



REPUBLIC OF KENYA



KENYA LAW

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**Musee v Brand Construction Limited (Civil Appeal E319 of 2021)
[2023] KEHC 22479 (KLR) (Civ) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22479 (KLR)

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

**CIVIL
CIVIL APPEAL E319 OF 2021**

**AA VISRAM, J
SEPTEMBER 21, 2023**

BETWEEN

JAMES MUSYOKI MUSEE APPELLANT

AND

BRAND CONSTRUCTION LIMITED RESPONDENT

*(Being an appeal against the Ruling of the Chief Magistrate Court
at Nairobi by Hon. Mr. Kagoni E. (Mr), (PM) delivered on the
10th day of May, 2021 at Nairobi Civil Suit No. 4277 of 2017)*

JUDGMENT

Introduction

1. The appellant (plaintiff in the lower court) filed a suit in the lower court vide a plaint dated May 31, 2017. He alleged that he was employed by the respondent (defendant in the lower court) as a mason. That on or about October 31, 2015, he was injured in the course of his employment in the right eye by a chip that came off the wall he was chiselling, which chip hit him in the right eye causing him severe injury upon which he was hospitalized. He claimed that he suffered loss and damage and that the accident was caused by negligence on the part of the respondent.
2. The respondent opposed the suit vide its statement of defence dated 4th September, 2017 where it denied the appellant's allegations entirely. The respondent's defence stated that the said accident was wholly caused and contributed by the negligence of the appellant.
3. The respondent consequently filed a Notice of Motion dated January 13, 2020, on the grounds that the court lacked jurisdiction to hear and determine the suit by virtue of section 16 of the [Work Injury Benefits Act](#) (WIBA).



4. The trial court, in its ruling dated May 10, 2021, found that it lacked jurisdiction to hear and determine the suit and accordingly struck out the suit with costs.
5. Aggrieved by the above ruling, the appellant filed this appeal dated June 8, 2021, on the following grounds:-
 1. That the Learned Trial Magistrate erred in law in striking out the suit without sufficient basis in law.
 2. That the Learned Trial Magistrate erred in law and fact in holding that the appellant's claim was not merited, contrary to the law and evidence.
 3. That the Learned Trial Magistrate erred in law and fact in failing to properly consider and address the issue of jurisdiction of the Court hence arriving at an erroneous conclusion.
 4. That the Learned Trial Magistrate erred in law and fact in construing and applying the applicable law regarding work related injury.
 5. That the Learned Trial Magistrate erred in law and fact in fact by failing to consider the appellant's submissions and the judicial authorities cited by the appellant in arriving at the decision.
 6. That the Learned Trial Magistrate erred in law and fact in engaging in extraneous issues which were not canvassed before the Court while making the decision.
 7. That the Learned Trial Magistrate erred in law and fact in failing to hold that the trial court had jurisdiction to hear and determine the case.
 8. That the Learned Trial Magistrate erred in law and fact by considering extrinsic matters thereby failing to judiciously exercise his discretion.
 9. That the Learned Trial Magistrate erred in law and fact in making an erroneous decision and without any basis in law.
6. The parties agreed that the matter be disposed of by way of written submissions, and the appellant and respondent filed their respective submissions on 13th January, 2023, and 17th February, 2023.

appellant's submissions

7. The appellant submitted that the Magistrate's Court had jurisdiction to hear and determine work injury claims. In support of the above, the appellant relied on the decision of the High Court in Petition No.185 of 2008: *Law Society of Kenya v The Attorney General & another* (2009) eKLR. He submitted that the suit had been filed during the subsistence of the above decision, and was therefore in the proper court at the time it was filed.
8. He submitted that he had a legitimate expectation to have his matter heard in the lower court and relied on the decision of the Supreme Court in *Law Society of Kenya v the Attorney General & another* (2019) eKLR, in which the court stated as follows:-

“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.”

9. Based on the above law, he argued that the Magistrate’s Court had the jurisdiction to handle his matter at the time it had been filed and the same ought to be heard and determined in that court. In further support of the above position, he relied on the decision of the High Court in *Ken-Knit Kenya Ltd v Obwari Obwoye* [2022] eKLR where the court stated as follows:-

“The Learned Magistrate in my view correctly stated the position regarding jurisdiction to entertain WIBA matters that were pending before the Courts in reliance to Hon. Justice Ojwang’s judgment which was subsequently overturned by the Court of Appeal. The decision of the Court of Appeal has since been upheld by the Supreme Court with the guidance that matters pending before the Courts based on Justice Ojwang’s decision to proceed to conclusion under the principle of legitimate expectation.

respondent’s submissions

10. The respondent submitted that section 16, *WIBA* barred the appellant from taking action against it, other than in accordance with the provisions of the said statute. It argued that Section 16, when read in conjunction with section 23 (1) gives the Director authority to decide on any compensation claim resulting from an injury or death at work and clearly forbids the injured employee from initiating legal action. Further, that the constitutionality of Section 16 has been affirmed by the Supreme Court.
11. The respondent relied on several authorities in support of its submission as stated above, including the following: Eldoret High Court Civil Appeal Number 86 of 2017, *Jumbo North (E.A) Limited v Wilder Wangira* (2020) eKLR; Mombasa ELRC No 65 of 2017; *Said Mohammed v Diamond Industries Ltd* (2018) eKLR.
12. The respondent argued that the appellant’s grounds of opposition filed in response to the supporting affidavit contained matters of fact and not law. Matters of fact ought to be contained in a replying affidavit and not in grounds of opposition, which are limited to matters of law. It argued that the grounds could not amount to a denial of the allegations made on oath, and therefore, the factual elements of its application were unopposed.

Analysis and determination.

13. I have carefully reviewed the contents of the record of appeal, the rival written submissions filed by the parties, and perused the record in its entirety. Two primary issues arise in this appeal, namely:-
 - a. Whether this court has jurisdiction to determine the appeal herein?
 - b. Whether the trial court had jurisdiction to determine the suit herein?
14. I will begin with the first issue for the reason that in the event this court lacks jurisdiction to entertain the appeal, any determination on the second issue will be a nullity.



15. The starting point is that jurisdiction is everything, and without it, a court has no power to take any further step. This principle was stated in the classic case of *The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1. Where Nyarangi J.A. held as follows:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. Further to the above, the Supreme Court in the cases of *In Re The Matter of the Interim Independent Electoral Commission*, S.C., Constitutional Application No. 2 of 2011; [2011] eKLR, and in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*, SC Application No 2 of 2012; [2012] eKLR, held that the assumption of jurisdiction by courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. It was stated:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.

17. The issue before me is whether the High Court has jurisdiction to entertain this appeal. At this point, I am not addressing the question of whether the lower court had jurisdiction. The appellant’s submissions were primarily directed at the jurisdiction of the Magistrate’s Court to hear and determine the suit. Very little, if anything at all, was advanced by the appellant in support of his contention that the High Court has jurisdiction to hear and determine this appeal.

18. Article 162 of the Constitution of Kenya states as follows:

2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
 - a. Employment and labour relations; and
 - b. The environment and the use and occupation of, and title to, land.
3. Parliament shall determine the jurisdiction of and function of the courts contemplated in clause (2).

19. Additionally, a review of the WIBA and The Employment & Labour Relations Court (ELRC) Act No. 20 of 2011 lead me to the conclusion that appeals arising from WIBA matters fall within the exclusive jurisdiction of the Employment and Labour Relations Court. For instance, section 52 (1) and (2) WIBA which relate to a decision by the Director and challenge to the same, reads as follows:-

“An objector may, within thirty days of the Directors reply being received by him, appeal to the Industrial Court against such decision.”



20. The above section is in line with the recent practice directions issued by The Hon. The Chief Justice and President of the Supreme Court in relation to WIBA matters and published in the Kenya Gazette Vol. CXXXV—No. 99 Nairobi, on April 28, 2023, which states as follows:-

Section 16 as read with sections 23 and 52 of the WIBA does not limit access to courts but creates a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of alternative dispute resolution mechanism starting with an investigation and award by the Director of Occupational Safety and Health Services and thereafter, under section 52 an appeal mechanism to the Employment and Labour Relations Court (formerly the Industrial Court). (emphasis mine)

21. A further review of the case law confirms the position that the ELRC is the appropriate court to hear and determine appeals arising from WIBA related disputes under the Act.

22. In *Milton Khamasi Anord v Capital Reef (Co) Ltd* [2022] eKLR it was held that;

“Hence, this being an appeal arising from a work injury, is a dispute between an employer and employee. Accordingly, it is my finding that the court with jurisdiction to hear and determine this appeal is the Employment and Labour Relations Court.”

23. In *Saidi Mohammed v Diamond Industries Ltd* (2018) eKLR, the court observed that the ELRC has appellate jurisdiction in disputes relating to work injury. The consequence thereof, is that appeals in relation to work injuries ought to be heard and determined by the ELRC and not this court.

24. Based on the reasons set out above, I find and hold that that this appeal ought to have been filed in the ELRC and not this court. Having found that I have no jurisdiction, I do not think that it would be proper to render my decision on the remaining issues.

25. The appeal before me is accordingly incompetent and is struck out with costs to the respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....For the Appellant

.....For the Respondent

