Rok Industries Limited v Wambua (Appeal 85 of 2023)
[2024] KEELRC 715 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 715 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL 85 OF 2023

NJ ABUODHA, J

MARCH 14, 2024

[FORMERLY MILIMANI CIVIL APPEAL NO. E498 OF 2021]

BETWEEN

ROK INDUSTRIES LIMITED ..... APPELLANT

AND

STEPHEN MULWA WAMBUA ..... RESPONDENT

(Being an appeal from the Ruling of Hon. A.N MAKAU(PM) issued in Milimani Chief Magistrate's Court CMCC No. 3212 of 2017 in respect to the Appellant's Notice of motion dated 30th September,2020 between Stephen Mulwa Wambua v ROK Industries Limited delivered on 23rd July, 2021)

JUDGMENT

1. Through the Memorandum of Appeal dated 12th August,2021, the Appellant appeals against the Ruling of Honourable A. N Makau delivered on 23rd July, 2021) in Milimani Chief Magistrates Court CMCC No. 3212 of 2017 (*Stephen Mulwa Wambua v ROK Industries Limited*)

2. The Appeal was based on the grounds that:

    i. The Learned Magistrate erred in both fact and law by failing to appreciate that section 16 as read with sections 23(1) of the Work Injury Benefits Act 2007 confers powers of adjudication of any claim for compensation arising from injury or death in the workplace upon the Director of Occupational Safety and expressly bars institution of court proceedings by the aggrieved employee.

    ii. The Learned Magistrate erred in both fact and law by misinterpreting the principle of legitimate expectation and holding that it applied to all claims that were already filed before the Magistrates court.

iii. The Learned Magistrate erred in both fact and law by disregarding the fact that the two superior courts i.e the Court of Appeal in *Civil Appeal No. 133 of 2011* and Supreme Court in *Petition No. 4 of 2019* were clear that the principle of legitimate expectation in work injury claims applied to the matters that were pending in court prior to the enactment of the Work Injury Benefits Act 2007.

iv. The Learned Magistrate erred in both fact and law by holding that the Magistrates court had jurisdiction to hear and determine work injury claims.

v. The Learned Magistrate erred in both fact and law by basing her ruling on irrelevant considerations.

3. The Appellant prayed that the appeal be allowed and the ruling of 23rd July,2021 be set aside as a whole and be substituted with an order allowing the Appellant's application dated 30th September,2020 therefore striking out the plaint and the suit in its entirety. The Appellant prayed for costs of this Appeal and in the lower court proceedings.

4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant in its submissions dated 17th October, 2023 submitted on the Applicable principle in Appeals and relied on the case of *Mbogo v Shah* [1968] EA 93, *Mwanasokoni v Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga v Kiruga & Another* (1988) KLR 348 concerning when a superior court will interfere with the decision of the inferior court. These he submitted included when the lower court acted on wrong principles, there was no evidence and the court did not take into consideration some factors hence arriving at a wrong decision.

6. On the issue of whether the Notice of Motion dated 30th September, 2020 was opposed the appellant submitted that the respondent filed grounds of opposition dated 9th November, 2020 in opposition to the Motion. According to Counsel, the grounds of opposition did not raise any issues of law and did not cite a single statute. The statements contained therein were matters of facts. It was Counsel's contention that grounds of opposition ought to be restricted to pure matters of law and not facts as in this case. In this respect the appellant relied on the case of *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited* [2010] eKLR and Civil Appeal No. 95 of 2016 *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR.

7. The Appellant submitted that grounds of opposition though means of opposing an application was not to be used when one intends to deny allegations in an application. A sworn replying affidavit should have been deponed if indeed the Respondent wanted to rebut the averments in the said motion.

8. On the issue of whether the magistrate court had jurisdiction to hear work injury related claims, the Appellant submitted that it was not in dispute that this was a claim arising out of a work injury. The Appellant relied on Gazzette Notice No. 5477 and submitted that while this Appeal was pending hearing and determination, the Hon. Chief Justice published in the said Gazette notice giving some Practice Directions relating to pending court claims for compensation for work related injuries. The net effect of this Gazette Notice was 'conferring jurisdiction' upon Magistrates. Counsel submitted however that, with great respect to the Hon. Chief Justice, it was trite that jurisdiction was donated to the courts by the *Constitution* and/or the statute which created them.

9. The Appellant submitted that a court must have jurisdiction in any litigation and relied on the Supreme Court *in the Matter of Interim Independent Electoral Commission* [2011] eKLR. and Petition No.

33 of 2018, *Sammy Ndungu Waity v I.E.B.C. and 3 others* [2019] eKLR and *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others*, S.C Petitions 13A of 2013. The Appellant further submitted that the said Gazette Notice did not confer jurisdiction as it was abundantly clear that only Statute and in this instance the Work Injury Benefits Act, 2007 could confer jurisdiction. According to Counsel, the Act was operationalized on 2nd June 2008 vide Gazette Notice No. 60 of 23rd May 2008. It provided mechanisms for compensating employees for injuries sustained and or diseases contracted in the course of duty. The Appellant relied on Sections 16 and 23(1) of WIBA and stated that it conferred powers of adjudication of any claim for compensation arising from injury or death in the workplace, upon the Director and expressly barred institution of court proceedings by the aggrieved employee.

10. The Appellant submitted that Part IV provided that all such claims shall be lodged with "the Director" thereby vesting sole and exclusive jurisdiction to that officer to determine the claims. Counsel relied on Section 52 (2) which permits a person aggrieved by the Director's decision to appeal therefrom to the Employment and Labour Relations Court. The Appellant furher submitted that the constitutionality of various provisions of WIBA, including Section 16, was challenged in Nbi *Petition No 185 of 2008*. Hon. Justice (Prof) Ojwang J delivered a judgment on 4th March 2009 declaring certain provisions including Section 16, unconstitutional.

11. It was the Appellant's submissions that an appeal was preferred therefrom to Court of Appeal being *C.A NO 133 of 2011* where the position of the High Court was set aside and that the Court of Appeal decision was subsequently upheld by the Supreme Court in *Petition No 4 of 2019*.

12. It was the Appellant's submissions that the Court of Appeal and Supreme Court authoritatively spoke and affirmed the constitutionality of Section 16 amongst other sections of WIBA which ousts jurisdiction of courts to hear and determine claims for compensation respecting injuries sustained in the course of duty.

13. The Appellant submitted that in any event both the Court of Appeal and Supreme Court limited application of "legitimate expectation" to suits filed prior to WIBA coming into force and relied on *C.A No 133 of 2011*. It was the appellant's submission that legitimate expectation was primarily anchored on the statutes that were in forced prior to the enactment of WIBA and not prior to the determination of the Court of Appeal. That the court's role was not to make law but to interpret the law.

14. The Appellant submitted that following the Supreme Court and Court of Appeal's said judgments various Judges have applied and interpreted the same to set aside judgments in, and dismiss/strike out, suits (such as this one). Counsel referred to a number of cases for example Eldoret Civil Appeal Number 86 of 2017; *Jumbo North (E.A.) Limited v Wilder Wangira* [2020] eKLR among others where the courts refused to entertain suits filed after the enactment of the Act for lack of jurisdiction. The Appellant therefore submitted that the Chief Magistrate's court did not have jurisdiction to handle work injury claims such as this one.

15. On the issue of whether the court erred in failing to strike out the claim the Appellant submitted that our legal system is adversarial in nature. Courts do not direct claimants on filing suits. They (claimants) act independently. Counsel relied on the cases of *Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission & 2 others* (2013) eKLR and *Macfoy v United Africa Co LTD* [1961] 3 All ER, 1169 and contended that a court must have jurisdiction from the onset. Further, Counsel submitted that the jurisdiction of the court flows from the constitution and statute. He relied on Supreme court decisions in the cases of the matter of Advisory Opinion of the Court under Article 163 of the *constitution* and *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others* on this issue.

16. The Appellant submitted that the trial court in its ruling at page 11 of the Record of Appeal relied on the decision in *West Kenya Sugar Co. LTD v Tito Lucheli Tangale & Others* [2021] eKLR yet the Court of Appeal sitting at Kisumu in Civil Application No. E130 of 2021 stayed the execution of the said judgment (West Kenya Sugar) pending the hearing and determination of the substantive appeal before the court being Civil Appeal E-88 of 2021.

17. It was the Appellant's submission that that decision having been stayed, remained unusable for the purposes of this appeal and was in effect bad law and further that this suit, having been filed in the court and before a forum which lacked jurisdiction, the suit lacks merit and should fail automatically.

18. The Appellant asked the court to be guided by the dicta of the court in *Republic v Business Premises Rent Tribunal & another Ex-parte Albert Kigera Karume* (2015) eKLR on the import of lower courts taking in to account decisions of the higher courts.

19. The Appellant submitted that this court cannot and should not be allowed to deviate from the findings of two Superior Courts i.e. the Supreme Court and the Court of Appeal in addition to the findings of five other Judges of the Employment and Labor Relations Court. Counsel submitted that the Appellant still had recourse before the office of the Director of Occupational Safety.

20. The Appellant therefore asked the court to set aside the subordinate court's ruling of 23rd July 2021 as a whole and be substituted with an order allowing the Appellant's application dated 30th September 2020 and striking out the Plaint and the suit in its entirety.

21. The Respondent on the other hand did not file his submissions or attend court when directions on the delivery of judgment were given.

Analysis & determination

22. I have considered the pleadings by both parties and the submissions by the Appellant and this being a first Appeal I will proceed to reanalyze the evidence before me as was held in the case of *Selle v Associated Motor Boat Company Limited* [1968] EA 123 thus:-

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities ..... or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

23. In this case, the ruling of the trial court was that it had jurisdiction to entertain the suit having been filed in 2017 which fell within the bracket of 2009 to 2019. The trial Court therefore disallowed the Appellant's application dated 30th September,2020 seeking to strike out the plaint. The main issue in this appeal therefore is whether the trial court had jurisdiction to hear the WIBA matter as it ruled.

24. The Court takes note that the commencement date for WIBA is June 2, 2008 as per *Legal Notice No .60* of May 23, 2008. The judgment of the High Court by Ojwang J. was delivered on March 4, 2009 and that of the Court of Appeal was delivered on November 17, 2017. The judgment of the Supreme Court was delivered on December 3, 2019.

25. The case in the lower court by the Respondent in this appeal was filed on 18th April, 2017. This therefore meant that the case by the Respondent was filed after the WIBA had commenced operation and the High Court had declared various sections of the Act unconstitutional before the case was filed. In addition, the Court of Appeal and the Supreme Court had not dealt with the respective appeals filed therein as at the date of filing of the case the subject of the present appeal.

26. It should be noted that the Court of Appeal and the Supreme Court did not give directions on cases that were filed between the time of the High Court decision and the decision of the Court of Appeal. The two superior courts directed on matters that had been filed prior to coming into operation of WIBA on June 2, 2008 and directed that such matters should proceed on merits to logical conclusion based on the doctrine of legitimate expectation. This was the same observation in the case of *Omutiti v Orpower 4 Inc* (Employment and Labour Relations Appeal 12 of 2021) [2023] KEELRC 1974 (KLR) (31 July 2023) (Judgment)that: -

> The following dates are very important to this appeal and any other matter relating to the issues herein. The date of commencement of the WIBA is June 2, 2008 as per *Legal Notice (LN) No 60* of May 23, 2008. The judgment of the High Court was delivered on March 4, 2009 and that of the Court of Appeal was delivered on November 17, 2017. The judgment of the Supreme Court was delivered on December 3, 2019. The case in the lower court by the Appellant in this appeal was filed on September 27, 2017. There are two very important aspects of this date. The first one is that the case by the Appellant was filed after the WIBA had commenced operation. Secondly, the High Court had declared various sections of the Act unconstitutional, as alluded to above, before the case was filed. The third angle is that the Court of Appeal and the Supreme Court had not dealt with the respective appeals filed therein as alluded to above as at the date of filing of the case. What has probably caused the confusion that has been witnessed in matters raising the same or similar issues as raised in this appeal is that the Court of Appeal and the Supreme Court did not comment on or give directions on cases that were filed between the decision of the High Court and the decision of the Court of Appeal. The two superior courts directed on matters that had been filed prior to coming into operation of WIBA on June 2, 2008 and directed that such matters should proceed on merits to logical conclusion based on the doctrine of legitimate expectation.

27. Due to this confusion the Chief Justice gave practice directions on the WIBA matters vide the *Kenya Gazette* of 28th April,2023 and provided as follows: -

> Claims Filed after Commencement of WIBA but before the Supreme Court decision
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> 7. Taking into account that High Court vide its judgment dated 4th March, 2009 in *Law Society of Kenya v. Attorney General & Another* (2009) eKLR declared some of the provisions in *WIBA* including Sections 16, 23(1) and 52, which prescribe the procedure for lodging claims under the *Act* unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in court. As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in *Attorney-General and 2 Others v Ndii and 79 Others; Prof. Rosalind Dixon and 7 Others (Amicus Curiae)* (Petition 12, 11 and 13 of 2021(Consolidated)) [2022] KESC 8 (KLR) to lodge their claims in court.

Therefore,

i. 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.

28. This therefore meant that by the time the Respondent filed their case at lower court in April,2017 the High Court judgment of 2009 was applicable which had rendered the provisions of *WIBA* unconstitutional. The litigants could only seek redress in courts before the superior courts overturned the High Court decision. The Supreme Court in *Law Society of Kenya v Attorney General & another* [2019] eKLR quoted with concurrence the dictum of the Court of Appeal in this matter thus:

> " With respect, we agree that claimants in those pending case have legitimate expectations that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked".
>
> The Supreme Court went on to state thus:
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> > " In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the *Act*, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, *WIBA*, not being unconstitutional and an even more progressive statute, as we have shown above, we opine that it is best that all matters are finalized under Section 52 aforesaid"

29. This Court is not only bound but agrees with holding by the Court of Appeal and the Supreme Court on this matter and consequently upholds the ruling by the lower court that it had jurisdiction to entertain the suit as per the directions given by the Chief Justice on such matters.

30. The Appeal is therefore found unmerited and is hereby dismissed with costs to the Respondent.

31. It is so ordered.

DATED THIS 14TH DAY OF MARCH, 2024

DELIVERED THIS 14TH DAY OF MARCH, 2024

ABUODHA NELSON JORUM

JUDGE