



Maisha Mabati Mills Ltd v Ondari & another (Employment and Labour Relations Appeal 152 of 2022) [2024] KEELRC 236 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 236 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 152 OF 2022**

**BOM MANANI, J
FEBRUARY 15, 2024**

BETWEEN

MAISHA MABATI MILLS LTD APPELLANT

AND

SHEM ONKWARE ONDARI 1ST RESPONDENT

JOKALI HANDLING SERVICES LTD 2ND RESPONDENT

RULING

1. The instant application arises from a decision of this court that was delivered on 25th October 2022 striking out the appeal from the decision of the trial Magistrate in Thika CMCC No. 404 of 2018 for want of jurisdiction. For the same reason, the court declared the decision of the trial Magistrate a nullity and incapable of conferring legal rights or burdens on the parties to the action.
2. The genesis of this court's decision was the protracted contest between the Law Society of Kenya on the one hand and the Attorney-General and the Central Organization of Trade Unions on the other regarding the constitutionality of various provisions in the *Work Injury Benefits Act*, 2008. That dispute commenced at the High Court before it escalated to the Supreme Court of Kenya.
3. In the High Court, various provisions in the Act were declared unconstitutional. In particular, the court declared as unconstitutional those provisions which divested jurisdiction from the court to hear and determine claims that relate to work injuries and occupational diseases.
4. On appeal, the Court of Appeal reserved a substantial part of the High Court's decision. In effect, the Court of Appeal found a majority of the impugned provisions as constitutional. The court concluded that the initial mandate to process work injury and occupational disease claims lay with the Director of Occupational Safety and Health Services (the Director). The decision by the Court of Appeal was subsequently upheld by the Supreme Court.



5. The High Court decision was rendered on 4th March 2009. Upon this decision, many litigants with work injury and occupational disease claims filed them before various courts.
6. As these cases were pending trial, the Court of Appeal rendered its decision on 17th November, 2017 reversing a substantial part of the High Court decision and affirming the authority of the Director to process work injury and occupational disease claims. Even after the Court of Appeal had affirmed the mandate of the Director to entertain these claims, some litigants (including the 1st Respondent) defied this pronouncement and presented their claims in court. The Court of Appeal's decision was to later be affirmed by the Supreme Court on 3rd December 2019.
7. In effect, litigants (including the 1st Respondent) who had filed work injury and occupational disease claims in various courts after the decision by the High Court found themselves in a state of limbo. They could not prosecute these cases before court because both the Court of Appeal and Supreme Court had affirmed the powers of the Director to determine them in the first instance.
8. Both the Court of Appeal and the Supreme Court observed that only those claims that were pending in the court system at the time of enactment of the [Work Injury Benefits Act](#) were to be processed through the court system on account of the principle of legitimate expectation. All other claims were to be handled by the Director.
9. This development yielded a fair amount of varied interpretation. Some courts understood the Court of Appeal and the Supreme Court to have allowed the processing by courts of all work injury and occupational disease claims that were pending before them including those that were filed after 4th March 2009, the date that the High Court struck out parts of the [Work Injury Benefits Act](#) which had granted the Director powers to process the claims. Yet, others understood the two appellate courts to have saved only those claims which had been filed in court before 2nd June 2008 when the [Work Injury Benefits Act](#) came into force and which were still pending resolution.
10. This court subscribes to the latter position. As a result, it holds the view that work injury and occupational disease claims that were presented to court after the coming into force of the [Work Injury Benefits Act](#), were improperly filed. The Director and not the courts had the mandate to determine such claims in the first instance.
11. This is particularly so for claims which were filed in court after 17th November 2017 after the Court of Appeal had reversed the aforesaid decision of the High Court thereby affirming the Director's powers to process these claims. After 17th November 2017, it must have been plain to anyone with such claim that he/she was required to submit it to the Director and not the court.
12. It is noteworthy that the Applicant filed his claim in court on 22nd May 2018. It is for this reason that the court struck out the appeal and declared the trial court's decision a nullity ab initio.
13. In a bid to resolve the variant approaches to the matter and achieve uniformity in handling work injury and occupational disease claims that were still pending before courts, the Chief Justice issued Gazette Notice No.5476 of 2023. By this notice, the Chief Justice introduced what is now known as the "Practice Directions relating to pending court claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision in [Law Society of Kenya v. Attorney General & Another](#), Petition No. 4 of 2019; [2019] eKLR".
14. In the directions, the Chief Justice provided guidelines on how to handle the pending work injury and occupational disease claims. The objectives of the directions are to:-



- a. consolidate and standardize practice and procedure in the Employment and Labour Relations Court and the Magistrates Courts in relation to claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision dated 3rd December, 2019, which are pending in courts;
 - b. enhance access to justice;
 - c. facilitate timely and efficient disposal of cases that were filed prior to the Supreme Court decision; and
 - d. ensure uniformity in court experience. (Emphasis added through underlining)
15. For claims that had been filed after the enactment of the Work Injury Benefits Act but before the Supreme Court decision of 2019, the following directions were given:-
- a. All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment and Labour Relations Courts or the Magistrates' Courts shall proceed until conclusion before the said courts.
 - b. All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and the Magistrates' Courts shall be delivered by the same court.
16. Regarding the date of commencement for the directions, the Legal Notice provided as follows:-
- “These Practice Directions shall come into force upon the date of issue.”
17. The directions are dated 24th April 2023. They are deemed to have been issued on 28th April 2023 when they were published in the Kenya Gazette.
18. There is no indication that the directions were intended to have retrospective application. On the contrary, they required that actions which were still pending before courts and which had been filed within the aforesaid timeframe to be processed to conclusion before the courts where they were pending. In addition, they required courts to deliver pending judgments and rulings in respect of such causes. This is clear from the excerpts quoted above.
19. The directions do not require courts to reopen matters that had been concluded one way or the other before they issued. If this was the intention, they (the directions) would have explicitly spoken to the matter.
20. The court delivered its decision on the appeal on 25th October 2022 striking it out for want of jurisdiction. On the other hand, the aforesaid directions came into existence on 24th April 2023 and were effectuated on 28th April 2023 after their gazettelement, approximately six (6) months after the court's decision that disposed of the appeal.
21. Relying on the directions, the Applicant (1st Respondent in the appeal) has now filed the instant application asking the court to review its decision and reopen the appeal. The Applicant argues that the directions present new circumstances which should provide ground for the court to set aside its decision and reopen the appeal.
22. The Applicant's request raises the question whether the aforesaid directions can be applied retrospectively to reopen matters which had been resolved and closed at the time that they (the



- directions) issued. At the time of giving directions on the mode of hearing of the instant application, I asked the parties to address me on the issue.
23. In his submissions, the Applicant asks me to consider his case as *sui generis* and invoke the practice directions retrospectively to reopen the matter. He nevertheless acknowledges that the directions targeted pending matters.
 24. The Applicant asks the court to apply the mischief rule to discern the true intention of the directions. According to the Applicant, because part of the objectives of the directions was to facilitate access to justice and provide uniformity in disposal of work injury claims, this should be reason to apply them retrospectively in order to reopen his case.
 25. The Applicant argues that the directions did not constitute new law. Rather, they were a clarification of the law as it is.
 26. The Applicant argues that the Chief Justice cannot have intended that the directions apply preferentially in order to benefit only a section of litigants. Therefore, the court should invoke them (the directions) to reopen his already closed matter.
 27. Further, the Applicant argues that a plain reading of the directions demonstrates that they were intended to apply retrospectively. According to him, the fact that the directions apply to suits that were filed before they came into force implies that they apply retrospectively.
 28. The Applicant further argues that the directions stand in the same position as a judicial decision. As such and just like judicial decisions, they have retrospective application.
 29. On its part, Appellant contends that the directions were intended to apply to actions which were pending in the court system at the time that they were issued. They were not intended to apply retrospectively to reopen closed matters.
 30. Whether practice directions can be invoked to allocate legal rights and obligations is a matter that remains fluid. Certainly, they (practice directions) cannot assume the position of judicial precedent as suggested by the Applicant. And neither can they be invoked to alter settled legal principles or provisions of the law or confer jurisdiction where none exists (*John K. Malembi v Trufosa Cheredi Mudembei & 2 others* [2019] eKLR). Not being in the nature of judicial precedents, I cannot agree with the Applicant's proposition that they (practice directions) necessarily have retrospective application.
 31. Having said thus, it is clear to me that the aforesaid directions were intended to apply to cases that were still pending in the court system at the time that they (the directions) were issued. Therefore, they cannot be invoked to resurrect matters which were closed before they (the directions) were issued.
 32. The law is presumed to have prospective as opposed to retroactive application. Ordinarily, statutory instruments are presumed not to have retrospective application unless a contrary intention is expressed in them. Commenting on the matter, the learned Judge in *Keroche Industries Ltd v Kenya Revenue Authority* (2007) e KLR stated as follows:-

“Retrospective laws, except where specifically allowed by the legislature, are generally frowned upon as a matter of policy.”



33. In *Pauline Anna Benadette Onyango v Kenya School of Law* [2017] eKLR, the court quoting the decision in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others*, SCK Application No. 2 of 2011 [2012] eKLR, expressed itself on the matter as follows:-

“.....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 is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

34. As indicated earlier, there is nothing in the practice directions that were published on 28th April 2023 to suggest that they were intended to apply retrospectively. On the contrary, they (the directions) clearly state that they were to provide a guide for processing work injury and occupational disease actions that were still pending in the court system at the time that they issued. As such, the Applicant cannot rely on them to ask the court to reopen a matter that had been closed long before they came into existence.

35. Importantly and as a matter of public policy, it is undesirable for the court to reopen the appeal that was closed on 25th October 2022 on the basis of Practice Directions that were issued on 28th April 2023, six (6) months after the impugned decision was rendered. If the court were to do so, it will have opened a Pandora’s Box for many other Applicants whose matters had been closed one way or the other before the directions issued to file similar motions with the hope of re-litigating their causes. This will engender more confusion in this troubled area of law.

36. Alluding to the aforesaid public policy requirement, the Court of Appeal in *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR quoting the Supreme Court decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, observed as follows:-

“In the matter before us, the question is not whether the appellants seek to rely on a law that has retrospective effect. The sole issue to consider is whether the applicants can reopen a case that was finalized by the Court of Appeal (by then the highest Court in the land) before the commencement of *the Constitution* of 2010. Decisions of the Court of Appeal were final. The parties to the appeal derived rights, and incurred obligations from the judgments of that Court. If this Court were to allow appeals from cases that had been finalized by the Court of Appeal before the Commencement of *the Constitution* of 2010, it would trigger a turbulence of pernicious proportions in the private legal relations of the citizens.” Emphasis added by underlining.

Determination

37. Having regard to the foregoing, I reach the conclusion that the Practice Direction on management of work injury and occupational disease claims that issued vide Gazette Notice No.5476 of 2023 were not intended to apply retrospectively to reopen closed matters.

38. Consequently, they cannot be invoked to reopen the instant appeal which was closed through the court’s decision that was rendered on 25th October 2022.

39. As a result, the instant application is without merit.

40. Accordingly, it is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF FEBRUARY, 2024

B. O. M. MANANI



JUDGE

In the presence of:

..... for the Appellant/Respondent

.....for the 1st Respondent/Applicant

.....for the 2nd Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

