



REPUBLIC OF KENYA



West Kenya Sugar Company Limited v Kakai (Employment and Labour Relations Appeal 15 of 2021) [2023] KEELRC 660 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 660 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 15 OF 2021**

**JW KELI, J
MARCH 9, 2023**

**BETWEEN
WEST KENYA SUGAR COMPANY LIMITED APPELLANT
AND
JOSEPH KAMOZO KAKAI RESPONDENT**

(Appeal from Ruling of Hon. R.N Akee (R.M) delivered on the 17 February 2021 in Kakamega CMCC No. 56 Of 2018 between Joseph Kamozo Kakai v West Kenya Sugar Company Limited)

JUDGMENT

1. The Appellant aggrieved by the Ruling and order of Honourable R.N Akee RM delivered on the February 17, 2021 in Kakamega CMCC No 56 of 2018 between Joseph Kamozo Kakai v West Kenya Sugar Company Limited brought the instant Appeal vide Memorandum of Appeal dated February 23, 2021 and record of appeal received in court on the December 9, 2021 seeking the following Orders:-
 - a. This Appeal be allowed.
 - b. The order dismissing the preliminary objection dated 17th March 2020 be set aside and substituted with an order allowing the preliminary objection dated 17th March 2020 with costs.
 - c. The Honorable court be pleased to strike out the Respondent's suit in the subordinate court with costs to the appellant
 - d. The costs of the appeal be awarded to the appellant.
2. The Appeal was premised on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact by dismissing the preliminary objection dated March 17, 2020.



- ii. That the learned trial Magistrate erred in law and fact by failing to analyze the authority cited by the Appellant in its written submissions to wit:- Supreme Court Petition No 4 of 2019 [Law Society of Kenya v Attorney General & another](#) and its import to the status of the suit (being a work injury claim) as filed in the subordinate court.
 - iii. That the learned trial Magistrate erred in law and fact by failing to consider and /or taking into account the Appellant's written submissions in respect of the preliminary objection dated March 17, 2020.
 - iv. That the learned trial Magistrate erred in law and fact by dismissing the preliminary objection dated March 17, 2020 citing failure by the appellant to raise the preliminary point in its statement of defense whereas a preliminary objection can be raised at any time.
 - v. That the learned trial Magistrate erred in law and fact by failing to analyze the issue of jurisdiction of the subordinate court to hear and determine the work injury related claim in view of the provisions of section 16,23(1) and 52 of the [Work Injury Benefits Act](#).
 - vi. That the learned trial Magistrate erred in law and fact by failing to address herself to weighty legal issues on the issue of jurisdiction as raised in the preliminary objection dated 17/03/2020.
 - vii. That the learned trial Magistrate erred in law and fact by failing strike out the respondent's suit whereas the same was filed in the wrong forum contrary to the provisions of the [Work Injury Benefits Act](#), cap 238 Laws of Kenya.
3. The court directed that the Appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Dennis Onyimbo Onyikwa Advocate instructed by M/S Onyinkwa & Co Advocates were dated September 19, 2022 and received in court on the September 22, 2022. The Respondent's written submissions drawn by V.A Shibanda & Co Advocates were dated December 15, 2022 and received in court on the December 22, 2022.

Background to the appeal

4. The Respondent filed a suit Kakamega CMCC Case No 56 of 2018 against the Appellant for injuries alleged to have been suffered at the workplace vide a Plaint dated February 7, 2018 and filed in court on the February 15, 2018 seeking the following reliefs:-
- a. General damages
 - b. Costs of this suit
 - c. Interest on (a) and (b) above at court rates
 - d. Any other or further relief that this honourable court may deem fit and just to grant. (pages 3 & 2 of the record of appeal was the plaintiff's case)
5. The Respondent entered appearance and filed defence (pages 22-39 of the record was the defence case). While the suit was pending the respondent filed notice of preliminary objection dated 17th March 2020 as follows:-
- i. That this honourable court has no jurisdiction to entertain, hear and/or determine the matter herein pursuant to the provisions of Section 16,23 (1) and 52 of the [Work Injury Benefits Act](#).



- ii. That this suit having been filed in the year 2018 was filed during the subsistence of the [Work Injury Benefits Act](#) not the [Workmen's Compensation Act](#) and/or common law and therefore the operative law herein is the [Work Injury Benefits Act](#) which mandates that litigation related to work injuries should be handled in the first instance by the Director of Occupation Safety and Health Services and not this honourable court.

Note :

The Defendant at the hearing of the preliminary objection rely on the decision made by the Supreme Court in Supreme Court Appeal No 4 of 2019 [Law Society of Kenya v Attorney General and Central Organisation of Trade Union \(K\)](#)'(page 40 of the record of appeal)

6. The trial court considered the notice of preliminary objection by the respondent /appellant and delivered its Ruling dated February 17, 2021 in Kakamega CMCC No 56 of 2018 between Joseph Kamozo Kakai v West Kenya Sugar Company Limited dismissing the preliminary objection with costs(pages 49-50 of the record). It is the said Ruling that is challenged vide the instant appeal vide the grounds outlined above.

Determination

7. 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.

Issues for determination.

8. The appellant identified the following issues for determination:-
 - i. Whether the learned trial magistrate erred in law and fact dismissing the preliminary objection dated 17/3/2020 on the ground that the appellant failed to raise the preliminary objection in its defence.
 - ii. Whether the preliminary objection dated 17th March 2020 filed by the Appellant in the subordinate court was proper and competent.
 - iii. Whether the subordinate court has jurisdiction to hear and determine the suit herein
 - iv. Whether the learned trial magistrate erred in law and fact by failing to strike out the suit for want of jurisdiction.
9. The Respondent address the merit of the appeal.
10. The court having read the impugned ruling and the submissions by the parties was of the considered opinion that the issues to be addressed in the instant appeal were as follows:-
 - a. Whether the learned trial magistrate erred in law and fact dismissing the preliminary objection dated 17/3/2020 on the ground that the appellant failed to raise the preliminary objection in its defence.



- b. Whether the Notice of preliminary objection by the appellant in the magistrate court dated 1 March 7, 2020 was merited.
 - a. Whether the learned trial magistrate erred in law and fact dismissing the preliminary objection dated 17/3/2020 on the ground that the appellant failed to raise the preliminary objection in its defence.
11. The appellant submits that the learnt trial magistrate dismissed the preliminary objection on the ground that the defendant (appellant) failed to raise the preliminary objection in its statement of defence. The appellant submits that it preliminary objection was on point of law on issue of jurisdiction of the subordinate court to entertain, hear and determine work injury related claims as it lacks jurisdiction pursuant to section 16 and 23(1) of the *Work Injury Benefits Act* and the issue did not require evidence to be adduced by the parties. The appellant relied on the decision of the Supreme Court in *Law Society of Kenia v Attorney General & another* [2019]e KLR That it disagreed with the learnt Magistrate that the preliminary objection ought to emanate from pleadings as a preliminary objection on the point of law can be raised at any stage which the suit was alive as held in *Kenya National Highways Authority v George Kirima Abuaba*[2021]e KLR.
 12. The Appellant further submitted that parties cannot confer jurisdiction as the same is derived from the *Constitution* and the statutes. That the appellant having admitted jurisdiction did not confer the Magistrate court jurisdiction. To buttress this submission the appellant relied on the decision in *A.W.G V D.N.K & another* [2022]e KLR. The appellant agreed with the learnt magistrate that jurisdiction was everything and without it the court could not take a single step relying on decision of Nyarangi JA in *Owners of Motor Vessel 'Lilian S' v Caltex Oil(Kenya) Ltd* [1989]e KLR where the Judge, inter alia, held that a court has no power to make one more step where a court has no jurisdiction.

The Respondent submissions

13. The respondent in opposition to the appeal submits that the appellant in its defence admitted jurisdiction (page 25 of the record of appeal) and then raised objection that the court lacked jurisdiction. That the appellant never amended its defence and as it stands the appellant still admits jurisdiction of the subordinate court. That in Court of appeal decision in *Galaxy Paints Company Limited v Falcon Guards Limited* case No 219 of 2018(UR) it was held that the trial court by dint of *Civil Procedure Rules* may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. The respondent submits that parties are bound by their pleadings as held in *Joseph Mbuta Nziu v Kenya Orient Insurance Company Limited* [2015]e KLR where the court cited with approval decision of Nigerian Supreme Court as follows:-

“Adetoun Oladeji (nig) Ltd v Nigeria Breweries PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

‘... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
14. The respondent submits that the decision of the subordinate court was thus correct based on the foregoing submissions that parties are bound by their pleadings.



Issue A:- Decision

15. The court finds that the preliminary objection before the trial magistrate court raised issue of jurisdiction of the court. Jurisdiction is a point of law proper for being raised by way of preliminary objection. The subordinate court dismissed the preliminary objection as the issue of jurisdiction had not been challenged in defence as follows:- “This court wishes to state the starting point of a notice of preliminary objection is that it ought to emanate from pleadings and if it is well argued than it may dispose off the whole suit as decided in Mukisa Biscuits. The defendant filed their defence and nowhere in their defence did they raise their point of preliminary objection...”

16. The court finds that jurisdiction is only conferred by the Constitution and the law. The parties cannot confer jurisdiction to the court by consent or failure to raise the same. The court of law must satisfy itself it has jurisdiction over a dispute. That would mean that whether or not the defendant raise the issue of jurisdiction in their defence is immaterial to the exercise of jurisdiction by the Court. The court must have jurisdiction for without it its decision is null and void ab initio. The court in reaching the said conclusion was guided by the Supreme Court of Kenya decision in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others [2012] eKLR where the court stated as follows: -

A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.” And, in Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR, the Court of Appeal further stated:

“[44] a party cannot through its pleadings confer jurisdiction to a court when none exists.”

17. The court on whether the magistrate erred in finding that preliminary objection having not been raised in defence was improper, the court finds the issue of jurisdiction can be raised at any stage of the proceedings and upholds Court of Appeal decision in Jamal Salim v Yusuf Abdulahi Abdi & another Civil Appeal No 103 of 2016 [2018] eKLR where it was stated as follows: -

“Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another v Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”

18. The court guided by the foregoing jurisprudence holds that the trial learnt magistrate erred in law by holding that the point of preliminary objection having not been raised in defence could not be raised



later. The court holds that a point of law challenging the jurisdiction of the court can be raised at any stage during the proceedings and that the court must satisfy itself of having jurisdiction before taking any further step in the proceedings.

Issue B. Whether the Notice of preliminary objection by the appellant in the magistrate court dated March 17, 2020 was merited.

19. The court finds that the notice of preliminary objection dated March 17, 2020 by the respondent was dismissed on technicality. Having found the preliminary objection was properly raised, the court guided by the principles in Sella case proceeds to consider the said preliminary objection on merit.

Appellant's Submissions

20. The appellant submitted that the subordinate court had no jurisdiction over work related injuries as held by the Supreme Court in *Law society of Kenya v Attorney General & another* 2019 e KLR where the court held that the primary jurisdiction over work injury related matters was conferred upon the Director of Occupational Safety and Health Services and the same is anchored under section 16, 23(1) and 52 of *WIBA*.

The Respondent's submissions.

21. The respondent submitted the subordinate court had jurisdiction over the suit relying on the decision of the court in *West Kenya Sugar Company Ltd v Tito Lucheli Tangale* [2021]e KLR to wit :-

“48. In light of this, in this Court's view, subscribing to the position taken by the Appellant that all claims lodged with the Courts after 2 June 2008 should not be entertained because of jurisdiction would be antithetical to the right to access justice since the litigants who moved the Court after 22 May 2008 did so on the assurance of judge declared law that they could present their disputes to the Courts.

49. The Court says so because the employees who moved the Court on the strength of judge declared law would be met with an insurmountable plea of limitation because section 26 of the *Work Injury Benefits Act* has prescribed time within which an accident should be reported to the Director of Occupational Safety and Health.

53. In the view of this Court, these litigants who filed their disputes with the Courts from 22 May 2008 to 3 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 a conclusion before the Courts where they had been lodged.”

22. The appellant submits that the Supreme Court decision was delivered in 2019 when the suit was already filed.

Decision

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



The Court of Appeal decision on WIBA

24. The Court of Appeal decision on jurisdiction under *WIBA* was in *Attorney General v Law Society of Kenya & another* [2017] eKLR delivered on November 17, 2017. 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 from 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. In the end, we allow the appeal to the extent that we set aside the learned Judge’s orders declaring sections 4, 16, 21 (1), 23(1), 25 (1) (3), 52 (1) (2) and 58(2) to be inconsistent with the former Constitution. The result is that only sections 7 (in so far as it provides for the Minister’s approval or exemption) and 10 (4) are inconsistent with the former and current Constitution” That a lengthy import of the parts of the judgment of court of appeal which the court found necessary for clarity and emphasis purpose.



The Supreme Court Decision

25. 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:-

- 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)

26. 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)

27. 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 enactment and commencement 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).



28. 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 finalised under *WIBA Act*(emphasis given).
29. 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 the WIBA.
30. The Court then finds, respectfully, that the decision *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 Court of Appeal and Supreme Court decisions as analysed above which decisions are binding on this court.
31. In view of the foregoing binding decisions of the Court of Appeal and 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 WIBA and only exception on legitimate expectation basis being with respect to litigation pending before court prior to entry into force of WIBA Act that is 2nd June 2008, the instant suit having been filed in 2018 was before the wrong forum and in conflict with Court of Appeal holding on WIBA matters.
32. The court finds that in the recent past it has taken a consistent considered position that the magistrate courts lack jurisdiction over Work injury related claims filed post WIBA effective date. 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) 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 to apply in the instant appeal.

Conclusion and disposition

33. The Appeal is held to be with merit and is allowed. This Court holds that the learnt trial magistrate erred in law by failing to consider on merit the Preliminary objection dated March 17, 2020 which is hereby allowed by the court and the Suit in Kakamega CMCC No 56 of 2018 between Joseph Kamozi Kakai v West Kenya Sugar Company Limited struck off with costs the same having been filed when there was a judgment of the Court of Appeal delivered on November 17, 2017 declaring WIBA matter were to be decided by the Director of Occupational Safety and Health Services.
34. The Ruling of the trial magistrate court in Kakamega CMCC No 56 of 2018 between Joseph Kamozi Kakai v West Kenya Sugar Company Limited delivered on the February 17, 2021 by Hon. R.N Akee (RM)is set aside and in its place substituted with an order that the Preliminary Objection dated March 17, 2020 is upheld and the suit dated February 7, 2018 struck off for want of jurisdiction with costs to the appellant/respondent.



35. Costs of the appeal to the appellant.

36. Right of appeal in 30 days.

37. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 9TH MARCH 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Lucy

For Appellant : Wafula holding brief for Onyinkwa

For Respondent:- Absent

