



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 241 OF 2008**

**PATRICK MUKILA KILONZI.....APPELLANT**

**VERSUS**

**OMAR TRANSMOTORS LIMITED.....RESPONDENT**

**J U D G M E N T**

The Appellant was an employee of the Respondent at its workshop situated along Thika Road. On 9<sup>th</sup> November 2005 while at work, the Appellant sustained injuries. He filed a suit before the Chief Magistrate Court at Milimani for both general and special damages and also future medical expenses. On 15<sup>th</sup> April 2008 when the matter came for hearing, Mr Githinji who was then holding brief for Musyoki for Plaintiff/ Appellant told the court that the matter was affected by the enactment of the work Injury Benefits Act, 2007. The court as a result, struck out the suit with costs. A few weeks later, the Appellant being dissatisfied and aggrieved by the order, filed a memorandum of Appeal on the following grounds:

1. ***That the learned honourable magistrate erred and misdirected herself when she struck out the Appellant's suit on ground that the same was affected by a new legislation.***
2. ***That the learned Honourable magistrate erred and misdirected herself in law when she ordered the Appellant to pay the costs of the suit as if he was responsible for enactment of the law she cited.***
3. ***That the honourable magistrate erred and misdirected herself in law when she applied a new legislation (work Injury Benefit Act) retrospectively, to strike out the suit.***

During the hearing of this appeal, the court directed the matter to be prosecuted by way of written submissions. The Respondent in this case did not file any submissions as prior to taking directions the Respondent counsel A. N. Ngujiri, had filed an application to withdraw from acting which this court allowed. I will therefore proceed without the Respondent submissions.

On the ground 1 and 3 the Appellant submitted that while the current suit was pending, another suit was filed in the High court being petition number 185 of 2008 challenging the constitutionality of the Work Injury Benefits Act, 2007. The Appellant alleged that the existence of the suit in the High court was in the public domain. The Appellant further stated that the High court gave its judgment on 4<sup>th</sup> March 2009 in which the court declared the Work Injury Benefits Act, 2007, inconsistent with the provisions of the constitution in the following section 4, 7(1) and (2), 10(4), 16, 21 (1), 23(1), 25(1) (3), 52(1)(2) and 58(2). The court held that the sections were in conflict with the provisions of the constitution and were declared null, and devoid of the status of a law. The Appellant contended that the learned magistrate ought not to have struck out the suit in view of the High Court decision. The Appellant argued that if the magistrate

was of the view that she lacked jurisdiction over the suit, the same could have been transferred to the appropriate court.

On ground 2, the Appellant submitted that it was not proper for the court to order him to pay the cost of the suit since he did not himself pass the impugned law. The Appellant argued that there was no basis for the court to order him to pay the cost of the suit since he was in court on 15<sup>th</sup> April 2008 ready to execute the matter while the defendant did not attend. The Appellant added that defendant in his defence admitted the jurisdiction of the lower court therefore the court could have considered that, while exercising its discretion in awarding costs. The Appellant urged the court to allow the appeal with costs to the Respondent.

I have carefully perused the record including the lower court pleadings and the ruling. I have also perused the written submissions before this court on the face of the grounds of appeal which carefully considered the above documents, and in my view the main issues raised in this appeal are:

1. **Whether the enactment of a new law/statute is a ground for striking out a suit?**
2. **Who should pay the cost?**

On the first issue, the Appellant's claim before the learned magistrate was that the accident was caused by the Defendant's negligence/or breach of statutory duties. The claim was based on an injury under the Workmen's Compensation Act (Cap. 236) which was later repealed by the Work Injury Benefits Act No. 13 of 2007, the latter coming into force on 20.12.2007. The Appellant blames the striking out of the suit on the ground that the learned magistrate should have proceeded to hear the suit under the new law since the suit preceded the new laws.

In my understanding what the Appellant is saying that the court ought not to have applied the new law retrospectively. The *Black's Law Dictionary* (6<sup>th</sup> Edition) defines what a retrospective law is:

*“ A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring , or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred.”*

**The applicable provision of the law in regard to retrospective application of the law is Section 23(3) of the *Interpretation and General Provisions Act, (Chapter 2 of the Laws of Kenya)* which provide a useful guide on interpretation of the repealed or amended law vis-à-vis the repealing or the amending law. It provides:-**

***“(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -***

***(a) revive anything not in force or existing at the time at which the repeal takes effect; or***

***(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or***

***(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or***

***(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or***

***(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding***

***or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made (emphasis mine)***

A plain reading of the section shows that a written law which repeals or amends another law shall not revive anything not in force, or affect anything suffered or done under the operation of the old law. In **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, the Supreme Court held as follows, on retrospective application of the law.

***“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”***

In applying the above principles to the facts of this case, I find that the suit was struck on the basis of a new law. Section 58 of the **Work Injury Benefits Act** provides that ..... ***“Any claim in respect of an accident or disease occurring before the commencement of this Act shall be deemed to have been lodged under this Act.”*** In my understanding the intention of the legislature was to have all matters lodged under the Workmen’s Compensation Act dealt with as if they were lodged under the new law. As stated earlier the Appellant claim was based on the repealed law, the court in my view ought to have proceeded to determine it under the new law on merit. The learned magistrate therefore erred in striking out the suit based on the ground that a new law had come into force.

Over the years the courts have found the move to strike out a suit to be a draconian remedy that had to be used sparingly but that it could be nevertheless be exercised in deserving cases. In **DT Dobie Company (K) Limited Versus Muchina [1982] KLR** the Court of Appeal held that:

***“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the court process.....A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.”***

In the circumstance of this case, it is my humble view that the lower court should have sustained the suit by allowing the suit to go for trial under the new law under which it would be determined it on merit. I accordingly find that there was a miscarriage of justice in this matter and justice will only be done by setting aside the order of the lower court made on 15<sup>th</sup> April 2008 and ordering a fresh trial of the suit.

On the second issue, the Appellant complained that he was ordered by the court to pay costs following the striking out of the suit. Again, I will set aside the order as well. The issue of costs is discretionary and should be exercised judiciously to ensure the ends of justice. *The law regarding the award of costs is set out under Section 27 of the civil procedure Act. This states:*

***“Subject to such conditions and limitations’ as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:***

***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order”***

Recently, the Supreme Court in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR** held as follows:

***“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or***

***Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation..... Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.” (Emphasis mine)***

The result accordingly is that this is a case where this Appellate court will interfere with the lower court’s exercise of its discretion as the circumstances of the case dictate that the Appellant ought not to have been penalized in costs.

The appeal is accordingly allowed and the suit ordered for retrial by the lower court. Costs both here and the lower court, shall abide the fresh trial. Orders accordingly.

Dated and delivered at Nairobi this 11<sup>th</sup> day of March, 2015.

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**D A ONYANCHA**

**JUDGE**