



**Onany v Tononoka Rolling Mills Ltd (Employment and Labour Relations
Appeal E034 of 2021) [2024] KEELRC 1169 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1169 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E034 OF 2021**

K OCHARO, J

APRIL 26, 2024

BETWEEN

LEONARD ADONGO ONANY APPELLANT

AND

TONONOKA ROLLING MILLS LTD RESPONDENT

JUDGMENT

Introduction

1. This is a judgment in respect of two consolidated appeals, No. 86 of 2023 (formally NBI HCCA NO. E202 OF 2021) TONONOKA ROLLING MILLS LTD VS. LEONARD ADONGO OPANY, and NO. E034 OF 2021 – LEONARD ODONGO OPANY VS. TONONOKA ROLLING MILLS LTD. For clarity of record, LEONARD ADONGO OPANY, the Appellant in appeal E034 of 2023, shall hereinafter be referred to as the Plaintiff, and Tononoka Rolling Mills, the Defendant.
2. Imperative to state that the two appeals were filed by the Defendant and the Plaintiff respectively, challenging a ruling of the Trial Magistrate in Milimani CMCC No. 2778 of 2017, of 19th March 2022.
3. This Judgment shall dispose of the consolidated appeal by answering these two questions; whether the suit before the trial court was filed in an appropriate forum, having been filed after the decision of Justice J. B. Ojwang (as he then was) in Petition No. 185 of 2008, on the unconstitutionality of Section 16 of the *Work Injury Benefits Act*, 2007 but before the Court of Appeal decision on his judgment, and whether the Plaintiff's claim was already resolved under the mechanism provided for under the WIBA, before he initiated the suit before the trial court.

The Suit

4. Through a plaint dated 25th April 2017, the Plaintiff filed a suit at Milimani Commercial Courts Civil Suit No. 2778 of 2017, alleging that on the 4th day of February 2015 while in the course of his duty as an



employee of the Defendant, as a Moulding Machine Operator, he sustained workplace injuries when the moulding machine blew up and hot melted metal splashed on him occasioning him severe burns. He attributed the accident to the negligence, and breach of statutory and contractual obligations on the part of the Defendant, its agent, servant, employer and/or supervisor. As a result, he sought general and special damages against the Defendant.

5. The Defendant resisted the suit by filing a Statement of Defence dated 10th July 2017, which was subsequently amended on 28th July 2017. It admitted in the Amended Statement that, the Plaintiff was at all material times its employee and that a workplace accident occurred on the 4th of February 2015. However, it denied that the accident was at all caused or in any way contributed to, by any negligence, or breach of statutory or contractual obligations on its part or that of its employee, agent, servant and or supervisor.
6. It was contended that the accident was solely caused and/or substantially contributed to by the negligence of the Plaintiff in the manner he performed his duties.
7. The Defendant further averred that upon the occurrence of the accident the Plaintiff was paid KShs.750,720/- as compensation under the [Work Injury Benefits Act](#) for the injuries he had suffered. Further, if the Trial Court were to find that the Plaintiff was entitled to any compensation under the suit, then the said amount be deducted from the awarded sum.
8. Through a Notice of Motion application dated 29th October 2020, the Defendant sought before the Trial Court;

- “(a) That the plaint herein, and consequently the suit, be struck out.
- (b) That the Defendant be awarded costs of the suit.”

The application was anchored on the prime grounds that;

- i. The court lacked jurisdiction to entertain the claim in view of sections 16 and 23 of the [Work Injury Benefits Act](#).
 - ii. The High Court decision declaring section 16 of WIBA unconstitutional was overturned by the Court of Appeal on the 17th of November 2017 in Civil Appeal No. 133 of 2011, which thus determined that Magistrate Courts lack jurisdiction to hear and determine claims such as arising from work-related injuries. The Court of Appeal decision was upheld by the Supreme Court on 3rd December 2019 in Petition No. 4 of 2019.
 - iii. In any event, the Plaintiff's claim for compensation under WIBA was assessed, determined and paid. His cause of action had been extinguished thereby, and he had no further claim arising from the subject incident.
9. The Plaintiff opposed the application through his replying affidavit sworn on the 24th of November 2020. The opposition was anchored on two prime grounds:
 - a. That the suit before the trial Magistrate was properly initiated before the court, after the decision of Justice J. B. Ojwang (as he then was) and before the Court of Appeal decision that overturned the decision.
 - b. That the Defendant has expressly admitted the jurisdiction of the lower court, in the statement of Defence filed on 12th July 2017 as well as the Amended Defence filed on 31st July 2017.



10. After considering the submissions by Counsel for the parties, for and against the application, the Learned Trial Magistrate, rendered himself on the application, through a very brief ruling thus;

“I have grossed over the matter before me.that the same fails under WIBA statute, the consequence of which the file is returned back to the registry to await further directions. The Court lacks jurisdiction.

Ruling dated 19th March 2021.”

The Appeals

11. Aggrieved by the ruling, the adversaries in the suit, filed separate appeals hereinabove mentioned, challenging the same on various grounds. The Defendant in his appeal No. 86 of 2023 in assailing the ruling, put forth the following grounds through the Amended Memorandum of Appeal, that: -

1. Having held that the Magistrates court lacked the jurisdiction to hear and determine the primary suit (Milimani CMCC 2278 of 2017), the Learned Magistrate erred both in fact and law, by failing to strike out the suit as prayed.
- 1A. The Learned Magistrate erred in fact and law by failing to again strike out the primary suit as defective and unsustainable given the Respondent’s lodged, assessed processed, determined and paid compensation claim under the *Work Injury Benefits Act*.
- 1B. The Learned Magistrate erred in fact and law by failing to make a determination on the issues in ground 1A above that were raised and argued before him.
2. The Learned Magistrate erred in fact and law by failing to award the Appellant costs of the primary suit.

12. The Plaintiff on the other hand through his Memorandum of Appeal in E034 of 2023, attacked the Ruling setting forth the following grounds: -

1. That the Learned Magistrate erred in law and fact by holding that the Magistrate’s court lacked jurisdiction to hear and determine the primary suit Number Nairobi CMCC 2778 of 2017 between the parties herein.
2. That the Honourable Magistrate erred in law and fact by dismissing the said primary suit Number Nairobi CMCC No. 2778 of 2017.
3. That the Learned Magistrate erred in law and fact by failing to appreciate and hold that the said suit was properly and lawfully filed on 25th April 2017 after Justice J. B. Ojwang’s final judgment in Nairobi Petition No. 185 of 2008 between the Law Society of Kenya versus the Honourable Attorney General and COTU which judgment declared unconstitutional section 16 of the *Work Injury Benefits Act* Number 13 of 2007 among other provisions thereof.
4. That the Honourable Magistrate erred in law and fact by failing to appreciate and hold that the said primary suit was duly filed properly and lawfully prior to the Court of Appeal (Waki, Makhandia, and Ouko JJA) judgment delivered on 17th November 2017 which overturned the aforementioned Justice J.B. Ojwang’s Judgment.
5. That the Honourable Magistrate erred in law and fact by failing to appreciate and hold that the said primary suit falls among such matters in which the Appellant herein and other litigants



have attained legitimate expectation and the primary suit should be finalized under section 52 of the *Work Injury Benefits Act*, 2007.

Submissions

13. Counsel for the Defendant, the Appellant in Court of Appeal No. 86 of 2023, first submitted on whether the lower court had jurisdiction to hear common law claims given the WIBA, and Supreme Court decision. The subject primary suit sought compensation under common law for injuries suffered at the workplace.
14. Counsel further submitted that the *Work Injury Benefits Act*, 2007 was operationalized on 2nd June 2008. It provides the mechanism for seeking compensation for injuries sustained and or diseases contracted in the course of duty. Section 16 thereof provides that no action shall be taken by an employee and no liability for compensation shall arise against any employer save under the provisions of the Act. Part IV thereof provides that all such claims shall be lodged with “the Director” thereby vesting sole and exclusive jurisdiction on the Director to determine the claims. Section 52(2) permits a person aggrieved by the Director’s decision to appeal therefrom to this court.
15. It was further submitted that the constitutionality of various provisions of the Act, including section 16, was challenged in NBI Petition No. 185 of 2008. Ojwang J, [as he then was], heard the Petition and delivered judgment on 4th March 2009 declaring section 16 and others unconstitutional. Further, an appeal was preferred therefrom to the Court of Appeal. The Court of Appeal delivered its judgment on 17th November 2017 setting aside aspects of the superior court’s decision, including respecting constitutionality of section 16. The Court of Appeal decision was subsequently upheld by the Supreme Court in Petition No. 4 of 2019.
16. The decision by the superior court having been overturned by the Court of Appeal, the Court of Appeal’s decision which the Supreme Court confirmed, it could not be available for the Claimant to assert that the legitimacy of his case flowed from the decision of the Superior Court.
17. Both the Supreme Court and the Court of Appeal being aware of the pre-existing suits pronounced themselves thereon, and classified them into two:
 - i. Those arising prior to the enactment of the WIBA and
 - ii. Those arising subsequent thereto. The Court of Appeal and the Supreme Court recognized that the principle of “legitimate expectation” only arose to Claimants who filed suits prior to the enactment of the WBA. It did not extend to protect suits filed subsequent thereto.
18. To support the submissions, Counsel cited various authorities, among them, Longonot Horticulture Ltd Vs. James Wakaba Maina (2019) eKLR, Said Mohamed vs. Diamond Industries Ltd (2018) eKLR and Paul Nganga vs. Sinopec International Petroleum Services Corporation Ltd Nakuru ELRC Appeal No. 57 of 2007.
19. It was argued that the Chief Justice’s Practice directions published on 26th April 2023 which appear to permit prosecution of pending suits related to Work Injury claims that were filed after the commencement of the Act and prior to the Supreme Court decision in the magistrates’ courts, being relied on by the Plaintiff is contrary to the Court of Appeal and the Supreme Court judgments. The Chief Justice acting administratively cannot set aside, alter or undo the import of binding and persuasive judicial pronouncement.
20. The judgment in Kisumu ELRCA 4 of 2019 relied upon by the Plaintiff was stayed by the Court of Appeal on November 2021 in Court of Appeal No. E130 of 2021.



21. Having rightly held that he lacked jurisdiction, the Learned Magistrate should have undertaken the logical step of striking out the suit on that score.
22. The Defendant's Counsel addressed this Court on a second question, whether the cause of action has been extinguished by the proceedings and resulting compensation made under WIBA. It was stated that, before the trial court, the Defendant did put forth ample material to demonstrate that the Plaintiff initiated compensation proceedings before the Director under the Act. Further, following the initiation an assessment and compensation ensued. He was paid KShs. 750,720/- leaving a balance of KShs.37,507/-. The Plaintiff did not dispute this fact before the trial Court either in the replying affidavit to the Notice of Motion or the reply to the Amended Defence. He is thus deemed to have admitted the existence of the WIBA compensation process, its outcome and settlement. The only option that remained available to the Plaintiff was to appeal against the Director's assessment if he was dissatisfied, not commencing the suit that he did before the lower court. The cause of action had been extinguished upon the assessment which crystallised into an enforceable award.
23. The Learned Magistrate failed to address or consider this vital aspect of the subject application. Had he, no doubt he could have struck out the suit.
24. Counsel concluded his submissions by urging this court to allow the Defendant's appeal and as a result, strike out the primary suit. Further, dismiss the Plaintiff's appeal with costs.
25. On his part, Counsel for the Plaintiff (the Appellant in E034 of 2023), referred this court to the submissions that the Plaintiff filed before the trial court, submissions that form part of the record of appeal herein.
26. Relying on the decision in Kisumu ELRC Appeal No. 4 of 2019 – West Kenya Sugar Co. Ltd vs. Tito Lucheti Tangale, Counsel submitted that cases that were filed after Justice J. B. Ojwang's (as he then was) decision but before the Court of Appeal decision were properly filed before the Magistrate's Courts. Further, the Practice Directions by Her Ladyship the Chief Justice, Martha Koome, vide Gazette Volume (XXV No. 99 Cages 1889 -1890 gives credence to this position.
27. He urges this court to conclude that Plaintiff's appeal succeeds on all grounds, with costs to him. Consequently, the primary suit should proceed to trial on merit, before the Chief Magistrate's Nairobi.

Analysis and Determination.

28. The consolidated appeal is in my view, not complex. It is easily disposable by answering the two questions herein before [para. 3] set out.
29. The *Work Injury Benefits Act*, 2007 came into force on the 2nd June 2008 by Gazette Notice No. 60 of 23rd May 2008. However, the constitutional validity of a couple of its provisions, and therefore, the legality of their applicability became a contested matter. The Law Society of Kenya filed a petition pursuant to Section 84 of the pre-2010 Constitution and Rule 12 of *the Constitution* of Kenya [Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual] High Court Practice Rules, 2006 challenging the constitutional validity of Section 7[1], 10[4], 16, 21, 52[1] and [3], and 58[2]. It was contended that the same were inconsistent with Sections 60, 75[1], 77[1], 77[9], 77[10], 80[1], and 82[1] of the retired Constitution.
30. Justice J.B Ojwang [as he then was] rendered himself on the petition, declaring as being inconsistent with the provisions of the former Constitution, Sections 7[1] and [2], 10 [4], 16, 21[1], 23[1], 25[1] and [3], 52[1] and [2], and 52[2] of WIBA.



31. The decision was appealed against. I have no doubt in my mind that neither the High Court nor the Court of Appeal gave a stay of the effect of the Judgment pending appeal. In my view, therefore, until that day when the decision was overturned by the Court of Appeal to the extent that it was as hereinabove stated, the decision remained a valid judgment that could order relevant actions by litigants and all persons that it could apply to. Of course, that is what the law of law could expect.
32. Undoubtedly, the High Court and Courts of equal status have the Constitutional authority to invalidate legislation or executive actions, which in the Court's considered judgment, conflict with *the Constitution*. This power gives the Court a crucial responsibility in assuring individual rights, as well as maintaining a "living Constitution" whose provisions are continually applied to complicated new situations.
33. The Courts' responsibility to overturn unconstitutional legislation is a necessary consequence of their sworn duty to uphold *the Constitution*. It is emphatically the province of the judiciary to say what the law is. Where a Court rules on a constitutional issue, the judgment is virtually final; until its decision can only be altered by an amendment to the law or provisions of the law declared unconstitutional, or by a new decision of the Court, or by a decision of a higher Court.
34. It is by reason of these foregoing premises that I could conclude that after the High Court decision hereinabove mentioned but before the decision of the Court of Appeal, matters emanating from work injury and or diseases contracted at the workplace, could only be filed in a manner in line with the decision. Thus, in ignorance of Section 16 of WIBA, and the other Sections mentioned hereinabove, that were declared inconsistent with *the Constitution*. The suits could, therefore, be filed in the magistrates' courts.
35. As a result, I hold that in the circumstances obtaining at the time of filing the primary suit; the existence of the High Court decision of 4th March 2009; the fact that the decision was not stayed pending appeal; the dictates of the rule of law; and the legitimate expectation of Kenyans whom the judgment bound; the suit was properly initiated. Therefore, the Learned trial Magistrate erred in law in holding that he didn't have jurisdiction on account of the WIBA provisions.
36. Consequently, ground 1 of Appeal No. E034 of 2021, succeeds.
37. I now turn to consider the second question. I have carefully considered the Notice of Motion Application dated 27th October 2020, which was placed before the trial Court for determination, and discern that its attack on the Plaintiff's case was two-prong, thus; the matter was filed in the wrong forum; and the plaintiff's claim was already resolved under the mechanism provided for by WIBA.
38. This Court notes and I agree with Counsel for the Defendant [Appellant in E 086 of 2023, that the Learned trial Magistrate did not address this pivotal point. Maybe he was blurred, with due respect, the sketchy manner in which he crafted his ruling.
39. It is clear to me that the Plaintiff [Appellant in E 034 of 2021] did not at all respond to the assertion that he had before the suit, initiated proceedings under WIBA and consequently compensated for the workplace injuries that he suffered. In my view, the failure equated to an admission of the existence of the initiation, assessment and eventual compensation.
40. It is not surprising that even in the appeals before this Court, the plaintiff has conveniently not addressed grounds 1A and 1B of the Amended Memorandum of Appeal in E.086 OF 2023. Additionally, I have carefully considered the documents running from page 87 through to 91 of the Record Appeal, I have no hesitation in concluding that the Plaintiff engaged the mechanism provided for under the WIBA, and as a result, got compensated for the injuries suffered.



41. Had the Learned trial Magistrate considered this issue and the material placed before him thereof, he could have struck out the suit.
42. On account of the foregoing premises, I hereby strike out the suit. As a result, Appeal No. E 086 of 2023, succeeds partially.
43. Each party shall bear its own costs.

READ SIGNED AND DELIVERED THIS 26TH DAY OF APRIL, 2024.

OCHARO KEBIRA

JUDGE.

In the Presence of:-

Mr. Jaoko for the Plaintiff.

Mr. Mege for Defendant.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

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