



**Majengo v Ultra Limited & another (Appeal 91 of 2022)
[2023] KEELRC 331 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 331 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 91 OF 2022
BOM MANANI, J
FEBRUARY 9, 2023**

BETWEEN

JOHN OKENO MAJENGO APPELLANT

AND

ULTRA LIMITED 1ST RESPONDENT

SUMEET WALIA 2ND RESPONDENT

*(Arising from the Magistrate's Court at Nairobi in the
Senior Principal Magistrate's Court Case No 6622 of 2015.)*

JUDGMENT

Introduction

1. This appeal arises from proceedings commenced before the Magistrate's Court at Nairobi in the Senior Principal Magistrate's Court Case No 6622 of 2015. From the Plaint dated November 3, 2015, the case was initially between the Appellant and the 1st Respondent. However, the 2nd Respondent was later dragged into the proceedings at the stage of execution of the decree of the trial court stemming from the judgment delivered on October 31, 2016.
2. The Appellant applied for orders to compel the 2nd Respondent to satisfy the said decree in his capacity as the director and shareholder of the 1st Respondent. According to the Appellant, the directors and shareholders of the 1st Respondent had concealed the assets of the 1st Respondent in a bid to evade the obligation to satisfy the decree aforesaid. Therefore, the court needed to lift the corporate veil of the 1st Respondent in order to get to the real owners of the company and have them shoulder personal responsibility for the decree.



Summary of Facts

3. The dispute between the parties arose from a workplace accident that occurred on August 18, 2012. The Appellant, who was an employee of the 1st Respondent, was injured on this date whilst on duty within the 1st Respondent's premises.
4. From the record, the accident appears to have been reported to the Director of Occupational Safety and Health (Director) under the [Work Injury Benefits Act](#) (WIBA). In accordance with the provisions of the WIBA, the Director assessed the compensation due to the Appellant as Ksh. 331,901. It would appear that the 1st Respondent made partial settlement of the award leaving a balance of Kshs 102,274.
5. The Appellant instructed his lawyers on record to follow up the payment following which the lawyers issued a demand dated February 18, 2015 to the 1st Respondent for payment. In the demand letter, the lawyers introduced a new claim under common law for special and general damages. They demanded that the 1st Respondent admits liability for and makes good these claims failing which they were to institute legal proceedings to compel recovery.
6. This demand was followed by the case before the trial magistrate commenced through a Plaint dated November 3, 2015. The trial court heard the matter and entered judgment in favour of the Appellant for Kshs 769,584 being both general and special damages.
7. It appears that the Appellant was unable to recover the amount from the 1st Respondent through the usual enforcement mechanisms of decrees under the [Civil Procedure Act](#). Consequently, he applied for the lifting of the 1st Respondent's corporate veil in a bid to have the 1st Respondent's directors and shareholders shoulder personal responsibility for the decree. This is how the 2nd Respondent was brought on board these proceedings.
8. In the initial application filed in December 2018, the Appellant sought for orders of examination of the books of accounts and lifting of the corporate veil of the 1st Respondent. In its ruling of July 15, 2019, the court allowed the application to the extent that the directors of the 1st Respondent were to be examined on the books of accounts of the 1st Respondent. The court deferred the prayer for lifting of the corporate veil until after the process of examination of the 1st Respondent's books of accounts had been concluded.
9. It would appear that the Appellant was dissatisfied with the order. In the Appellant's view, the issue of examination of the directors of the 1st Respondent on the 1st Respondent's books of accounts had been dealt with and was not available for reconsideration. The court ought to have issued orders lifting the 1st Respondent's corporate veil.
10. After hearing the application, the trial magistrate arrived at the conclusion that the 1st Respondent was genuinely impecunious, a matter that rendered it impossible for the 1st Respondent to settle the decree. In the trial court's view, there was no evidence of a fraudulent attempt by the directors of the 1st Respondent to evade settling the decree. As a result, the application was dismissed. It is this order that triggered the current appeal.

Jurisdiction

11. After carefully examining the record of the proceedings before me, I have no doubt in my mind that the cause of action giving rise to the suit before the trial magistrate fell within the realm of the WIBA. The matter arose from an alleged work injury. The work injury is alleged to have occurred on August



- 18, 2012. By this time, the WIBA, whose commencement date was June 2, 2008, had already come into force.
12. It is true that the Act faced initial challenges when portions of it were declared unconstitutional by the High Court in *Law Society of Kenya v Attorney General & another* [2009] eKLR. However, it is also true that both the Court of Appeal (*Attorney General v Law Society of Kenya & another* [2017] eKLR) and the Supreme Court (*Law Society of Kenya v Attorney General & another* [2019] eKLR) reversed the High Court's finding on the unconstitutionality of portions of the *Act*.
 13. It has been observed that the decisions of the Court of Appeal and Supreme Court on whether courts have original jurisdiction on matters reserved for the Director under the WIBA had retroactive effect (*Heritage Insurance Company Limited v David Fikiri Joshua & another* [2021] eKLR). The effect of this holding is that the validity and efficacy of the WIBA was not legally interrupted by the decision of the High Court in *Law Society of Kenya v Attorney General & another* [2009] eKLR.
 14. Indeed no less court than the Supreme Court has observed that with the enactment of the WIBA, only work injury claims that were pending in courts on the commencement date of the Act were to be processed through the court system. All other claims arising thereafter had to be processed in accordance with the provisions of the WIBA. The principle of legitimate expectation applied only to claims predating the Act and which were already pending in court as at June 2, 2008. In restating this position, the Supreme Court (*Law Society of Kenya v Attorney General & another* [2019] eKLR) expressed itself as follows:-

“...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.”
 15. That being the position, the question whether the trial court had jurisdiction to entertain the action before her, having been filed on November 3, 2015 and having arisen from a workplace accident that is said to have occurred on August 18, 2012 during the currency of the WIBA, became an issue for consideration by the court. It is apparent that the court did not interrogate this question.
 16. I am alive to the fact that the issue of jurisdiction was not taken up before the trial court. It is also clear to me that neither of the parties has moved this court to interrogate the subject. The question therefore is whether this court can take up the matter on its own motion at this stage of the proceedings.
 17. It is now settled that the question of jurisdiction is primary and goes to the root of the power of a court to pronounce itself on a matter. Being of such significance, a court may raise the question on its own motion (*Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited* [1989] KLR 1 and *Monata Matiko Chonchorio v John Marwa Chabaro* [2021] eKLR). Further, the question may be taken up at any stage of the proceedings including on appeal (*Southern Star Sacco Limited v Vanancio Ntwiga* [2021] eKLR). On the basis of the foregoing judicial authority, I am satisfied that once it became apparent to me that the issue of jurisdiction was germane in the cause, I became entitled to interrogate it suo moto notwithstanding that the matter is on appeal and the issue had not arisen during trial of the case.
 18. Having regard to the fact that the cause of action in the dispute arose after the WIBA had come into force, it is clear to me that the right forum for the Appellant to have processed his claim was before the



Director and not the magistrate’s court. Therefore, the trial court had no jurisdiction to entertain the cause from the very commencement. The consequence of the foresaid is that any pronouncement by the trial court in the case was a nullity ab initio. Commenting on this, the court in *Southern Star Sacco Limited v Vanancio Ntwiga* (*supra*) had this to say on the matter:-

“Jurisdiction is fundamental and a judgment rendered by a court that does not have jurisdiction to hear is *void ab initio*.”

19. The current appeal arises from proceedings built on a false premise that the trial court had jurisdiction over the case. To the extent that it did not, the trial court’s judgment is a nullity and proceedings to enforce the decision are a nullity. Thus, there was no competent decision to warrant the filing of the current appeal.
20. The other jurisdictional question I need to consider is whether the appeal, arising from invalid proceedings under the WIBA is competent. The only time this court is entitled to assume jurisdiction over matters that fall under the Director’s realm under the WIBA is when a party is challenging the Director’s decision under section 52(2) of the Act. This appeal, though touching on a matter that falls within the mandate of the Director, has not originated from the Director’s decision in terms of sections 51 and 52 of the *WIBA*. To that extent, the court has no appellate jurisdiction to entertain it. The appeal is therefore incompetent.
21. The foregoing notwithstanding, the court being of equal status with the High Court, has supervisory jurisdiction over magistrates’ courts and other tribunals that work under it to interrogate their decisions pursuant to the provisions of article 165(6) of the *Constitution*. This jurisdiction is intended to ensure that the inferior tribunals do not stray beyond their jurisdictional limits in their decision making. The court, exercising this power, can nullify a decision of a subordinate court that is rendered without jurisdiction (*Paragon Electronics Limited v Andako* (Appeal 63 of 2022) [2022] KEELRC 13422 (KLR)). Exercising this power, I declare the judgment by the trial court rendered on October 31, 2016 and all subsequent proceedings and orders as null and void and incapable of conferring any legal rights on the Appellant capable of enforcement against the Respondents.

Final Orders

- a. The appeal arising out of a decision not arrived at in terms of sections 51 and 52 of WIBA is incompetent. Thus, it is struck out.
- b. The trial court had no jurisdiction to entertain the dispute that gave rise to the decree that the Appellant is attempting to enforce. Consequently and in exercise of this court’s supervisory jurisdiction under article 165(6) of the *Constitution*, the decree and all subsequent orders are declared null and void and incapable of conferring a legal right on the Appellant.
- c. There will be no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF FEBRUARY 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Applicant

..... for the Respondent

ORDER



In light of the directions issued on July 12, 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

