



**Opala v Allied Wharfage Limited & another (Appeal 24 of 2020)  
[2024] KEELRC 1067 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1067 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL 24 OF 2020**

**M MBARÚ, J  
MAY 9, 2024**

**BETWEEN**

**NICHOLAS ODIDA OPALA ..... APPELLANT**

**AND**

**ALLIED WHARFAGE LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SKATESHIP CONTRACTORS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being appeal from the ruling of Hon. Ndegwa delivered  
on 30 July 2020 in Mombasa CMCC No.2531 of 2015)*

**JUDGMENT**

- 1 The appeal arises from the judgment in Mombasa CMCC No.2531 of 2015 delivered on 30 July 2020. The appellant is seeking that the appeal be allowed the ruling of the lower court against the appellant be set aside and the matter be taken back before another court for full hearing and determination. The appellant be granted costs of the lower court and this appeal.
- 2 Before the trial court, the parties were on 22 July 2020 to address the question of whether the court had jurisdiction to hear a work injury claim. Both parties attended and filed written submissions, in a ruling delivered on 30 July 2020 the trial court held there was no jurisdiction and hence struck off the suit with costs to the respondent and third party.
- 3 Aggrieved by this decision, the appellant filed the appeal. The appellant has five (5) grounds of appeal that;
  1. The learned magistrate erred in law and fact by striking out the suit without considering the doctrine of legitimate expectation.



2. The learned magistrate erred in law and fact in failing to consider that at the time the suit Section 16 of the [Work Injury Benefits Act](#) had been declared unconstitutional and the suit was legitimately filed in court.
  3. The learned magistrate erred in law and fact by failing to consider the appellant's written submissions.
  4. The learned magistrate erred in law and fact by failing to grant costs to the appellant.
  5. The learned magistrate erred in law and fact by failing to adhere to the constitutional provisions on fair hearing and trial and the doctrine of legitimate expectation.
- 6 Parties attended and agreed to address the appeal by way of written submissions. Only the appellant complied.
- 7 On 11 April 2024, by consent, the appellant and 1<sup>st</sup> respondent settled the appeal.
- 8 The appeal is against the 2<sup>nd</sup> respondent.
- 9 The appellant submitted that on the question of jurisdiction, the appellant had a legitimate expectation that his claim would be heard by the trial court on the merits. The learned magistrate in declining jurisdiction relied on Section 16 of the [Work Injury Benefits Act](#), 2007 (WIBA). This was in error as striking out the suit, denied the appellant a fair hearing on his claim. Under WIBA, the High Court had in the case of [Beja Mbetsa Katana v Tarmal Wire Products Limited](#) Civil Appeal No.20 of 2020 held that a litigant has a legitimate expectation that the practice directions by the Chief Justice on 28 April 2023 were in tandem with article 48 of the [constitution](#) on the right to access justice. The practice directions were to consolidate and standardize practice procedures for the court to enhance access to justice and to facilitate the timely and efficient disposal of cases.
- 10 The learned magistrate failed to take into account the Supreme Court judgment in [Law Society of Kenya v Attorney General & Another](#)[2019] eKLR had found WIBA to be constitutional and Section 16 of the Act had divested the court's jurisdiction to deal with the matter despite the same court had emphasized on the doctrine of legitimate expectation.
- 11 High Court Petition No. 185 of 2008 was filed on 14 April 2008. On 4 March 2009, the court declared various sections of WIBA unconstitutional.
- 12 On 23 December 2011, the appellant filed his claim for the work injury. There was no law barring him from filing his claim.
- 13 There was an appeal against the judgment of the High Court in Civil Appeal No.133 of 2011 and the judgment was delivered on 17 November 2017. The High Court judgment was set aside. The Supreme Court in Petition No. 4 of 2019 agreed with the Court of Appeal that WIBA was constitutional.
- 14 The trial court hence erred in striking out the suit with costs without taking into account the superior court judgments that had preceded the ruling delivered on 30 July 2020.
- 15 As noted above, the 2<sup>nd</sup> respondent did not address the appeal. No written submissions are filed.

### **Determination**

- 16 This is a first appeal. The court has the mandate to re-evaluate the record and make its conclusions.
- 17 The appellant filed a claim before the trial court on 30 December 2015 on the facts that on 27 April 2015 he suffered a work injury.



- 18 On 20 July 2020, the learned magistrate delivered a ruling and declined jurisdiction by striking out the suit with costs. The trial court relied on the judgment in *Said Mohamed alias Said Ndaro v Diamond Industries* [2018] eKLR where the court held that the WIBA does not confer jurisdiction on magistrates or the High Court. Jurisdiction can only flow from the *constitution* or the law as held in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.
- 19 Pending the ruling of the learned magistrate, the Supreme Court in Petition No. 4 of 2019 – *Law Society of Kenya v Attorney General & Another* [2019] eKLR addressed the entire matter and in the judgment delivered on 3 December 2019 held that all pending claims before different courts filed pending the High Court Petition No.185 of 2008 and Court of Appeal Civil Appeal No.133 of 2011 should be heard by such court. Litigants had legitimate expectations that the claims filed under such a forum should be heard and determined on merit.
- 20 The Supreme Court appreciated that before the WIBA enactment, work injury claims were filed at the trial court and the High Court. Following the orders in High Court Petition No. 185 of 2008 declaring the WIBA provisions unconstitutional, some claims that were pending hearing got stuck. Following the Court of Appeal judgment in Civil Appeal No.133 of 2011, there was clarification but again, this did not clarify what should be done to matters pending from the date the High Court declared WIBA unconstitutional.
- 21 For these reasons, through the Chief Justice's Directions on 29 April 2023, all matters were consolidated under one document. Claims pending before the court should and ought to be heard under such a forum.
- 22 As of 22 July 2020 when the learned magistrate directed parties to address the question as to whether the court had jurisdiction, there were Practice Directions concerning WIBA and the Supreme Court Petition No. 4 of 2019 judgment had just been delivered on 3 December 2019.
- 23 Judgment in *Law Society of Kenya v Attorney General & Another* [2019] eKLR delivered on 3 December 2019 being judgment in rem is binding on the trial court. The ruling that there was no jurisdiction was in error.
- 24 The appeal is with merit and is hereby allowed. The subject ruling of 30 July 2020 was initiated by the trial court and hence no orders on costs. The matter is hereby remitted back to the trial court for hearing and determination on the merit.
- 25 Place file before the Mombasa, Chief Magistrate on 20 May 2024 for directions.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 9 DAY OF MAY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

.....and.....

