



**Odindo v Chandaria Industries Limited (Civil Appeal E088 of 2021)
[2024] KEHC 12960 (KLR) (Civ) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12960 (KLR)

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

CIVIL

CIVIL APPEAL E088 OF 2021

JN NJAGI, J

OCTOBER 24, 2024

BETWEEN

WASHINGTON ADONGO ODINDO APPELLANT

AND

CHANDARIA INDUSTRIES LIMITED RESPONDENT

*(Being an appeal from the ruling of Hon. E. Kagoni, PM, in
Milimani CMCC No. 8096 of 2017 delivered on 3/2/2021)*

JUDGMENT

1. The appellant herein was aggrieved by the ruling of the trial magistrate in Milimani CMCC No. 8096 in which the court upheld a Preliminary Objection by the respondent herein that the court had no jurisdiction to hear and determine the appellant's suit. The appellant consequently lodged the instant appeal.
2. The grounds of appeal are that:
 - a. That the learned magistrate erred in fact and law in holding that the Court had no jurisdiction to hear and determine the appellant's suit.
 - b. That the learned magistrate erred in fact and law in misconstruing the import of Civil Appeal No. 133 of 2011, Attorney General vs. *Law Society of Kenya & COTU and Supreme Court Petition No. 4 of 2019* Law Society of Kenya & COTU and Supreme Court vs. Attorney General.
 - c. That learned magistrate erred in fact and law in failing to recognize and uphold the legitimate expectation of the appellant to have the suit determined in accordance with existent law when the suit was filed.



- d. That the learned principal magistrate erred in law and fact by striking out the plaint despite having held that the court had no jurisdiction to hear and determine the appellant's suit.
3. The appellant now seeks that the ruling of the trial magistrate be set aside and substituted with an order dismissing the respondent's preliminary objection with costs.
4. The matter was disposed of by way of written submissions.

Appellant's Submissions

5. The appellant submitted through his counsel that his suit was filed on 15th November 2017 which was two days before the Court of Appeal delivered its decision in *Attorney General v Law Society of Kenya and COTU (2017) eKLR* where the court while addressing work related accidents claims brought under the repealed Workmen's compensation Act or common law held that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases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.
6. The appellant further submitted that the decision of the Court of Appeal was upheld by the Supreme Court in *Law Society of Kenya v Attorney General & another, Petition No.4 of 2019 (2019) eKLR* where the court held that:

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 conducted 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.”

7. It was submitted that the trial court misconstrued the judgments of the Court of Appeal and Supreme Court and thereby failed to recognize and uphold the legitimate expectation of the appellant to have the suit determined in accordance with the law as it was when the suit was filed.
8. It was the submission of the appellant that the position of the law as at when the appellant filed his case was as held by the High Court (Ojwang J. as he then was) where the High Court had declared some sections WIBA unconstitutional. That the result of the High Court decision was to annul the provisions of WIBA which ousted the initial jurisdiction of courts to hear and determine cases of compensation for occupational injuries and deceases. Therefore, that the magistrate's court had jurisdiction at the time when the appellant filed the case.
9. The appellant relied on the Court of Appeal decision in *Attorney General v Law Society of Kenya and COTU (2017) eKLR* where it stated that litigants had legitimate expectation that matters filed in court at the time WIBA was enacted that their cases would proceed under the regime of law under which they were filed. That the same view was upheld by the Supreme Court in *Law Society of Kenya v Attorney General & another (supra)*. The appellant submitted that the Supreme Court did not limit legitimate expectation to cases that were before the court as at the commencement date of the Act. That the court recognized that legitimate expectation is a broad exception which may also apply to other cases. That the same would encapsulate cases that were filed when the High Court Order was in force. The appellant cited the case of *West Kenya Sugar Company Limited v Tito Lucheli Tangale, ELRC Appeal*



No. 4 of 2019 (Kisumu) where the issue was a claim filed in the magistrate's Court on 8th June 2017 which was during the pendency of the annulment order of the High Court and the court held that:

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.

10. The appellant reiterated his submissions before the trial court and submitted that the trial court had jurisdiction. He submitted that parties are entitled to rely on the law as it is in ordering their affairs. Reliance was placed in the case of *Markus Janus vs. American Federation of State, County and Municipal Employee, Council 31; AFL-CLO et al, No. 19-1553*(US Court of Appeal for the seventh Circuit) to buttress that there is a legitimate expectation of the public to conduct their affairs in accordance with the existing law.
11. It was submitted that contrary to what the trial court held, that the correct end date was 17th November 2017 when the Court of Appeal rendered itself and not when the Supreme Court rendered its judgment as the Court of Appeal Judgment was not stayed. The appellant submitted that the appellant had legitimate expectation that his case would be heard and decided in the subordinate court which had jurisdiction at the time he filed the suit. That the subordinate court misinterpreted the import of the Court of Appeal and Supreme Court decisions and fell in error in holding that it had no jurisdiction.
12. The appellant submitted that the trial court had no power to strike out its plaint the moment it determined that it lacked jurisdiction. Reliance was placed in the case of *Owners of Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Ltd (1989) 1 KLR 1* to buttress the point that once the court found it had no jurisdiction then it ought to have downed its tools.

Respondent's Submissions.

13. The respondent submitted on two main issues for determination. First whether the appellant could file a suit for compensation for a work injury claim on account of the High Court judgment; and secondly whether the trial court erred by striking out the plaint after it determined that it had no jurisdiction to hear the suit.
14. On the first issue, the respondent submitted that WIBA was enacted in to law in 2007 and became operational on 2nd June 2008, through Gazette Notice No. 60 of 2008 for purposes of providing compensation to employees for work related injuries and diseases contracted in the course of employment.
15. The respondent submitted that through a judgment delivered by High Court (Hon. Ojwang J), certain sections of WIBA were declared unconstitutional. The said decision was subjected to the Court of appeal in *Attorney General vs. Law Society of Kenya & another (2009) eKLR* in which the appellate Court on 17/11/2017 upheld the constitutionality of Sections 4, 16, 21(1), 23(1), 25(1)(3), 52(1)(2) and 58(2) of the WIBA 2007.
16. The Supreme Court in *Law Society of Kenya vs. Attorney General & another (2019) eKLR* on 3/12/2019 upheld the decision of the appellate court. The respondent submitted that section 23(1) of WIBA requires injuries under the WIBA to be subjected before the Director of Occupational Safety and Health Service as per section 52(2) of WIBA before approaching Court and hence the trial court did not have jurisdiction. The court was referred to the case of *Manuchar Kenya Limited vs. Dennis Odhiambo Olwete [2020] eKLR* to buttress this position.



17. The respondent submitted that the superior courts decisions are clear that only work injury claims arising before enactment of WIBA were excluded and every other claim arising after is to be processed within the established processes in the Act.
18. On the 2nd issue, the respondent submitted that section 23(1) of WIBA requires injuries under WIBA to be adjudicated upon by the Director of Occupational Safety and Health Services and that the Employment and Labour Relations Court only comes in as an appellate avenue.
19. This court was reminded that jurisdiction is everything as set out in Samuel Kamau Macharia & another vs. KCB & 2 others [2012] eKLR. That WIBA has ousted the jurisdiction of first instance from the Court.
20. On the issue of striking out of the plaint, the appellant submitted that the trial court was within the ambit of the law in striking out the plaint filed once it established that it lacked jurisdiction. Counsel relied in the case of Abraham Mwangi Wamigwi vs. Simon Mbiriri Wanjiku & another (2012) eKLR to buttress this position.

Analysis and determination

21. I have considered the grounds of appeal and submissions by both counsels for the parties. It is trite law that the duty of a first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as was held by the Court of Appeal in several cases including the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR.
22. The single issue for determination in this appeal is whether the appellant's claim ought to have been filed in the magistrate's court or notified to the Director of Occupational Safety and Health Services in accordance with the provisions of Workmen Injuries Benefits Act.
23. The Appellant faults the learned magistrate for finding that he had no jurisdiction to handle claims related to injuries at the workplace. The magistrate was faulted for misconstruing the findings in Supreme Court decision Petition No. 4 of 2019 on the scope of applicability of legitimate expectation with respect to the appellant's claim and arrived at a wrong conclusion
24. It is common ground that the suit before the learned magistrate related to compensation for injuries at the workplace an area of law dealt with by the *Work Injury Benefits Act*, 2007 which is;

“An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes.”
25. Section 16 of the Act provides that;

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.
26. In an appeal by the Attorney General in Appeal No. 133 of 2011, the Court of Appeal found Section 16 of WIBA to be consistent with *the constitution*. The Court of Appeal was emphatic that;

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 . . .

That Section 16 cannot be read in isolation so as to create the impression that it curtails the right to immediately access the court because by looking at the intention of Section 16, the purpose it fulfils is apparent. That the purpose is related in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director. The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process . . .”

27. Section 21 provides that;

Written or verbal notice of any accident provided for in Section 22 which occurs during employment shall be given by or on behalf of the employee concerned to the employer and a copy of the written notice or notice of the verbal notice shall be sent to the Director within twenty-four hours of its occurrence in the case of a fatal accident.

28. The purpose of the notice is to trigger inquiries by the Director as provided by Section 23(1) of the WIBA, 2007 That;

After having received notice of an accident or having learned that an employee has been injured in an accident, the Director shall make such inquiries as are necessary to decide upon any claim or liability in accordance with this Act.

29. Having found that the provisions of Section 16 were part of the operative legal framework from 17th November, 2017, I will now proceed to determine the question of jurisdiction.

30. In *West Kenya Sugar Co. Ltd V Tito Lucheli Tangale* (2021) eKLR, relied upon by the Respondent and the learned magistrate substantially, the Respondent (Tito Lucheli) filed his case at the Magistrates Court on 8th June, 2017 and the learned trial magistrate found that the court had jurisdiction to hear and determine the suit. The Appellant filed an appeal before the High Court and the appeal was later transferred to the Employment and Labour Relations Court for determination. The court held that;

“The consequence being that the declaration by the High Court that Section 16 of the *Work Injury Benefits Act* was still the law up to the time, the Court of Appeal delivered judgement on 17th November, 2017.”

“In the courts respectful view, bar any orders, all claims which were lodged with the courts from 22nd May, 2008 to 3rd December, 2019 being claims underpinned by judge-made law or judge-declared law were validly within the jurisdiction of the courts.”

31. What were the implications of the Court of Appeal decision rendered on 17th November, 2017?

32. The decision by the Court of Appeal on 17th November, 2017 set aside the decision of the High Court save as regards the provisions of Section 7 (in relation to Ministerial approval or exemption) and 10(4) of the WIBA, 2007.

33. The provisions of Sections 4, 16, 21(1), 23(1), 25(1) (3), 52(1) (2) and 58(2) of the WIBA, 2007 were no longer unconstitutional and were part of the operational legal framework.

34. In the present case the appellant filed his suit on 15th November 2017 which was two days before the decision of the Court of Appeal which overturned the High Court decision. Like the suit in



West Kenya Sugar Co. Ltd v Tito Lucheli Tangale (supra), the appellant's suit herein was instituted during the currency of the High Court decision. I am persuaded by the submission by counsel for appellant that between the time Justice Ojwang annulled some sections of WIBA and the time the Court of Appeal set aside his orders, the applicable law was that work injury claims were to be heard and determined at the Magistrates' courts.

35. As regards legitimate expectation, the appellant argued that the learned magistrate misconstrued the findings of the Supreme Court in Petition No. 4 of 2019 as regards the scope and application of the doctrine of legitimate expectation.
36. Both the Court of Appeal and the Supreme Court addressed the issue of legitimate expectation. Clearly, the two courts did not address the fate of matters filed in court after the commencement of the *Work Injury Benefits Act* after delivery of the High Court decision on 4th March, 2009.
37. In paragraph 88, the Supreme Court alluded to the possibility of suits filed under the previous legal regime to being continued under WIBA subject to taking into account the invoked legal regime.
38. The decision of J.B. Ojwang had not been set aside by the Court of Appeal and by parity of reasoning the applicable law was as espoused in his judgment. Consequently, I am persuaded that the learned magistrate misconstrued the scope and applicability of the doctrine of legitimate expectation as espoused by the Supreme Court in *Law Society of Kenya V Attorney General & another (Supra)*.
39. In the upshot, it is the finding of this court that the appeal herein is merited and I consequently hold that the trial magistrate had jurisdiction to hear and determine the appeal. In the premises, the ruling and order of the trial magistrate made on February 3, 2021 is set aside and substituted with an order dismissing the respondent's Preliminary Objection.
40. The appellant to have the costs of the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr Oluoch for Appellant

Miss Kerubo for Respondent

Court Assistant – Amina

30 days Right of Appeal

