



**Wanjau v Lee Construction Company (Civil Appeal E069 of 2021)
[2024] KEHC 9841 (KLR) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9841 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E069 OF 2021
S MBUNGI, J
AUGUST 6, 2024**

BETWEEN

TIMOTHY KABUGA WANJAU APPELLANT

AND

LEE CONSTRUCTION COMPANY RESPONDENT

JUDGMENT

1. The appeal arises from a decision of Hon. V.S Kosgei (RM). That Ruling triggered the present appeal as epitomised in the memorandum of appeal crafted as follows:-
 - a. The trial magistrate erred in law and in fact in upholding a notice of preliminary objection which dismissed the entire suit for lack of jurisdiction against the holding given in Kisumu ELRC Appeal No 129 of 2018 originally Kakamega High Court Civil Appeal No 129 of 2018 West Kenya Sugar Co. Ltd v Tito Lucheli Tangale, which was by a superior court.
 - b. The trial magistrate erred in law in failing to appreciate the doctrine of precedents hence arriving at an erroneous decision.
 - c. The trial magistrate erred in law and fact in shutting the appellant out of the justice system by insisting on procedures than the substance hence dismissed the appellants claim.
2. The appellant prayed that the ruling by the trial court in Karatina PMCC No 63/2018 be varied and set aside and the appeal be allowed to proceed and be heard on merit and that the costs of the appeal be provided for as well.
3. The appeal was disposed of by written submissions.
4. The appellants' suit in the trial court was in relation to an accident that happened on the 22nd day of July 2015 involving the respondents motor vehicle KBJ 915W/2D2552 on which the appellant was travelling to the respondents place of work. At the time of the incident the appellant was employed



by the respondent and the accident occurred while the appellant was travelling to his work place and therefore for all purposes and intent the appellant was seeking damages for injuries occasioned in the course of his employment by the respondent.

Appellant Submissions

5. The appellant chose not to escalate themselves further in the matter up to this point.

Respondent's Submissions

6. The respondent in their submission contended that this court is clothed with discretionary jurisdiction to interfere with the decision of the trial court in instances where judgement of the trial court is not supported in law and/or it amounts to miscarriage of justice. Reliance was placed in the case of: [Stephen Mwalloy Mbondo v County Government of Kilifi](#) (2021) eKLR citing the case of *Mbogo & another v Shab* (1968) EA.
7. The respondent submitted that no error was committed and this court should not interfere with the decision of the trial court as the ruling delivered was wholly supported by laws. They further submitted that the jurisdiction to determine work injury claims lay with the Director of Occupational Safety and Health in accordance with sections 23, 51 and 52 of the [Work Injury Benefits Act](#) No 13 of 2007. That at the time of filing the suit the jurisdiction to hear and determine the work injury claims was vested with the director for Occupational Safety and Health thus the trial court was right to strike out the plaint since it lacked jurisdiction in handling the suit.

Analysis And Determination

8. I do find the following issues arising for determination;-
 - a. Whether this court has power to interfere with the trial court's ruling?
 - b. Whether the trial court had jurisdiction to handle the appellants suit?
 - c. Costs of this appeal.
9. I have considered the pleadings by both parties and the submissions by the respondent and this being a first appeal I will proceed to reanalyze the evidence before me as was held in the case of *Selle v Associated Motor Boat Company Limited* [1968] E.A 123 thus:-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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, this 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 or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
10. The Court takes note that the commencement date for [WIBA](#) is June 2, 2008 as per Legal Notice No 60 of May 23, 2008. The judgement of the High Court by Ojwang J. was delivered on March 4, 2009 and that of the Court of Appeal was delivered on November 17, 2017. The judgement of the Supreme Court was delivered on December 3, 2019.



11. The case in the lower court by the appellant in this appeal was filed on 9th July, 2018. This therefore meant that the case by the appellant was filed after the WIBA had commenced operation and the High Court had declared various sections of the Act unconstitutional before the case was filed. In addition, the Court of Appeal and the Supreme Court had dealt with the respective appeals filed therein as at the date of filing of the case the subject of the present appeal.
12. It should be noted that the Court of Appeal and the Supreme Court did not give directions on cases that were filed between the time of the High Court decision and the decision of the Court of Appeal. The two superior courts directed on matters that had been filed prior to coming into operation of WIBA on June 2, 2008 and directed that such matters should proceed on merits to logical conclusion based on the doctrine of legitimate expectation. This was the same observation in the case of Omutiti v Orpower 4 Inc (Employment and Labour Relations Appeal 12 of 2021) [2023] KEELRC 1974 (KLR) (31 July 2023) (Judgement) that: -

“The following dates are very important to this appeal and any other matter relating to the issues herein. The date of commencement of the WIBA is June 2, 2008 as per Legal Notice (LN) No 60 of May 23, 2008. The judgement of the High Court was delivered on March 4, 2009 and that of the Court of Appeal was delivered on November 17, 2017. The judgement of the Supreme Court was delivered on December 3, 2019. The case in the lower court by the Appellant in this appeal was filed on September 27, 2017. There are two very important aspects of this date. The first one is that the case by the Appellant was filed after the WIBA had commenced operation. Secondly, the High Court had declared various sections of the Act unconstitutional, as alluded to above, before the case was filed. The third angle is that the Court of Appeal and the Supreme Court had not dealt with the respective appeals filed therein as alluded to above as at the date of filing of the case. What has probably caused the confusion that has been witnessed in matters raising the same or similar issues as raised in this appeal is that the Court of Appeal and the Supreme Court did not comment on or give directions on cases that were filed between the decision of the High Court and the decision of the Court of Appeal. The two superior courts directed on matters that had been filed prior to coming into operation of WIBA on June 2, 2008 and directed that such matters should proceed on merits to logical conclusion based on the doctrine of legitimate expectation.”

13. Due to this confusion the Chief Justice gave practice directions on the WIBA matters vide the Kenya Gazette of 28th April, 2023 and provided as follows: -

Claims Filed after Commencement of WIBA but before the Supreme Court decision;- Taking into account that High Court vide its judgement dated 4th March, 2009 in *Law Society of Kenya v Attorney General & another* (2009) eKLR declared some of the provisions in WIBA including Sections 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 nullity, as appreciated by the Supreme Court in *Attorney-General and 2 others v Ndi 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, 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 conclusion before the said courts.

14. The Supreme Court in *Law Society of Kenya v Attorney General & another* [2019] eKLR quoted with concurrence the dictum of the Court of Appeal in this matter thus:

“With respect, we agree that claimants in those 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”.

The Supreme Court went on to state thus:

“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 finalised under Section 52 aforesaid”

15. It is my considered view that the jurisdiction of this Court in relation to *WIBA* matters is now well established. The Court does not have primary jurisdiction over matters relating to Work Injury Benefits, but it certainly has appellate jurisdiction over them under Section 52 of the *Work Injury Benefits Act* Cap 236 of the Laws of Kenya. This position was affirmed in Supreme Court Petition No 4 of 2019 *Law Society of Kenya v The Attorney General & COTU*, as follows:

“(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.”

16. It bears no repetition that I find no reason to depart from the trial court's finding that the original jurisdiction lay with the Director of Occupational Safety and Health to determine work injury claims for proper disposal. The appeal is dismissed. Costs of the appeal to the respondent



SIGNED, DELIVERED & DATED AT KAKAMEGA VIRTUALLY THIS 6TH DAY OF AUGUST 2024.

HON. JUSTICE. S. MBUNGI

JUDGE.

Court:

Judgment read in absence of the parties /Advocates.

Elizabeth Angong'a – Court Assistant - Present

