



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 22 OF 2018

CHINA ROAD & BRIDGE CORPORATION..... APPELLANT

VERSUS

KELVIN NYUKI MACHIMBO..... RESPONDENT

(Being an appeal from the Judgement of the Honorable L.P. Kassan (SPM) delivered on 30.1.2018 in SPMCC No 628 of 2017 at Mavoko Law courts)

BETWEEN

KELVIN NYUKI MACHIMBO PLAINTIFF

VERSUS

CHINA ROAD & BRIDGE CORPORATION..... DEFENDANT

JUDGEMENT

1. This an appeal from the Judgement of the Honourable L. P. Kassan delivered on 30.1.2018 in **SPMCC No 628 of 2017** at Mavoko.
2. The appeal was canvassed vide submissions, however in light of my reasoning below, I deemed it unnecessary to consider them.
3. Having looked at the memorandum of appeal and the submissions in respect of the appeal, I deemed it necessary to examine the issue of jurisdiction. Therefore as a consequence the issue for determination is whether the court has jurisdiction to determine the appeal.
4. According to the memorandum of appeal and submissions, it is clear that the appeal is in respect of a dispute related to a work injury claim. There have been considerable developments with regard to the law that governs such disputes that shall guide me in this ruling.
5. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **Owners Of Motor Vessel "Lilian S" V Caltex Oil (K) Ltd [1989] KLR 1** that:-

“Jurisdiction is everything without which a court of law has no power to make one more step where a court of law 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 the moment it holds the opinion that it is without jurisdiction.”

6. In the case of **Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR**, the operation of Section 16 of the Work Injury Benefits Act that barred actions for recovery of damages for occupational accident was stayed. The court ordered *inter alia* a declaration **that Sections 10, 16, 23, 26 and 53 (2) (d) and 2 (e) and the entire part IV and V are ultra vires the Constitution of Kenya 2010 and are null and void to the extent that they place judicial authority in an entity that is not part of the judiciary as well as A declaration that the provisions of the Employment and Labour Relations Act No. 20 of 2011 Section 12(a), 22, 29 and 35 and the Magistrate’s Court Act Section 9(b) by dint of Article 261 (1) of the Constitution of Kenya 2010 and Section 7 of Schedule 6 of the Constitution of Kenya, override all provisions in the Work Injury Benefits Act No. 13 of 2007 that are in conflict with them.**

7. The Employment & Labour Relations Court Act No. 20 of 2011 provides as here below under Section 12 (1):

12. Jurisdiction of the court

(1) *the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including;-*

- (a) ...disputes relating to or arising out of employment between an employer and an employee;*
- (b) Disputes between an employer and a trade union;*
- (c) Disputes between an employers' organization and a trade union's organization;*
- (d) Disputes between trade unions;*
- (e) Disputes between employer organizations;*
- (f) Disputes between an employers' organization and a trade union;*
- (g) Disputes between a trade union and a member thereof;*
- (h) Disputes between an employer's organization or a federation and a member thereof;*
- (i) Disputes concerning the registration and election of trade union officials; and*
- (j) Disputes relating to the registration and enforcement of collective agreements.*

8. The Employment Act No. 11 of 2007 at Section 87 provides as follows: -

87. Complaint and jurisdiction in cases of dispute between employers and employees

(1) Subject to the provisions of this Act whenever –

- (a) An employer or employee neglects or refuses to fulfill a contract of service; or*
- b) Any question, difference or dispute arises as to the rights or liabilities of either party; or*
- (c) Touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.*

(2) No court other than the Industrial court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

9. In effect the **Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR** case issued declarations that clarified conflicting positions because Section 16 of the Work Injury Benefits Act was declared unconstitutional and on the other hand disputes relating to or arising from the employment relationship between an employee and an employer are to be heard by the ELRC. In the case of **Saidi Mohammed v Diamond Industries Ltd (2018) eKLR** the court observed that the Employment and Labour Relations Court has appellate jurisdiction in disputes relating to work injury. The consequence thereof is that appeals in relation to work injuries are handled by the Employment and Labour Relations Court and it is patently clear from the interpretations of this case that I find that this court had no jurisdiction to entertain the appeal in the first place.

10. With regard to the legal effect of the finding in the case of **Saidi Mohammed v Diamond Industries Ltd (2018) eKLR and Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR** I am guided by the case of **A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88**, (at paragraph 36) where Murray CJ, stated as follows:

“Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position”.

11. Similarly in In the South African case of *Sias Moise v. Transitional Local Council of Greater Germiston*, Case CCT 54/00, Justice *Kreisler* (for the majority) held:

“If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution.”

“Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.”

12. Further, In India, Mahajan J, in *Keshavan Madhava Menon v. The State of Bombay [1951] INSC* held that:

“If a statute is void from its very birth then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law.”

13. In light of the foregoing authorities, I safely conclude and hereby find that it is not the function of this court to entertain any appeal in disputes relating to work injury. The Employment and Labour Relations Court does have appellate jurisdiction.

14. In the result the appeal herein is dismissed for lack of jurisdiction. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 20th day of November, 2019.

D.K. Kemei

Judge