



**Ayieko v Ima Hauliers Limited (Employment and Labour Relations Appeal
8 of 2022) [2023] KEELRC 189 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 189 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 8 OF 2022**

**JW KELI, J
JANUARY 26, 2023**

BETWEEN

GEORGE JUMA AYIEKO APPELLANT

AND

IMA HAULIERS LIMITED RESPONDENT

JUDGMENT

1. The Appellant aggrieved by the ruling and order of Honourable T.A Odera, Chief Magistrate Delivered on the 4.6.2021 in Mumias Chief Magistrate Civil Case No. 78 of 2018 brought the instant appeal vide memorandum of appeal dated 18th June 2021 and record of appeal received in court on the 29th July 2022 seeking the following Orders:-
 - i. That this appeal be allowed
 - ii. That Mumias CMCC NO. 78 of 2017 be set down for hearing
 - iii. That costs of this appeal and in Mumias CMCC NO. 78 of 2017 be awarded to the Appellant.

Background to the appeal

2. The Appellant filed a suit MUMIAS CMCC CASE NO. 78 OF 2018 against the Respondent for injuries alleged to have been suffered at the workplace vide a Plaint dated 26th January 2017 and received by the trial court on even date seeking the following reliefs:-
 - a. General damages for past , present and future medical and nursing expenses
 - b. Special damages of Kshs. 5,000/-.
 - c. Costs
 - d. Interest



- e. Any other relief that this honourable court may deem fit to grant. (pages 13-16 of the record)
3. The Respondent entered appearance and filed defence (pages 40-43). While the suit was pending the respondent filed notice of preliminary objection dated 25th March 2021 raising points of law on grounds that in terms of the provisions of sections 16, 23, 51 and 58(2) of the *Work Injury Benefits Act* No. 13 of 2017 which were upheld by the Supreme Court in Nairobi Supreme Court Petition No. 4 of 2019 *Law Society of Kenya V The Attorney General & Another* that this Honourable Court lacks jurisdiction to hear and determine the present suit.
 4. The Notice of Preliminary Objection was canvassed by way of written submissions. The Appellant's written submissions were dated 9th April 2021 (pages 52-54).
 5. The Court on perusal of the record of appeal did not find the Respondent's written submissions on the Preliminary Objection. The court applying provisions of Article 159(2)(d) of *the Constitution* and in pursuit of substantial justice perused the original lower court file and found the Respondent's written submission on the preliminary objection which were dated 6th May 2021 and filed in court on the 11th May 2021.
 6. The trial court delivered its Ruling on the 4th June 2021 (pages 4 to 12). It is the said Ruling that is challenged vide the instant appeal.
 7. The Appellant being aggrieved by the Ruling of Hon. T. A Odera (CM) IN MUMIAS CMCC NO. 78 OF 2018 between George Ayieko Juma -vs- Ima Haulers Limited delivered on the 4th June 2021 filed the instant Memorandum of Appeal dated 18th June 2022 seeking to challenge the Ruling of the trial court on the following grounds:-
 - a. That the learned trial magistrate erred in law and fact when she upheld the preliminary objection dated 25th March 2021 hence occasioning a miscarriage of justice.
 - b. That Hon. Magistrate erred in both law and fact when she failed to consider, analyse and take into consideration the submission and case law by the Appellant hence occasioning a miscarriage of justice.
 - c. That the ruling by the Hon. Magistrate was poorly reasoned hence denying the Appellant access to justice as pronounced by the Supreme Court in Supreme Court petition No. 4 of 2019 and by the Employment and Labour Relations Court at Kisumu Civil Appeal No. 4 of 2019 hence occasioning a miscarriage of justice.
 8. The Court gave directions that the instant appeal be canvassed by way of written submissions. The parties complied.

Determination

Issues for determination.

9. The Appellant in their written submissions drawn by Omundi Bw'onchiri Advocates relies on the decision in *West Kenya Sugar Limited vs Tito Lucheli Tangale (2021)eKLR* and on their submissions before the trial court and further addresses issue of access to justice and the doctrine of legitimate expectation.
10. The Respondent in their written submissions drawn by L.G Menezes and Company Advocates identified the following issue for determination in the appeal:-



- a. Whether the trial magistrate had jurisdiction to hear and determine the case before her
11. The Court having read the impugned ruling, the memorandum of appeal and the having considered the submissions by the parties is of the considered opinion that the issue for determination is whether the appeal is merited.
12. The Court sitting on appeal from trial court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others (1948)EA123*. In the instance appeal, the impugned ruling is on matters of law so the court will re-evaluate the law and authorities relied on in determining the preliminary objection by the trial court.

The Court Decision On Merit Of The Appeal

13. The trial court ruling subject of the instant appeal was by Hon. T. A Odera (CM) IN MUMIAS CMCC NO. 78 OF 2018 between George Ayieko Juma -vs- Ima Haulers Limited and delivered on the 4th June 2021. The trial court upon consideration of the preliminary objection at the last paragraph of its ruling stated: ‘It is my humble view that the legitimate expectation referred to by the Court of Appeal and upheld by the Supreme Court was in relation to the matters filed in courts before WIBA was enacted in the year 2007 as those parties expected to be heard in the courts where they filed the suit and not matters filed after the Act was enacted. This matter was filed after WIBA came into force and plaintiff is represented by Counsel. The legitimate expectation thus does not apply to this case as per the Supreme Court decision. I proceed to return the plaint to the plaintiff to file before the Director of Occupational Safety and Health Services under WIBA’.
14. The court finds that the trial court in its ruling considered the submissions of the Appellant at pages 5 to 7 which relied on the decision in *ELRC Kisumu Appeal No. 4 of 2019 West Kenya Sugar vs Tito Luchele Tangale*.
15. The Appellant reiterates the holding *ELRC Kisumu Appeal No. 4 of 2019 West Kenya Sugar vs Tito Luchele Tangale* and the Respondent takes same position at trial court that the court had no jurisdiction pursuant to the Supreme Court decision *In law Society of Kenya v Attorney General & Another (2019)eKLR*. The court proceeds to consider the appeal on merit.

What was the position of the Court of Appeal and the Supreme Court regarding jurisdiction on work injury claims under WIBA ?

16. The Court of Appeal decision on jurisdiction under WIBA was in *Attorney General V Law Society of Kenya & Another [2017] eKLR*. The court addressed legitimate expectation of litigants already before court as at time of WIBA effective date as follows:-

“We find, from the submissions of the respondents that at the commencement date of the Act there were before the courts, pending determination, several work- related accident claims brought under the repealed Workmen’s Compensation Act (Cap. 236) or the common law. (emphasis given)

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.(emphasis given) Indeed as a result of this concern, the learned Judge in a ruling on an interlocutory application directed that;



“On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen’s Compensation Act or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case, finalized on the basis of the operative law prior to the entry into force of the *Work Injury Benefits Act, 2007*....”(emphasis given)

The legislative practice where a new judicial forum is created to replace an existing system is to finalize all proceedings pending in the previous system before that forum where they were commenced. (emphasis given) For instance upon the establishment of the Employment and Labour Relations Court, section 33 of the Employment and *Labour Relations Act* provided for what would happen to pending claims as follows;

“All proceedings pending before the Industrial Court shall continue to be heard and shall be determined by that court until the Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary.”

In its original form Section 58 (2), though, in our view not inconsistent with the former or current Constitution requires further consideration to ensure smooth transition to the Act from Workmen’s Compensation Act.

Similarly in terms of Section 23 of the *Interpretation and General Provisions Act*, it is clear that where a written law partially or wholly repeals another written law, unless a contrary intention appears, the repeal cannot revive anything not in force or existing before the repeal or affect the previous operation of a repealed law in relation to interests, rights and or obligations enshrined under such law.” This is a lengthy import of the parts of the judgment of Court of Appeal which the court found necessary for clarity and emphasis purpose.

17. The Law Society of Kenya aggrieved by the decision of the Court of Appeal appealed to the Supreme Court in *Law Society of Kenya v Attorney General & another* [2019] eKLR vide Petition No. 4 of 2019, the decision relied on by the Appellant at the trial court. The Supreme Court addressed the issue of legitimate expectation by parties already before court in paragraph 85 as follows:-

‘[85] 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”(emphasis given)

18. The Court has shown emphasis under the decisions of the Court of Appeal and Supreme Court outlined above to the effect that the legitimate expectation alluded to by the Court of Appeal and upheld by the Supreme Court in *Law Society of Kenya v Attorney General & another* [2019] eKLR vide petition no. 4 of 2019, was with respect to pending litigation as stated by the Justice Ojwang sitting at the High Court while granting interim orders as follows:- “On the foregoing grounds, I will order that, pending the hearing and determination of the main cause, all pending litigation which had been commenced on the basis of either the Workmen’s Compensation Act or of the common law, or of a combination of both regimes of law, shall continue to be prosecuted and, in a proper case,



finalized on the basis of the operative law prior to the entry into force of the *Work Injury Benefits Act, 2007*....”(emphasis given)

19. The Court of Appeal position on the legitimate expectation was in tandem with the High Court interlocutory order by Justice Ojwang (as he then was) above. The Court of Appeal position on the legitimate expectation was limited to pending cases at whatever stage filed under legal regime prior to enactment of WIBA. This Court of Appeal position was upheld by the Supreme Court *Law Society of Kenya v Attorney General & another* [2019] eKLR vide petition no. 4 of 2019 which held as follows:- “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.”(para 85, emphasis provided).
20. The court finds that the Supreme Court held that WIBA not being unconstitutional, save for such legitimate expectation with respect to matters filed prior to its enactment, that it was best that all matters be finalized under section 52 of WIBA Act(emphasis given). Sections 52 (1) and (2) of WIBA further provides:-

“ 52.

 - (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.
 - (2) An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.”
21. Applying the foregoing decisions of the Court of Appeal and Supreme Court which are binding on this court the court finds and determines the law on work injury related claims is that all pending litigation filed prior to the entry into force of WIBA commenced on the basis of either the Workmen’s Compensation Act or of the common law, or of a combination of both regimes of law are to be finalised on basis of the legitimate expectation that upon the passage of WIBA such cases would be concluded under the judicial process which had been invoked (para 85 of Supreme Court decision supra). Further all other litigation on work injury claims post entry into force of WIBA would proceed before the Director WIBA as provided for under section 52 of WIBA.
22. The Court then finds, respectfully, that the decision relied on by the Appellant of *West Kenya Sugar Co Ltd v Tito Lucheli Tangale* (2021)eKLR holding that all litigants who filed their disputes with the courts from 22nd May 2008 to 3rd December 2019 on the firm belief that the judge declared law was the valid law in place then, are entitled to successfully assert legitimate expectation in having the claims heard to conclusion before the courts where they had been lodged was not consistent with the holding Supreme Court decision as analysed above which decision is binding on this court . The court is not persuaded with the argument that the High Court declarations having not been stayed by the court or



court of appeal would continue to be valid law post the pronouncement of the WIBA as constitutional and in view of the glaring guide on the legitimate expectation application scope under paragraph 85 of the Supreme Court decision. The Supreme court in paragraph 85 held that save for such legitimate expectation with respect to matters filed prior to its enactment, that it was best that all matters be finalised under section 52 of WIBA Act(emphasis given).

23. The court holds that jurisdiction is not a procedural technicality. That without jurisdiction the court cannot exercise discretion or take any more steps consistent with the decision of Court of Appeal in decision of Nyarangi JA in Owners of the Motor Vessel Lilian “S’ -VS- Caltex Oil (Kenya) ltd 1989 eKLR where the court of Appeal stated :-

“Jurisdiction is everything without it, a court has power to make one more step. A court of law downs tools in respect of the matter before court the moment it holds the opinion that it is without jurisdiction”.

24. In view of the foregoing the binding decision of the Supreme Court in Law Society of Kenya v Attorney General & another [2019] eKLR vide petition no. 4 of 2019 on all work injury related claims post entry into force of WIBA lying with Director of Occupational Safety and Health Services and only exception on legitimate expectation basis being with respect to litigation pending before court prior to entry in force of WIBA Act, that is on 2nd June 2008, the suit having been filed on the 6th February 2017, the court finds and determines no merit in the instant appeal and holds that the trial magistrate did not error in interpretation of the law in its ruling delivered on 4th June 2021.
25. The court finds that in the recent past it has consistently taken the position that the magistrate court lacks jurisdiction over matters falling under WIBA filed post its effective date of 2nd June 2008. The decisions of the court include:- West Kenya Sugar Co Ltd v Shirandula (Employment and Labour Relations Appeal E005 of 2021) [2022] KEELRC 13284 (KLR) (24 November 2022) (Judgment), West Kenya Sugar Co. Ltd v Libuyi (Appeal E013 of 2021) [2022] KEELRC 13244 (KLR) (17 November 2022) (Judgment) West Kenya Sugar Co. Ltd v Sakasa (Employment and Labour Relations Appeal E006 of 2021) [2022] KEELRC 13187 (KLR) (10 November 2022) (Judgment). The court upholds its said decisions in the instant appeal.

Conclusion and disposition

27. The Court holds that the magistrate court has no jurisdiction to hear and determine work injury related claims filed upon commencement of *Work Injury Benefits Act*(WIBA) on 2nd June 2008. The original jurisdiction over WIBA matters post the effective date (2nd June 2008) lies with the Director of Occupational Safety and Health Services (Dosh).
26. The court upholds the Ruling of Hon. T. A Odera (CM) IN MUMIAS CMCC NO. 78 OF 2018 between George Ayieko Juma -vs- Ima Haulers Limited delivered on the 4th June 2021.
27. The Court in order to temper justice with mercy and taking into consideration the conflicting decisions of the court on the jurisdiction on work injury related claims, the court orders each party to bear own costs both in this appeal and in the trial magistrate’s court.
28. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 26TH JANUARY 2023.

**J. W. KELI,
JUDGE.**



In The Presence Of:-

Court Assistant : Brenda Wesonga

For Appellant: Ombito holding brief for Bw'Onchiri

For Respondent:- Fundi

