



REPUBLIC OF KENYA



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**Mutua v Load Trailers (E.A) Ltd (Civil Appeal E285 of 2020)
[2023] KEHC 18597 (KLR) (Civ) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E285 OF 2020

JN NJAGI, J

JUNE 15, 2023

BETWEEN

TITUS KAWELU MUTUA APPELLANT

AND

LOAD TRAILERS (E.A) LTD RESPONDENT

(Being an appeal from the judgment and decree of Hon. E.M. Kagoni, Principal Magistrate, in Nairobi CMCC No.1131 of 2018 delivered on 2/11/2020)

JUDGMENT

1. The appellant/plaintiff herein instituted suit against the respondent/defendant at the Chief Magistrate's Court in Nairobi seeking for compensation for injuries sustained while working in employment of the respondent. The respondent raised a Preliminary Objection that the said court did not have jurisdiction to hear and determine the matter pursuant to the provisions of section 16 and 52 of the *Work Injury Benefits Act*, (2007) (WIBA) and the Supreme Court judgment in Petition No.4 of 2019, *Law Society of Kenya v The Attorney General & another* (2019) eKLR. The trial court upheld the preliminary objection and struck out the suit with costs to the respondent/defendant.
2. The appellant was aggrieved by the decision of the trial court and filed the instant appeal. The grounds of appeal are that:
 1. The learned Magistrate erred in law and in fact and misdirected himself in delivering said order dismissing the appellant's suit for lack of jurisdiction.
 2. The learned Magistrate erred in law and in fact by confirming that he lacked jurisdiction and then went ahead to dismiss the suit with costs to the respondent, though obligated to down his tools once the court communicates its lack of jurisdiction.



3. The learned Magistrate erred in law and in fact by adopting a wrong principle of law by failing to down his tools once aware that he lacked jurisdiction but went ahead to confer jurisdiction upon himself and dismissed the primary suit occasioning a miscarriage of justice.
 4. The learned Magistrate erred in law and in fact by awarding the respondent costs of the suit dismissed whereby he established that he lacked jurisdiction.
 5. The learned Magistrate erred in law by not taking into consideration the submissions tendered on behalf of the appellant on the primary suit that ignoring the issues raised therein.
 6. The decision was arrived at on consideration of a wrong principle of law.
3. The background facts to the appellant's case is that he was involved in a work injury accident in the year 2015 and filed suit before the Magistrate's Court in the year 2018. Before he filed the suit the Court of Appeal had in the case of *Attorney General v Law Society of Kenya & another* (2017) eKLR delivered a judgment over work injury claims on the November 17, 2017 in which it held that section 16 as read with section 23(1) of *WIBA* conferred the power to adjudicate claims for compensation arising from injury or death in the workplace to the Director of Occupational Health and Safety and that the sections barred aggrieved employees from instituting court proceedings. The court at the same time held that pending claims in courts were to be finalized in those courts under the judicial process in which they were invoked. The holding of the Court of Appeal was upheld by the Supreme Court in Petition No 4 of 2019 *Law Society of Kenya v The Attorney General & another* (2019) eKLR in a judgment delivered on December 3, 2019. The Supreme Court agreed with the court of Appeal that claims that were pending in court upon passage of WIBA were to be concluded in those courts.
 4. The appellant in this appeal through the firm of Nzavi & Co. Advocates, submitted that the appealed ruling was delivered on 2/11/2020 at the time when there were varied interpretations of the Supreme Court judgment in Petition No.4 of 2019, The *Law Society of Kenya v The Attorney General & another* (supra). That the Supreme Court in Paragraph 84 of its judgment expressly stated that all workman injury claims filed under the Act or the common law were to continue to be prosecuted and finalized on the operative law. Further that the court clarified that all pending cases were to be concluded under the judicial process under which they were invoked.
 5. The appellant submitted that the trial court in its ruling in this matter ignored the Chief Justice's directions issued on 15/9/2020 on pending work injury claims.
 6. It was submitted that the trial court went into error in striking out the suit once it concluded that it lacked jurisdiction to entertain the matter but should instead have downed its tools as held in the case of *Owners of Motor Vessel "Lilian S" v Caltex Oi Kenya Limited* (1989) eKLR.
 7. The respondent on the other hand through Gertrude Matata, Waithaka & Associates advocates, submitted that the WIBA provides the mechanism for compensating employees for injuries sustained and or disease contracted in the course of duty. That section 16 thereof provides that no action shall lie by an employee and no liability for compensation shall arise to an employer save under the provisions of the statute. That the import of the section is that an employee injured in the course of duty does not have the option of suing the employer under the common law for negligence, breach of duty and breach of contract but can only obtain compensation as provided under WIBA. That the Act vests exclusive jurisdiction for injury and death claims to the Director of Occupational Health and Safety, a position which was upheld by the Court of Appeal in The *Attorney General v Law Society of Kenya* (supra) and by the Supreme Court in *Law Society of Kenya v The Attorney General* (supra).



8. The respondent further cited the case of *Saidi Mohamed v Diamond Industries Ltd* (2018) eKLR where Justice Rika of the Employment and Labour Relations Court while considering the Court of Appeal decision in *Attorney General v Law Society of Kenya* (supra) observed that:
13. The provisions relating to jurisdiction, dealt with by the Court of Appeal, are sections 16, 23(1), 52(1)(2), and 58(2).
 14. In general, the Court of Appeal ruled there is nothing unconstitutional about the above provisions. There is nothing discriminatory in the provisions. Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution, or an Act of Parliament, that procedure should strictly be followed. Jurisdiction donated to the Director of Work Injury Benefits is not unique. The exercise of this jurisdiction is donated by statute and is legitimate. The decision of the Director of Work Injury Benefits can be appealed against at the E&LRC....
 25. The Court shall therefore decline jurisdiction in this dispute, but not for the reasons stated by the respondent in the Preliminary Objection. It declines jurisdiction on the ground that the Claimant has not come to Court, under the procedure laid down in the Work Injury Benefits Act. As the Court of Appeal noted, the Act became operational on 2nd June 2008 through Gazette Notice No. 60 of 2008. It is the duty of the Court to implement it.
9. The respondent also cited the case of *Longonot Horticulture Limited v James Wakaba Maina* (2019) where Justice Mbaru of the same court held that:
- All industrial accidents and disease are legally to be reported to the Director and not filed with the lower court. the shift created by the WIBA has been in place since 20th December, 2007 and no reasons is given as to why the respondent failed to adhere....
- The suit before the lower court was filed after December 20, 2007 and as noted above, filed before the wrong forum. There was no jurisdiction to extend time or to hear the matter premised on work injury by the lower court.
10. I have considered the grounds of appeal, the grounds in opposition thereto and the submissions by the respective advocates for the parties. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the court did not see or hear the witnesses testify - see *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123.
 11. The appellant does not seem to seriously contest that a magistrate's court has no jurisdiction to entertain work injury claims, especially considering that the Court of Appeal and the Supreme Court have already pronounced themselves over the matter and notably considering that decisions of the two courts are binding on this court and the subordinate courts. His advocate however argued that there was varied interpretations of the Supreme Court decision in Petition No.4 of 2019 in that the Court in Paragraph 84 of its judgment expressly stated that all workman injury claims filed under the Act or the common law were to continue to be prosecuted and finalized on the operative law. More so that the trial court ignored the Chief Justice's directions issued on 15 /9/2020.
 12. I do not think that there was any confusion in paragraphs 84 and 85 of the Supreme Court decision in Petition No.4 of 2019. The Court expressly and in very clear language pronounced itself thus in paragraph 85 in respect to pending cases:
 - (85) 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.

13. It is clear from this passage that the Supreme Court was referring to pending cases that were filed before the enactment of WIBA and not those which were filed with the courts after the commencement date. It is those cases that were filed before the WIBA came into force that could continue to be heard in courts under the regime of law under which they were filed. The appellant's case was filed in 2018 which was a decade after WIBA was operationalized. It cannot have been one of those pending cases that the supreme court had in mind in the above referred to passage. The appellant's case was filed in the wrong forum instead of being filed under WIBA. It was not a pending case as referenced in paragraphs 84 and 85 of SC Petition No.4 of 2019. It is untenable for the appellant to argue that his case was a pending case for the purposes of the referred to paragraphs. His argument to that end is therefore dismissed.
14. The appellant further argued that the trial court ignored the Chief Justice's directions issued on 15 /9/2020 on pending cases. The circular read as follows:

“Circular to:

All Judges of the High Court

All Judges of the ELRC and

All Magistrates

Ref: Work Injury Claims

Complaints have been made to me that there is confusion in the handling of pending Work Injury Claims filed before the enactment and coming into effect of the Work Injury Benefits Act, 2007. It is alleged that after the Supreme Court decision of 3rd December 2019 on the matter, some courts have struck out some of such cases, while others have and are hearing them.

I wish to bring to your attention the fact that in dismissing the appeal before it, the Supreme Court ordered that “For the avoidance of doubt the determination in Civil Appeal No. 133 of 2011 (Waki, Makhandia, Ouko JJ. A) is hereby upheld.”

The Court of Appeal had itself, inter alia, held that “We find, from the submissions of the respondents that at the commencement date of the Act there were before the courts, pending determination, several work related accident claims brought under the repealed Workmen's Compensation Act (Cap 236) or the common law.

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.

Please be guided accordingly.

Hon. Justice D. K. Maraga, EGH

Chief Justice & President of



The Supreme Court of Kenya

15th September, 2020.”

15. From my reading of the circular, there is nothing to suggest that the Chief Justice indicated that pending matters as referred to by the Supreme Court included those that were filed after WIBA came into operation. The Circular clearly referred to matters that were filed before the WIBA came into operation. It is therefore misleading for the appellant to imply that the Chief Justice’s circular allowed magistrate’s courts to entertain hearing matters that were filed after the commencement date of the WIBA. The Chief Justice has no such power. As held by the Supreme Court in the case of *Samuel Kamau Macharia & another Vs KCB Ltd & 2 others* (2012) eKLR, a court’s jurisdiction flows from either the Constitution or legislation or both and that a court of law cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. That being the case the magistrate’s court had no jurisdiction to entertain the matter where legislation vested that power to another body.
16. The WIBA vests exclusive jurisdiction to hear work related injury claims to the Director of Occupational Health and Safety. Section 16 of the said Act bars courts from entertaining such claims as calls of first instance. A person dissatisfied with the award of the Director has a right of Appeal to the Employment and Labour Relations Court. In view of this, the filing of the appellant’s claim before a magistrate’s court after WIBA came into operation was untenable in law as the magistrate’s court had no jurisdiction to entertain the matter. The trial court was therefore right in its finding that it had no jurisdiction to entertain the matter.
17. The appellant argued that the trial magistrate was wrong in striking out the suit upon reaching a decision that he had no jurisdiction to entertain the matter.
18. In the classical case of the *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* (1989) eKLR, Nyarangi JA held that jurisdiction goes to the root of every case and where the court has no jurisdiction it has to make no other move in the matter. The court stated that;

“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.”
19. In *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR, the Court of Appeal cited several decisions of that court and held that where a claim was filed before a court devoid of jurisdiction, it was a nullity ab initio and was not transferable to another court.
20. Among the cases the Court cited in the aforesaid decision is the case of *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR where the Court held that:

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding



objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”

21. The Court also cited its decision in the case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR where it held that:

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v. Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.

22. Upon reviewing these cases the Court concluded that:

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.

23. In view of these clear pronouncements of the Court of Appeal, I am of the view that the trial magistrate was correct in striking out the suit. The suit was filed before a body devoid of jurisdiction and as such it was incompetent, a nullity ab initio and dead on arrival. It has also to be noted that the procedure of filing claims under WIBA is radically different from the one employed in filing suits under civil law. So even if this court had the power to transfer the case to the Director appointed under WIBA, it would serve no purpose in view of the different procedures of filing claims under the two systems.

24. In the final end, it is my finding that the appeal lacks merit. Consequently, the appeal is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH JUNE 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr Karuhaga for appellant

Ms Chelang’at for respondent

Court Assistant – Amina

30 days Right of Appeal

