



**Mukisa v West Kenya Sugar Company Limited (Civil Appeal  
E006 of 2024) [2024] KEHC 10542 (KLR) (3 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10542 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL APPEAL E006 OF 2024  
WM MUSYOKA, J  
SEPTEMBER 3, 2024**

**BETWEEN**

**JOHN MUKISA ..... APPELLANT**

**AND**

**WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT**

*(An appeal arising from the judgment and decree of Hon. Kassim Akida, Resident Magistrate,  
CM, Adjudicator, delivered on 15th February 2024, in Busia SCCC No. E033 of 2023)*

**JUDGMENT**

1. The suit, at the primary court, was initiated by the appellant, against the respondent, for compensation, arising from a road traffic accident, which allegedly happened on 18<sup>th</sup> July 2023, along the Busiwabo-Mundika road, involving the appellant and a motor-tractor registration mark and number KTCB 789H/ZG1867. KTCB 789H/ZG1867 was allegedly owned or controlled by the respondent at the material time, and the appellant was travelling on it as a passenger, when the same was allegedly recklessly and carelessly driven. The respondent was allegedly injured in the accident, and he attributed it to negligence on the part of the respondent. The respondent filed a response, in which it denied everything pleaded in the statement of claim, specifically pleading that the said motor-tractor was not within Busia County at the material time, but at Kakamega.
2. A formal hearing was conducted, on 16<sup>th</sup> January 2024, where 4 witnesses testified for the appellant, and 1 for the respondent. Judgment was delivered on 15<sup>th</sup> February 2024. The claim was dismissed, on the basis that the trial court lacked jurisdiction to entertain it.
3. The appellants were aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 20<sup>th</sup> February 2024, revolve around the trial court considering issues that were not pleaded nor canvassed before it; there being no evidence that the cause of action was in the nature of an employer/employee relationship; the provisions of the *Small Claims Court Act*, Cap 10A, Laws of Kenya, being



- disregarded; the failure to determine the issues of liability and quantum, regardless of jurisdiction; and the claim being dismissed instead of being struck out.
4. Directions, on the disposal of the appeal, were not given, but both sides have filed written submissions.
  5. The appellant has submitted on jurisdiction, the dismissal of the claim instead of striking it out, and the failure to make a determination on quantum and liability. On jurisdiction, it is submitted that the claim was not subject to the *Work Injury Benefits Act*, Cap 236, Laws of Kenya, contrary to what the trial court held, as a contract of employment was not established between the appellant and the respondent, for the evidence before the court was that the appellant was an employee of the Busia Sugar Company. He relies on *Isaac Lumumba Omega vs. Specialised Air Conditioning Limited* [2022] eKLR (Mwaura, J). On dismissal of the claim, it is submitted that, once a court finds that it is bereft of jurisdiction, it ought to strike out the matter, instead of dismissing it. It is argued that a dismissal is final, while a striking out affords opportunity to the parties to move to the proper forum. *Enock Kirao Muhangi vs. Hamid Abdala Mbarak* [2013] eKLR (Angote, J) and *Biosystems Consultants vs. Nyali Links Arcade* [2023] eKLR (Magare, J) are cited. On liability and quantum, it is submitted that the court, despite finding itself without jurisdiction, should have addressed itself to how it would have ruled on liability and quantum, had it found that it had jurisdiction. He cites *Joseph Muthuri vs. Nicholas Kinoti Kibera* [2022] eKLR (PJ Otieno, J). He also cites *Samwel Ngure Gathii vs. Josephine Wanjiru Mbugua* [1998] eKLR (Omolo, Shah & Pall, JJA) on causation and blameworthiness. He asserts that the trial court had jurisdiction. He argues that the jurisdiction issue was not raised by the respondent at the trial.
  6. On its part, the respondent submits on 3 items, jurisdiction, ownership of the accident vehicle and blameworthiness. On jurisdiction, the respondent supports the decision of the trial court, and cites *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J). On ownership of the motor-tractor, the respondent points at a number of issues surrounding ownership of the said vehicle, and submits that ownership of the accident vehicle was not established sufficiently for liability to attach on it. It cites *Nancy Ayiemba Ngaira vs. Abdi Ali* [2010] eKLR (Ojwang, J), to support its contentions. It also submits that it had proved that the said vehicle was not at Busia, at the material time, but at Kabras, Kakamega. On blameworthiness, it is submitted that the appellant was blaming the driver of the subject tractor, for the accident, yet he did not join him to the suit as a co-respondent.
  7. The primary issue for determination is jurisdiction of the trial court, the rest of the issues are secondary.
  8. It is trite, that jurisdiction is at the core of any litigation. See *Adero Adero & another vs. Ulinzi Sacco Limited* [2002] eKLR (Ringera, J) and *Joseph Njuguna Mwaura & 2 others vs. Republic* [2013] eKLR (Mwera, Warsame, Kiage, Gatembu & J. Mohammed, JJA). A court or tribunal can only entertain matters that fall within its jurisdiction, which is conferred by the law, that is *the Constitution* and statute. See *In the Matter of Interim Independent Electoral Commission* [2011] eKLR (Mutunga CJ, Baraza DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Ndung'u, SCJJ) and *Kibos Distillers Limited vs. Benson Ambuti Adegga & 3 others* [2020] eKLR (Makhandia, Kiage & Odek, JJA). It cannot be conferred by judicial craft, in terms of the court arrogating to itself jurisdiction, where *the Constitution* and the statute have not so vested it, or by consent of the parties. See *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ) and *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA). Where a court finds itself bereft of jurisdiction, over a matter that it is seized of, it should down its tools, for it ought not take any further step in the matter, for the very reason of lack of jurisdiction. See *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR (Nyarangi, Masime & Kwach, JJA).



9. One other thing, as jurisdiction goes to the core or heart, or is at the centre, of the matter, issues around it can be raised and determined at any stage of the proceedings, and in any manner. See *Kenya Ports Authority vs. Modern Holdings (EA) Limited* [2017] eKLR (Makhandia, Ouko & M’Inoti, JJA). It can be raised in the pleadings, or during trial, or by way of preliminary objection on a point of law, or through an application, whether orally or in writing. It can be raised by either party or by the court on its own motion. The court can address it in its judgment, at the tail-end of the trial, like in this case, regardless of whether any of the parties had raised it, whether in their pleadings or in the course of the trial. It does not have to be raised as, or made, an issue at the trial, for the court to consider it. It is so central to the validity, authenticity and competence of the proceedings that the court can entertain and determine it at any stage of the proceedings. Because of its centrality, it can be prioritised, and disposed of as a preliminary issue, after stopping the proceedings temporarily to address it. See *Owners and Masters of the Motor Vessel “Jovev” vs. Owners and Masters of the Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367. Where it is established that the trial court is bereft of jurisdiction, the proceedings ought to be halted, regardless of the stage at which they are at. See *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR (Nyarangi, Masime & Kwach, JJA).
10. The issue is about jurisdiction of the Small Claims Court, where the claim at the trial court was initiated. The statute which vests the Small Claims Court with jurisdiction is the [Small Claims Court Act](#). That vesting is through section 12 of the [Small Claims Court Act](#), which confers jurisdiction on that court to determine civil claims relating to contracts for sale and supply of goods and services, contracts to money had and received, liability in tort in respect of loss or damage caused to any property or for delivery or recovery of moveable property, compensation for personal injuries, and set off and counterclaim under any contract. The claim by the appellant was for compensation, on account of injuries sustained, allegedly in a road traffic accident. The alleged injuries were to the body or person of the appellant, and, therefore, fell within the rubric of personal injury. That suggested that that was a claim that could be properly brought under the Small Claims Act.
11. The trial court took evidence, and it would appear that, while preparing judgment, it formed an opinion, from the material presented, that, although the claim was based on personal injury, and appeared to be within the mandate of the Small Claims Court, there was an issue of concurrent jurisdiction, as between the jurisdiction conferred by the [Small Claims Court Act](#) on the Small Claims Court, and that conferred by the [Work Injury Benefits Act](#) on the Director. The trial court took the view that the injury was suffered in the context of employment, and, going by that, formed the opinion that the claim ought to have been brought within the structures established under the [Work Injury Benefits Act](#). The pronouncement, that the trial court had no jurisdiction over the claim placed before it, was made against that background.
12. The issue then, according to me, is whether, where a concurrence of jurisdiction, of the nature that presented itself here, arises, either the court or tribunal seized of the matter loses jurisdiction over it, or the parties would have to make a choice of the forum before which they would prefer to place their claim.
13. The trial court flagged section 16 of the [Work Injury Benefits Act](#), which addresses the case where personal injury is suffered in the context of work or employment, and declares or decrees that no action should lie, whether by the injured employee or his dependant, for recovery of damages against the employer, and no liability for compensation, on the part of the employer, should arise, save or except under the provisions of the [Work Injury Benefits Act](#), with respect to such personal injuries.
14. My reading of section 12(1)(d) of the [Small Claims Court Act](#) and section 16 of the [Work Injury Benefits Act](#), together, tells me that the 2 provisions both cover personal injury. Section 12(1)(d) of



the *Small Claims Court Act* confers jurisdiction on the Small Claims Court over such personal injury, without any limitations, with respect to the circumstances under which the injury was caused. Section 16 of the *Work Injury Benefits Act* creates limitations or restrictions, with respect to personal injury occasioned at work or in the context of employment. For such personal injury, there is no room to bring claims against the employer, ostensibly responsible, except within the structures set out in the *Work Injury Benefits Act*, and liability, for compensation for such personal injury, should be determined in accordance with the provisions of the *Work Injury Benefits Act*. The trial court read the 2 sets of provisions together, and understood them to mean that section 16 of the *Work Injury Benefits Act* limited the jurisdiction of the Small Claims Court, with respect to personal injuries suffered in a work environment, and concluded that where such limitation applied, the Small Claims Court would have no jurisdiction. It should be noteworthy, that the jurisdiction conferred on the Small Claims Court, by section 12(1) of the *Small Claims Court Act*, is subject to “any other law,” which should include section 16 of the *Work Injury Benefits Act*.

15. For avoidance of doubt, section 16 of the *Work Injury Benefits Act* is worded as follows:

“Substitution of compensation for other legal remedies

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.”

16. While section 12(1)(d) of the *Small Claims Court Act* says:

“Nature of claims and pecuniary jurisdiction

(1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—

(a) ...

(b) ...

(c) ...

(d) compensation for personal injuries; and

(e) ...

(2) ...”

17. Did the trial court properly navigate that jurisdiction issue, by way of construction of the provisions of the 2 statutes? Unfortunately, both sides to this dispute did not address me, in their written submissions, on the issues that the trial court was grappling with, with regard to jurisdiction. They contented themselves with making generalised submissions on jurisdiction. My attention has been drawn to a recent decision, in Naomi Wanjiru Irungu vs. Francis Kimani Karanja Thika HCCA No. E037 of 2024 (Muchemi, J)(unreported), where the court made a construction of section 12(1)(d) of the *Small Claims Court Act*, to the effect that the same did not include or exclude specific classes of personal injuries, neither did it classify or categorise personal injuries. However, Naomi Wanjiru Irungu vs. Francis Kimani Karanja Thika HCCA No. E037 of 2024 (Muchemi, J)(unreported) is not helpful, for the purposes or in the circumstances of the instant case, for what was placed before the



- court, in that case, had nothing to do with section 16 of the [Work Injury Benefits Act](#), and the court did not have to deal with how that provision relates with section 12(1)(d) of the [Small Claims Court Act](#).
18. I am persuaded that the trial court properly construed and applied the 2 sets of provisions. Section 12(1)(d) of the [Small Claims Court Act](#) is not to be read in isolation. It has to be interpreted in the context of other laws, including section 16 of the [Work Injury Benefits Act](#). When the 2 provisions are read together, the effect would be that section 16 of the [Work Injury Benefits Act](#) limits the reach of section 12(1)(d) of the [Small Claims Court Act](#), by excluding its jurisdiction from matters relating to personal injury incurred at the workplace or within the context of employment.
  19. Was the injury herein incurred within the workplace, or in the context or course of employment? The trial court was persuaded that it was, that the appellant and 2 others were embarking onto the accident tractor in the course of their employment, within or near the premises of their employer. The appellant testified as PW1, and he informed the court that he boarded the tractor as an employee. The witness presented by the respondent, DW1, did not dispute that the appellant was an employee of the respondent, for he limited himself, in his testimony, to the fact that the tractor could not have been at the scene at the material time, for it was at Kabras, Kakamega.
  20. Was the appellant an employee of the respondent? In the written submissions, filed on his behalf, the respondent seeks to contest that, and cites the [Employment Act](#), Cap 226, Laws of Kenya, to support that contention. The respondent has been ambivalent on the employment status of the appellant. I find the submission, that the respondent had not provided proof of employment of the appellant, mischievous. It is not the respondent who raised the issue of employment. Indeed, as indicated herebefore, the respondent has not addressed itself to that. It was the appellant himself who brought it up, at the trial, for it never arose in the pleadings. Apparently, it was what he told the trial court that prompted it to look at section 16 of the [Work Injury Benefits Act](#). He testified, on oath, before the court, as indicated above, that he boarded the tractor as an employee. It would be disingenuous of him, on appeal, to turnaround, and claim that he was not employed by the respondent, or that he was not boarding the tractor in the course of discharge of his duties as an employee. Taking an alternative stance on appeal, to that taken at the trial, would mean that he lied to the trial court, and that he is speaking from both sides of his mouth, and possibly committing perjury. His stance, on appeal, should be taken with a pinch of salt. Parties should be careful about jumping from one argument to another, to suit themselves, depending on the forum before which they are at, for, by doing so, they run the risk of perjuring themselves.
  21. The respondent has waved the decision in *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J), arguing that, going by that decision, the Small Claims Court has not jurisdiction over a claim for personal injury arising from a road traffic accident. The trial court did not excuse itself from the matter on the basis of *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J), or on the issues addressed there, relating to negligence and liability, but rather on section 16 of the [Work Injury Benefits Act](#), which the court in *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J) did not deal with. Secondly, the position taken in *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J) has not received universal acceptance. It arose in *Naomi Wanjiru Irungu vs. Francis Kimani Karanja Thika* HCCA No. E037 of 2024 (Muchemi, J)(unreported), and the court there disagreed with it, on the basis that there was nothing in section 12(1)(d) of the [Small Claims Court Act](#), which included or excluded specific classes of personal injuries, in the manner suggested in *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J). I also had occasion to deal with it, in *Elron Limited vs. Robert Ngui Basil Milimani* HCCA No. E890 of 2022 (unreported), where I expressed a view similar to that in *Naomi Wanjiru Irungu vs. Francis Kimani Karanja Thika* HCCA No. E037 of 2024 (Muchemi, J)(unreported). *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J) is a decision of a court exercising concurrent



jurisdiction to mine. Consequently, it does not bind me, for it is of mere persuasive authority, and, clearly, I am not persuaded by it. The trial court properly cited lack of jurisdiction, by dint of section 16 of the *Work Injury Benefits Act*, and I do not think that *Ogwari vs. Hersi* [2023] KEHC 20111 (KLR) (Magare, J) would have been a good reason for it to down its tools.

22. So much for jurisdiction. The next issue relates to the consequential order that the trial court made, subsequent to its finding and holding that it had no jurisdiction, that is to say the dismissal of the claim at the trial court. The appellant argues that the trial court should not have dismissed the case, for that would have barred it from initiating another claim, before the forum with jurisdiction, and that it should have struck it out instead. The answer, to that argument, should lie with the decision in *Enock Kirao Muhanji vs. Hamid Abdala Mbarak* [2013] eKLR (Angote, J), which was cited by the appellant. It would not matter either way, whether a suit or claim is struck out or dismissed, on account of lack of jurisdiction, for it would not have been determined on its merits, and there would be no bar, on grounds of *res judicata*, to the filing of a claim or suit before the court or forum with jurisdiction. However, going by *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA) and *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (Karanja, Gatembu & Sichale, JJA), in such situations, the preferable position should be to strike out the cause.
23. The appellant faulted the trial court, for not proceeding, after finding and holding that it had no jurisdiction, to indicate how it would have ruled on the matter, with respect to liability. With respect, the appellant is mixed up, as between what happens when a trial court makes a finding that there was no liability, where it is required to go on and give an indication of how it would have assessed liability, and the case where the trial court holds that it is bereft of jurisdiction. Owners of the Motor Vessel “Lillian S” vs. *Caltex Oil (Kenya) Ltd* [1989] eKLR (Nyarangi, Masime & Kwach, JJA) gave the way forward. It stated that the court ought to down its tools. It ought to stop and proceed no further, other than making the consequential order of either dismissing or striking out the suit or claim, for lack of jurisdiction.
24. Let me recite verbatim, what was said in Owners of the Motor Vessel “Lillian S” vs. *Caltex Oil (Kenya) Ltd* [1989] eKLR (Nyarangi, Masime & Kwach, JJA), as it answers the argument that the trial court should have gone on to pronounce itself on liability and damages, after it had declared that it had no jurisdiction:

“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 the 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 ... Where a court takes it upon itself to exercise jurisdiction, which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
25. The respondent made submissions on issues around ownership of the tractor and blameworthiness. These go to the merits of the matter, which the trial court did not, quite properly, go into, after it pronounced that it had no jurisdiction. The appeal herein is not on the merits of the matter that was before the trial court, but on its verdict that it had no jurisdiction. There should be no basis, therefore, for venturing into the merits of the matter. In any event, these are the matters that Owners of the Motor Vessel “Lillian S” vs. *Caltex Oil (Kenya) Ltd* [1989] eKLR (Nyarangi, Masime & Kwach, JJA) addresses, that once the court holds it has no jurisdiction, everything comes to a stop. See also *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (Karanja, Gatembu & Sichale, JJA).



26. In view of everything said above, it is my conclusion that there is no merit in the appeal herein, the same is for dismissal, and I hereby dismiss it. I shall award costs to the respondent.

**DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 3<sup>RD</sup> DAY OF SEPTEMBER 2024.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Omondi, instructed by Omondi & Company, Advocates for the appellant.

Mr. Otieno, instructed by O&M Law LLP, Advocates for the respondent.

