



Butali Sugar Mills Limited & another v Mukweyi (Employment and Labour Relations Appeal 24 of 2021) [2023] KEELRC 401 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 401 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 24 OF 2021**

JW KELI, J

FEBRUARY 16, 2023

BETWEEN

BUTALI SUGAR MILLS LIMITED 1ST APPELLANT

FRODAK CLEANING SERVICES LIMITED 2ND APPELLANT

AND

PETER MUKAYI MUKWEYI RESPONDENT

JUDGMENT

1. The Appellant aggrieved by the Judgment of Honourable Nyakundi, Senior Principal Magistrate Delivered on the 28th January 2021 and decree issued on 16th November 2022 in Butali SPMCC No. 291 of 2017 brought the instant Appeal vide Memorandum of Appeal dated 16th February 2021 and the record of appeal received in court on the 3rd November 2022 seeking for the appeal to be allowed and the judgment of the court of 1st instance be set aside with costs to the Appellants.
2. The Appeal was premised on the following grounds:-
 - i. That the learned trial magistrate erred in law and fact in entertaining the suits whereas the honourable court did not have jurisdiction to entertain the same pursuant to the Supreme Court judgment dated 3rd December 2019 and further to the [Work Injury Benefits Act](#).
 - ii. That the learned trial Magistrate erred in law and in fact in applying wrong principles of law while assessing damages notwithstanding the fact that this is a work injury claim and the same ought to have been dismissed for want of jurisdiction and want of due procedure.
 - iii. That the learned trial Magistrate erred in law and in fact entertaining a suit that was unprocedurally instituted before the Honourable Court.



- iv. That the learned trial Magistrate erred in law and fact in failing to consider the evidence and submissions made by the appellant's in arriving at his decision.
3. The court directed that the appeal be canvassed by way of written submissions. The Appellants written submissions drawn by Kigen & Company Advocates were dated 9th January 2023 and received in court on the 11th January 2023. The Respondent's submissions drawn by Z.K. Yego Law Offices were dated 13th January 2023 and received in court on the 16th January 2023.

Background to the appeal

4. The Respondent/Claimant filed a suit ButaliSRMCC Case No.291 of 2017 against the Respondents(Appellants) for injuries alleged to have been suffered at the workplace vide a Plaint dated 4th December 2017 and received by the trial court on even date seeking the following reliefs:-
 - a. General damages for pain and suffering
 - b. Special damages of Kshs. 6,000/-.
 - c. Costs of and incidental to this suit.
 - d. Interest on the above at court rates
 - e. Any other of further relief that this honourable court may deem fit and just to grant. (pages 3 to 7 of the record are all pleadings by the plaintiff before the lower court).
5. The Respondent entered appearance and filed defence (pages 8-9).
6. The trial court proceeded to hear and determine the suit on merit with both parties calling their witnesses and producing evidence (pages 10-15 are the trial court proceedings)
7. The trial court delivered its judgment after the hearing and written submissions on the 28th January 2021.
8. The trial court entered judgment for plaintiff against the defendants jointly and severally in the sum of KES 106,000 (KES 100,000 general damages and KES 6,000 as special damages).

Determination

Issues for determination.

9. The Appellants in their written submissions identified the following issue for determination in their appeal :-
 - a. Whether the trial court had jurisdiction to entertain the Respondent's claim presented before it.
10. The Respondent in his written submissions addressed the merit of the decision of the trial court and the question as to whether the court had jurisdiction to entertain the claim.
11. The Court having read the trial court judgment , the memorandum of appeal and the having considered the written submissions by the parties in the appeal was of the considered opinion that the issues placed by the parties before the court for determination of the instant appeal are as follows:-
 - i. Whether the trial court had jurisdiction to entertain the Respondent's claim presented before it.
 - ii. Whether the instant 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.
- a. Whether the trial court had jurisdiction to entertain the Respondent's claim presented before it.

Appellants submissions

13. The Appellants submit that the Respondent's claim before the trial court was for compensation from the appellants for injuries sustained based on the tort of negligence. That work injury claims were governed by the provisions of the *Work Injury Benefits Act*(WIBA) No. 13 of 2007. That sections 21,22 and 23 of the WIBA sets out the procedure for any claim for compensation of employee and or dependant (s) of the employee arising from injuries sustained in the course of carrying out employment duties while section 16 limits the jurisdiction of lodging work injury claims to the Director and not any other forum except on appeal as provided for under section 51 and 52 thereof.
14. That the question as to whether the magistrate courts have jurisdiction to hear and determine work injury claims was settled by the Supreme Court when it upheld the decision of the Court of Appeal in Nairobi Civil Appeal No. 133 of 2011 Attorney General v Law Society of Kenya & another (2017)e KLR where the court upheld the constitutionality of sections 4,16, 1(1),23(1),25(1)(3)51(1)(2) and 58 of the *Work Injury Benefits Act* , 2007(WIBA). That WIBA requires work injury claims to be adjudicated upon by the Director of Occupational Safety and Health Services and expressly bars institution of suits in court save under the provisions of the Act. That the Employment and Labour Relations Court is designated as the appellate court from the decisions of the Director. The Appellant submits that the Supreme Court upheld the decision of the Court of Appeal in *Law Society of Kenya v Attorney General and another*(Maraga CJ&P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ) and dismissed the appeal and cites paragraph 85 to wit:-

[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”

15. The Appellant relying on the foregoing decisions of the superior courts(Supreme Court and the Court of Appeal) submits that the trial Magistrate court erred in law and fact in entertaining the suit whereas the honourable court did not have jurisdiction to entertain the same pursuant to the decision of the Supreme court which upheld the decision of the Court of Appeal cited above on the basis of *Work Injury Benefits Act* , No. 13 of 2007.

Respondent's submissions on the issue of jurisdiction

16. The Respondent submits that the appellant by questioning the jurisdiction of the trial court by relying on the Supreme Court decision the inference drawn is that the judgment of the trial court is null and



void ab initio if the court lacked jurisdiction. The respondent to buttress this position relied on the decision in *Public Service Commission & 4 Others v Cheruiyot & 20 Others* (Civil Appeal 119 & 139 of 2017 (consolidated) 2022 KECA 15 KLR Where the Court of Appeal held as follows:-

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows: “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
 37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ v Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows: “...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
 38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
 39. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows: “...a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.”
17. The Respondent further submits that the case before the trial court was filed on the 4th December 2017 while the Supreme court decision was delivered on the 3rd December 2019. That the prevailing judicial authority at the time was the High Court judgment in Petition No. 185 of 2008 *Law Society of Kenya v Attorney General & Another* [2009] eKLR which declared sections 4,7(1),& (2),



10(4),16,21(21),23(1)25(1)&(3),52 (1)&(2)and 58(2) of the Act to be in conflict with the provisions of the former constitution and consequently declared them, null and void. The Honourable Attorney General appealed to the Court of Appeal. The Court of Appeal rendered itself on 17th November 2017 in *Attorney General v Law Society of Kenya & Another* [2017] eKLR setting aside the judgment of High Court. However, the Court of Appeal ordered that all matters pending under the previous regime should be concluded under that Law. The decision of the Court of Appeal was appealed against to the Supreme Court which rendered itself on 3rd December 2019 upholding the decision of the Court of Appeal. The Supreme Court however directed that matters that proceeded under the previous regime ought to continue to their logical conclusion as parties had legitimate expectation that the said cases will be concluded vide the prevailing law at the time. Consequently the Respondent submits that the trial court had jurisdiction to entertain this case pursuant to the directions given by the Supreme Court and it rightfully exercised its jurisdiction and prays for the court to uphold the judgment of the trial court.

18. The Respondent further cited the decision in *In Legal Resources Foundation Trust v Attorney General & 2 Others, Council of Governors & 2 Others (Interested Parties)* {2019}eKLR where the court referred to *Republic v Attorney General & Another Ex parte Waswa & Others* [2005] 1 KLR 280 where the court elaborated the principle of legitimate expectation and stated thus:-

“The Principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty... the principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidence.”

Court Decision

19. The court on reading the submissions of the parties as summarized above on the issue of jurisdiction by the trial court found that there was no meeting of minds on the ratio decidendi in the Judgment of the Supreme Court on legitimate expectation and jurisdiction in WIBA matters pending before the court in *Law Society of Kenya v Attorney General and another*(Maraga CJ&P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

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

20. 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.” That a lengthy import of the parts of the judgment of court of appeal which the court found necessary for clarity and emphasis purpose.

21. 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 Supreme Court addressed the issue of legitimate expectation by parties already before court in paragraph 85 as follows:-

a.

[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)

22. 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)

23. The Court of Appeal position on the legitimate expectation was Thus 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).
24. 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 WIBA enactment, that it was best that all matters be finalized under WIBA Act(emphasis given). The position then taken by the respondent on interpretation of the Supreme Court and Court of Appeal decisions that all work injury matters pending in court prior to the Supreme Court decision ought to continue to logical conclusion as the parties had legitimate expectation that the said matters would be concluded before the court not to be correct. The court finds and determines that the legitimate expectation alluded to by the Supreme Court was on matters pending before the courts pre WIBA and filed on basis of either the Workmen’s Compensation Act or of the common law, or of a combination of both regimes of law which was the previous legal regime.
25. Applying the foregoing decisions of the Court of Appeal and Supreme Court, which are binding on this court and the magistrates courts, 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 Occupational Safety and Health Services as provided for under the WIBA. In the instant appeal, the claim before the trial magistrate court was filed on the 4th December 2017. This was post WIBA effective date. The Court of Appeal decision was delivered on 17th November 2017 declaring that the jurisdiction of WIBA matters lay with the Director Occupational Safety and Health Services. The Magistrate court heard and determined the suit without jurisdiction. Its decision was a nullity ab initio as held by the Court of Appeal in *Public Service Commission & 4 others v Cheruiyot & 20 others*(Civil Appeal 119 &139 of 2017 (consolidated)2022 KECA 15 KLR where the court held, ‘ A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.’”
26. The court finds that in the recent past it has taken a consistent considered position that the magistrate courts lack jurisdiction over matters falling under WIBA filed post its effective date. The decisions 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) where the court held that the magistrate court had no jurisdiction to hear and determine work injury related claims filed post entry into force of WIBA. The court upholds its said decisions in the instant appeal.

27. The court allows the appeal by finding that the trial court had no jurisdiction to hear and determine the suit based on work injury claims and the judgement dated 28th January 2021 was a nullity ab initio.

Whether the instant appeal is merited.

28. The court having found that the trial magistrate court had no jurisdiction to hear and determine the suit based on work injury claims and that the judgement dated 28th January 2021 was a nullity ab initio, then the obvious consequence would be that the appeal is merited. The court finds no need to delve into the merits of the decision of the trial court having decreed the said decision to be a nullity ab initio. The appeal is allowed and the judgment of the trial magistrate dated 28th January 2021 is set aside and the plaint dated 4th December 2017 struck off for lack of jurisdiction. The court in striking off the plaint is guided by the holding in Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (consolidated) 2022 KECA 15 KLR where the Court of Appeal held, ‘A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.’ The court upholds the said decision in finding the Honourable trial Magistrate heard and determined the claim before the trial court without jurisdiction and that the trial court decision was a nullity ab initio and amenable to setting aside ex debito justitiae.

Conclusion and disposition

29. The Appeal is held to be with merit and is allowed. The court holds that the learnt trial magistrate erred in law in proceeding to hear and determine the suit on work injury claim without jurisdiction and that her decision was a nullity ab initio and amenable to setting aside ex debito justitiae.
30. The Judgment of the trial court in Butali SPMCC No. 291 of 2017 Peter Mukayi Mukweyi v Butali Sugar Mills and Another delivered on the 28th January 2021 is hereby set aside and the plaint dated 4th December 2017 struck off for want of jurisdiction.
31. 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 appellant further having failed to raise the issue of jurisdiction in the first instance, the court orders each party to bear own costs both in this appeal and in the trial magistrate’s court.
32. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 16TH FEBRUARY 2023.

J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

For Appellant : Absent



For Respondent:- Ng'eno

Court Order:

The Respondent is granted leave of 30 days to appeal.

It is so ordered.

J. W KELI,

JUDGE.

