



REPUBLIC OF KENYA



KENYA LAW
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**Obare v Simakon Building & Civil Engineer Contractor (Appeal
E067 of 2023) [2024] KEELRC 1616 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1616 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E067 OF 2023**

**S RADIDO, J
JUNE 26, 2024**

BETWEEN

JOHN OTIENO OBARE APPELLANT

AND

SIMAKON BUILDING & CIVIL ENGINEER CONTRACTOR ... RESPONDENT

*(Being an Appeal against the Ruling on Notice of Motion dated
29th May 2023 of Hon Cheruiyot (S.P.M) in the Chief Magistrates
Court Civil Suit No. 548 of 2016 delivered on 19th September 2023)*

JUDGMENT

1. John Otieno Obare (the Appellant) sued Samikon Building & Civil Engineering Contractor (the Respondent) on 19 October 2016, alleging a breach of statutory duty of care/negligence. The negligence was pleaded to have arisen on 15 January 2015.
2. When the Cause came up for directions on 21 January 2019, the Subordinate Court noted that it lacked jurisdiction and directed that the file be returned to the registry pending a determination by the Court of Appeal on the constitutionality of the *Work Injury Benefits Act*.
3. The Cause was mentioned several times and eventually hearing was fixed for 25 April 2023. When the Cause was called out for hearing, the Respondent orally raised the question of the Court's jurisdiction on *WIBA* claims, and the Senior Principal Magistrate in a brief Ruling stated:

This Court has no jurisdiction over the *WIBA* matter.

This suit is struck out. No order as to costs because of the uncertainty of the law to many litigants.



4. The Appellant thereafter filed a Motion dated 29 May 2023, seeking the setting aside of the dismissal of the Cause on the want of jurisdiction on the part of the Court and reinstating the Cause.
5. The Motion was canvassed and in a Ruling delivered on 22 November 2023, the Senior Principal Magistrate rendered himself:
 - (1) Having considered the Notice of Motion dated 29th May 2023 and upon perusal of the pleadings and documents filed the Court finds as follows: The documents reveal
 - (i) That the suit is for damages for injuries sustained in the course of employment.
 - (ii) That the Court lacks jurisdiction to hear and determine claims for compensation for work related injuries.
 - (2) Consequently, the Court has no option other than to hold that it has no jurisdiction and to proceed to strike out the suit.
 - (3) Therefore, the application for setting aside the order striking out this suit dated 29th May 2023 lacks merit and is dismissed.
 - (4) Costs shall be borne by the Plaintiff.
6. The Senior Principal Magistrate did not deliver any Ruling on 19 September 2023. That is the day that the Senior Principal Magistrate heard the Motion and reserved Ruling to 15 November 2023. The Ruling was ultimately delivered on 22 November 2023.
7. The Appellant was dissatisfied with the Ruling of 22 November 2023, and he lodged a Memorandum of Appeal with the Court on 14 December 2023, contending:
 - i. The Learned Trial Magistrate erred in both law and fact in failing to appreciate the totality of the evidence as placed before him thereby arriving at a wrong decision.
 - ii. The Learned Trial Magistrate erred in law and fact in failing to consider the practice directions as issued by the Chief Justice thereby arriving at a wrong decision.
 - iii. The Learned Trial Magistrate erred in law and fact in failing to recognise the basic tenet of natural justice and the main intention of the Chief Justice as in to make justice accessible to all.
8. The Record of Appeal was filed on 18 April 2024 and the Court gave directions on 7 May 2024.
9. The Appellant filed his submissions on 24 May 2024, and the Respondent on 10 June 2024.
10. The Court has considered the Record of Appeal and the submissions.

Incompetence

11. The Respondent urged that the Appeal was incompetent because the Motion before the Senior Principal Magistrate had been brought under wrong or inapplicable provisions of procedural law.
12. The Respondent also asserted that the Motion was irregular because it was seeking the Senior Principal Magistrate to sit as an appellate Court whereas he had become functus officio.
13. The Respondent was aware of the nature of the application it was facing and it competently defended himself and the Court finds that the invocation of the wrong procedures did not prejudice the substantive hearing and determination of the Motion.



14. On the question of *functus officio*, this Court is of the view that it is not material since there is no Cross-Appeal.

Jurisdiction

15. The Senior Principal Magistrate declined jurisdiction on 25 April 2023. By that time, the Honourable the Chief Justice had not issued any directions with respect to Work Injury Benefits Injury Act.
16. The Directions were issued on 28 April 2023. This must have prompted the review application which was declined and is the subject of this judgment.
17. This Court addressed extensively the question of jurisdiction over the [Work Injury Benefits Act](#) in [West Kenya Sugar CO Ltd v Tito Lucheli Tangale](#) (2021) eKLR.
18. The Court stated therein:

The debate on the validity of judge-made law or judge-declared law has been the subject of debate for hundreds of years. There are many schools of thought, including Dworkin and Hart (positivists, realists etc). It is not the intention of this Court to dabble in that debate in this judgment.

What is clear to this Court is that until set aside and or vacated, a Court order and this includes judge-made law or judge-declared law is valid, and a litigant or citizen can order his or her life in the firm belief that the declared law is the law at the particular point in time.

Therefore, in this Court's view, those citizens or employees who lodged their claims with the Courts from 22 May 2008 when the High Court issued stay orders to 4 March 2009 when a final declaration of inconsistency was made were acting on the strength of the law.

....

In the Court's respectful view, bar any stay orders, all claims which were lodged with the Courts from 22 May 2008 to 3 December 2019 being claims underpinned by judge-made or judge-declared law were validly within the jurisdiction of the Courts.

19. The Appellant moved the Senior Principal Magistrates Court on 19 October 2016. The prevailing law then was that parties could approach the Courts in claims asserting actions under the [Work Injury Benefits Act](#) because the High Court had stayed or invalidated the provision ousting the jurisdiction of the Courts.
20. Before concluding, the Court notes that the Respondent's submissions were filed by the firm of Kemunto Ntenga & Associates Advocates. There is nothing on record to show when the said firm of advocates came on record to replace the firm of Omondi, Abande & Co. Advocates.

Conclusion and Orders

21. In light of the above, the Senior Principal Magistrate fell into error of law and fact in declining jurisdiction and or declining to review its order on jurisdiction.
22. The Court, therefore, sets aside and/or vacates the Ruling delivered on 22 November 2023 and substitutes thereof an order allowing the Motion dated 29 May 2023.
23. The Court further orders that Kisumu Chief Magistrates Court Cause No. 548 of 2016 be placed before the Chief Magistrate for reallocation to another Magistrate other than Honourable Cheruiyot for hearing and determination.



24. The Appellant to have costs of the Appeal.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 26TH DAY OF JUNE 2024.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances:-

For Appellant Owiti Mwallo Odhiambo & Associates Advocates

For Respondent Omondi Abande & Co. Advocates

Court Assistant Chemwolo

