limited [2020] eKLR in which he held as follows:

" 12. The claimant has urged the court to spare the claim and refer it to the Director under WIBA. The respondent prays that I dismiss the claim against her. Dismissing the claim without considering its merits would be a miscarriage of justice. I will also not strike it out because as at 2017 when the suit was filed, the law in place allowed him to file the suit in court by dint of the judgment of the High Court in Petition 15 of 2008. I therefore refer the dispute to the Director under WIBA to hear and determine it under the relevant provisions of WIBA."

28. There is also the decision in the case of Gakeri J in the case of Kamande & another (Suing as *Administrators and Personal Representatives of the Estate of Josephat Macharia Muigai - Deceased) v ACE Freight Limited (Cause 2204 of 2017*) [2022] KEELRC 1275 (KLR) (12 July 2022) (Judgment) in which the following was stated:

" 59. Without belabouring the point, this suit was commenced on November 6, 2017 before the Court of Appeal pronounced itself in Attorney General v Law Society of Kenya & another (supra) on November 17, 2017. Before this decision, sections 4, 7, 10 (4), 16, 21(i), 23(1), 25(1), (3) 51(1), (2) and 58(2) had been declared unconstitutional by Ojwang J. in High Court Petition 185 of 208.

60. In a nutshell, the Claimant had no other forum to litigate the claim and as was held by Radido J. in West Kenya Sugar Co. Ltd v Tito Lucheli Tangale [2021] eKLR, the Court has jurisdiction to hear and determine the suit herein.

61. The Learned Judge was categorical that

"In the view of this Court, these litigants who filed their disputed with the Courts from May 22, 2008 to December 3, 2019 on the firm belief that the judge declared the valid law in place then, are entitled to successfully assert legitimate expectation in having the claim heard to a conclusion before the Courts where they have been lodged."

62. The Court is guided by these sentiments and is in agreement with them.

63. Instructively, the Court of Appeal overturned the decision of the High Court on the unconstitutionality with the various sections of WIBA other than section 7 (in so far as it provides for the Minister's approval or exemption) and Section 10(4).

64. Before this decision, the law was as declared by Ojwang J. and reference of claims to the Director, Occupational Safety and Health Services (DOSHS) could not arise.

65. For the foregoing reasons, it is the finding of the Court that it has jurisdiction to hear and determine the suit herein."

29. I am of course aware of other Court decisions which appear to have advanced a conflicting position. I have in mind for instance, the decision of Keli J, delivered in *West Kenya Sugar Co Ltd v Shirandula (Employment and Labour Relations Appeal E005 of 2021)* [2022] KEELRC 13284 (KLR) (24 November 2022) (Judgment), and also the decision of Gakeri J, in *Kariri Limited v Gisiaina (Appeal E123 of 2021)* [2023] KEELRC 1184 (KLR) (17 May 2023) (Judgment).

30. On my part, I choose to and do follow the reasoning and holding of Radido J and O. Makau J as I find that it best advances the spirit of Article 159(2)(e) of *the Constitution* which obliges the Courts, in exercising judicial authority to be guided by among others, the principle that "the purpose and principles of this Constitution shall be protected and promoted".

31. Regarding the Gazette Notice 5476 issued by the Honourable the Chief Justice in the Kenya Gazette of 28/04/2023, the same was titled "Practice Directions Relating to Pending Court Claims Regarding Compensation for Work Related Injuries and Diseases Instituted Prior to the Supreme Court Decision in *Law Society of Kenya vs Attorney General and Another, Petitioner No. 4 of 2019*; (2019) eKLR".

32. The Directions, at paragraph *4*, provide that the objectives thereof are as follows:

a. Consolidate and standardize practice and procedure in the Employment and Labour Relations Court and the Magistrates Courts in relation to claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision on 3rd December 2019, which are pending in Courts;

b. Enhance access to justice;

c. Facilitate timely and efficient disposal of cases that were filed prior to the Supreme Court decision; and

d. Ensure uniformity and court experience."

33. The Directions then, at paragraph *7* provide as follows:

" Claims filed after commencement of WIBA but before the Supreme Court decision

Taking into account that 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 in 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 the 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 nullity, as appreciated by the Supreme Court in Attorney

General and 2 Others v Ndii and 79 others; Prof. Rosalind Dixon and 7 Others ..... 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 and Labour Relations Courts or the Magistrates' Courts shall proceed until completion before the said Courts.

....."

34. I am satisfied that the quoted passages of the Practice Directions above vindicate my finding that the general spirit of the Supreme Court decision is that all industrial cases instituted before the Courts during the period between the date of the enactment of WIBA on 2/06/2008 and the date of the Supreme Court decision on 3/12/2019 should all be allowed to remain in the Courts up to determination.

35. In the circumstances, I find that this Appeal is merited.

Final Orders

36. The upshot of the findings above is that I rule as follows:

i. This Appeal is allowed and the Ruling dated 6/05/2021 delivered in Eldoret CMCC No. 1098 of 2017 striking out the said suit is hereby set aside and substituted with an order dismissing the Respondent's Preliminary Objection filed in the said suit, and dated 28/10/2020.

ii. The said suit, namely, Eldoret CMCC No. 1098 of 2017, shall proceed to its logical conclusion before the trial Court.

iii. Considering the conflicting decisions of different Courts on the matter determined herein, I am satisfied that the Respondent had proper justification to file this Preliminary Objection and oppose this Appeal. In the circumstances, I direct that each party bears its own costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JUNE 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Ms. Karani for Appellant

Ms. Odwa for Respondent

Eldoret High Court Civil Appeal No. E055 of 2021