



REPUBLIC OF KENYA



**West Kenya Sugar Company Limited v Lichinga (Employment and Labour Relations Appeal E023 of 2021) [2023] KEELRC 597 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 597 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E023 OF 2021**

**JW KELI, J  
MARCH 2, 2023**

**BETWEEN  
WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT  
AND  
ANZALA RONALD LICHINGA ..... RESPONDENT**

*(Appeal from judgment of HON. Z.J Nyakundi SPM delivered on the 26th October 2020 in Butali PMCC NO. 160 OF 2018 between Anzala Ronald Lichinga v West Kenya Sugar Company Limited)*

**JUDGMENT**

1. The appellant aggrieved by the ruling and order of honourable Nyakundi Principal Magistrate Delivered on the October 26, 2020 in Butali PMCC No. 160 of 2018 brought the instant appeal vide memorandum of appeal dated November 2, 2020 and record of appeal received in court on the December 10, 2020 seeking the following orders:-
  - a. The appeal herein be allowed.
  - b. That this honorable court be pleased to strike out the respondent's suit in the subordinate court with costs
  - c. Cost of this 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 failing to strike out the respondent's suit despite having made a determination that the subordinate court did not have jurisdiction to her and determine the work injury cases filed after the enactment of WIBA.



- ii. That the learned trial magistrate erred in law and fact by failing to strike out the respondent's suit despite conceding that he lacks jurisdiction to hear and determine the same.
  - iii. That the learned trial magistrate erred in law and fact by failing to strike out the respondent's suit whereas the same was filed in the wrong forum contrary to provisions of the Work Injury Benefits Act Cap 238 Laws of Kenya.
  - iv. That the learned trial magistrate erred in law and fact by finding there was a gap as to what would happen to matters that were filed after the commencement date of WIBA and before the delivery on the Supreme Court decision in Supreme Court Petition No. 4 of 2019 Law Society of Kenya v Attorney General & another.
  - v. That the learned trial magistrate erred in law and fact by failing to consider arguments advanced by the appellant to have the respondent's suit struck out for want of jurisdiction.
3. The court directed that the appeal be canvassed by way of written submissions. Only the appellant filed written submissions. The appellant's written submissions drawn by Dennis Onyimbo Onyikwa Advocate instructed by M/S Onyinkwa & Co Advocates were dated November 24, 2022 and received in court on the December 15, 2022. The respondent was represented by Abok Odhiambo & Company advocates.

### **Background to the appeal**

4. The Respondent filed a suit Butali PMCC Case No. 160 of 2018 against the appellant for injuries alleged to have been suffered at the workplace vide a plaint dated June 11, 2018 seeking the following reliefs:-
- a. General damages
  - b. Special damages of Kshs. 15,000/-  
Future medical costs of kes 7,750/- replacabel at an interval of 2-3 years
  - c. Costs of this suit
  - d. Interest on (a) and (b) above at court rates
  - e. Any other or further relief that this honourable court may deem fit and just to grant. (pages 3 & 22 of the record was the plaintiff's case )
5. The Respondent entered appearance and filed defence (pages 26-29 is the defence case). While the suit was pending the respondent filed notice of preliminary objection dated January 22, 2022 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 Benefit Act.
  - ii. That this suit having been filed in the year 2018 was filed during the subsistence of the Work Injury Benefit Act not the Workmen's Compensation Act and/or common law and therefore the operative law herein is the Work Injury Benefit 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)'



6. It would appear that the Appellant had been sued in several matters where the said Notice of Preliminary Objection was also filed.
7. The trial court considered the notice of preliminary objection by the respondent /appellant and delivered its Ruling dated October 26, 2020 under Butali SPMCC Suit No. 160 of 2018 Anzala Ronald Lichinga - v- West Kenya Sugar Limited and ordered that the said ruling to apply to all work injury claims where the firm of Onyikwa appears for the defendant (pages 49-52 of the record ). It is the said Ruling that is challenged vide the instant appeal vide the grounds outlined above.

### **Determination**

8. The court found that in its judgment delivered on the February 9, 2023 in Bungoma ELRC Appeal No. E009 of 2021 West Kenya Sugar Company Limited Versus Elphas Kisohole Keiza(UR) the challenged ruling was in the instant case dated October 26, 2020 in Butali SPMCC Suit No. 160 of 2018 Anzala Ronald Lichinga v- West Kenya Sugar Limited and that the learned trial magistrate ordered that the said ruling to apply to all work injury claims where the firm of Onyikwa appears for the defendant. The court having delivered a judgment on the said trial magistrate ruling of October 26, 2020 it would be an act of duplication to write a fresh judgment. In the court judgment delivered on the February 9, 2023 in Bungoma Elrc Appeal No. E009 of 2021 West Kenya Sugar Company Limited Versus Elphas Kisohole Keiza the court held as follows: -

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- ‘8. The court on reading the submissions of the parties as summarized above on the first issue found there was no meeting of minds on the ratio decidendi in the ruling by the trial magistrate court delivered on the October 26, 2020. The trial court upon consideration of the preliminary objection by the appellant / respondent at the last two paragraphs of its ruling stated: ‘It is my considered opinion that the supreme court decision in petition No.4 of 2019 has a gap as what would happen to matters that were filed after the commencement date of the WIBA and before delivery of its decisions bearing in mind that most of these claims have been overtaken by events in the light of section 22 and 23 of the WIBA. As to whether the court should strike out all matters that were filed after commencement of WIBA as I down my tools for lack of jurisdiction , I have no powers to strike out any matter’’
9. The ratio decidendi of the ruling was that the learnt magistrate held she had no jurisdiction and downed her tools in view of the Supreme Court decision holding WIBA was constitutional. The learnt trial magistrate further held she had no powers to strike out the suit.
10. The court then finds and determines that the respondents submission that the magistrate’s ruling was that she had jurisdiction to determine the suit was a complete misapprehension of the appeal before the court. The only issue on appeal was whether the magistrate erred by holding she had no power to strike out the suit having held she had no jurisdiction. There was no cross appeal filed.

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



11. 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.

12. 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)

13. 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)
14. 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).
15. 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).
16. 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. The magistrate holding that there was a gap is thus misplaced. It was not the business of the court to argue the case of the litigants.



17. 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 May 22, 2008 to December 3, 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 court also finds it is academic to consider the impact of the High Court decision in *Juma Nyamawi Ndungo & 5 others v Attorney General Mombasa Law Society(interested party)*(2019)e KLR which was outrightly condemned by the Supreme Court and found to be rendered out of order and the court will say no more on the same. It would also be moot to consider the argument on the validity of the *WIBA* in terms of judicial authority to assess damages by the Director as submitted by the Respondent when the Supreme Court has already pronounced itself that WIBA is constitutional. It is further moot to consider the argument on retrospectivity of the superior courts decisions when 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).
18. The Court is persuaded by its colleagues in Mombasa ELRC Civil appeal no 21 of 2019 *Heritage Insurance Company Limited v David Fikiri Joshua and Another*(2021)eKLR where the court held that the *WIBA* having been declared constitutional by the two superior courts the High Court decision could no longer be relied on. A similar holding exists in Mombasa ELRC Civil Appeal No, 18 of 2020 *Perfect Sean Limited v Harrison Kahindi Said*. The decisions of the court are only persuasive whereas in terms of hierarchy the Court of Appeal precedent is superior and the Supreme Court decisions are binding.
19. The Respondent submitted that the suit was filed in 2017 and as such substantive issues have arisen since the filing of the suit and which issues ought to be determined by the trial court and to buttress this submissions relied on the decision in *Kiplagat Korir v Dennis Kipngeno Mutai*(2006) e KLR where the court held that broader issues of substantial justice precluded the court from determining the case on technicalities without considering its merits and further relied on the provisions of the *Constitution* article 159(2)(d). On this submission the court finds and determines 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' - v- 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”.
20. 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 *WIBA* 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 June 2, 2008, the instant suit having been filed in 2017 was before the wrong forum.

10. 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. Indeed the appellant further cited my decision in Bungoma ELRC appeal no. e004 of 2021 between West Kenya Sugar Co. Ltd v Edward Alpheu Ambesta wherein the court found that the work injury suit before the lower court was in the wrongly filed and proceeded to strike out the suit for want of jurisdiction. The court upholds its said decisions to apply in the instant appeal.

Whether the instant appeal is merited.

21. On the fate of the suit on finding lack of jurisdiction by the Magistrate court the appellants relied on the decision of Musyoka J in Mini Bakeries (NRB) limited v Levi Karuz Omedo (2002 )e KLR where the court held: ‘a suit or appeal filed before the court which has no jurisdiction is incompetent and is not available for transfer to the court with jurisdiction. The fate that such suit or appeal should suffer is that of being struck off.’ The court finds that the authority in Mini Bakeries (NRB) limited is consistent with the Court of Appeal decision in Owners of the Motor Vessel Lilian “S” - v- Caltex Oil ( Kenya ) ltd 1989 eKLR (supra) to the effect that jurisdiction is everything and without it the court cannot take one more step. The court upholds the decision in Mini Bakeries (NRB) limited then finds that the learnt magistrate erred in law in finding she had no power to strike out the suit having found she had no jurisdiction. The suit cannot stand and its only fate is to be struck off. The appeal is thus held to be merited.

Conclusion and disposition

22. The Appeal is held to be with merit and is allowed. The Court agrees with trial magistrate court that it lacked jurisdiction to hear and determine work injury related claims filed upon commencement of Work Injury Benefits Act(WIBA). The court holds that the learnt trial magistrate erred in law in finding she had no power to strike out the suit having held the trial court lacked jurisdiction to determine suit.
23. The Ruling of the trial court in Butali SPMCC No. 202 of 2017 Elphas Kisohole Keiza v West Kenya Sugar Co. Ltd delivered on the October 26, 2020 and decree dated November 21, 2022 is set aside and in its place substituted with an order that the preliminary objection dated March 18, 2021 is upheld and the suit dated August 14, 2017 struck off for want of jurisdiction.
24. 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.
25. The ruling dated October 26, 2020 holding was replicated in Butali SPMC Civil Suit No. 227 of 2018 Wycliffe Mbote Kipanga v West Kenya Sugar Ltd and in Butali SPMCC Civil Suit No. 182 of 2018 Sostine Salamba Milimo v West Kenya Sugar Ltd under Appeals Nos. Bungoma ELRC Appeal E011 of 2021 West Kenya Sugar Co. Ltd v Wycliffe Mbote Kipanga



*and Bungoma ELRC Appeal E010 of 2021 West Kenya Sugar Co. Ltd v Sostine Salamba Milimo* respectively.

26. The court holds and orders the instant judgment to apply in determination of the appeals Bungoma ELRC Appeal E011 OF 2021 *West Kenya Sugar Co. Ltd v Wycliffe Mbote Kipanga and Bungoma ELRC Appeal E010 OF 2021 West Kenya Sugar Co. Ltd v Sostine Salamba Milimo*.

27. It is so ordered”

### **Final Decision And Disposition**

11. The court upholds its judgment delivered on the February 9, 2023 in Bungoma ELRC Appeal E009 OF 2020 *West Kenya Sugar Co. Ltd v Elphas Kisobole Keiza* to apply mutandis mutandis in the instant appeal.

12. The Ruling of the trial magistrate court in Butali PMCC No. 160 of 2018 *Anzala Ronald Lichinga v West Kenya Sugar Co. Ltd* delivered on the October 26, 2020 and decree dated October 26, 2020 is set aside and in its place substituted with an order that the Preliminary Objection dated January 22, 2020 is upheld and the suit dated June 11, 2018 struck off for want of jurisdiction.

13. 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.

14. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 2<sup>ND</sup> MARCH 2023.**

**J. W. KELI,**

**JUDGE.**

**In The Presence Of:-**

Court Assistant : Brenda Wesonga

For Appellant : Masiga holding brief for Onyinkwa

For Respondent:- Absent

