



China Road and Bridge Corp (Kenya) v Mwangangi (Employment and Labour Relations Appeal E098 of 2021) [2023] KEELRC 1033 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1033 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E098 OF 2021**

BOM MANANI, J

APRIL 27, 2023

BETWEEN

CHINA ROAD AND BRIDGE CORP (KENYA) APPELLANT

AND

PATRICK MAUNDU MWANGANGI RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Chief Magistrate’s court, Nairobi in civil case No 7577 of 2017 delivered on August 13, 2021. In the decision, the court dismissed the Appellant’s preliminary objection challenging its jurisdiction to hear the case.
2. The objection was premised on the provisions of the *Work Injury Benefits Act* (WIBA). It was the Appellant’s case that since the cause of action in the suit was premised on an injury that is said to have occurred at work on March 27, 2017, the jurisdiction to entertain the claim vested in the Director of Occupational Safety and Health Services under the WIBA (Director). That the WIBA expressly ousted the court’s jurisdiction to hear such claims.
3. On the other hand, the Respondent’s contention was that the court had jurisdiction to hear the case under the principle of legitimate expectation. In the Respondent’s view, since the case was filed in 2017 after the provisions in the WIBA that ousted the court’s jurisdiction had been declared unconstitutional by the High Court, the matter was properly presented to the court.
4. The Respondent contends that the subsequent decisions by the Court of Appeal and Supreme Court setting aside the High Court decision did not apply retroactively. Consequently, suits filed in court after the High Court decision but before the decisions by the Court of Appeal and the Supreme Court were validly filed and that the litigants in such cases have a legitimate expectation that their cases will be processed through the court system.



5. The trial court agreed with the position expressed by the Respondent. Relying on the decision in [*West Kenya Sugar CO Ltd v Tito Lucheli Tangale \[2021\] eKLR*](#), the court held that the doctrine of legitimate expectation operated to save work injury suits filed in court during the period between the decision of the High Court and the decisions of the Court of Appeal and Supreme Court on the constitutionality of portions of the WIBA.
6. Aggrieved by the decision, the Appellant has filed the current appeal. The appeal raises a couple of grounds of appeal all of which boil down to the primary question whether the principle of legitimate expectation saved suits filed in court during the period alluded to by the trial court and whether as a result, courts in which such suits had been filed have jurisdiction over the matters. This includes the Respondent's action against the Appellant.

Analysis

7. The principles upon which this court ought to proceed when handling a first appeal have been discussed in a number of cases. The court is required to re-examine the issue in dispute and arrive at its own conclusion. Whilst it is discouraged that an appellate court should overturn a trial court's decision merely on the grounds that it would have reached a different decision from that of the trial court, it is nevertheless acknowledged that the decision will be amenable to be set aside if it is plain that the trial court, in making the determination, proceeded on the wrong principles of law.
8. The central question in the appeal is whether the Respondent's case before the trial court was saved by the principle of legitimate expectation. Admittedly, there has been a lot of litigation on this question with varying outcomes. However, the way to address the matter is to re-examine the context in which both the Court of Appeal and the Supreme Court used the phrase "legitimate expectation". To what extent did these two courts suggest that the principle could be invoked to save pending work injury or occupational disease claims?
9. The Court of Appeal expressed itself in the following manner in respect of suits which were to be saved under the principle of legitimate expectation:-

“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.....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.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..... 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.” Emphasis added by underlining.

10. Clearly, the import of the decision by the Court of Appeal was that the principle of legitimate expectation operated to save only those cases that were pending in the court system on the date of commencement of the new law (the WIBA). Inevitably, this pronouncement did not operate to cover cases filed after portions of the Act had been declared unconstitutional by the High Court.



11. On the other hand the Supreme Court expressed itself as follows on the issue:-

“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 added by underlining.

12. Again it is clear from this passage that reference by the Supreme Court on the application of the principle of legitimate expectation was in the context of matters that were pending in courts at the point of passage of the WIBA. This had nothing to do with cases filed after the High Court had declared portions of the Act unconstitutional. Therefore, the suggestion by the Respondent and the trial court that the principle of legitimate expectation was intended to cover all cases pending in courts including those filed after the High Court’s decision but before the decisions by the Court of Appeal and the Supreme Court is erroneous.

13. In my honest view, the decisions in the cases of [*West Kenya Sugar CO Ltd v Tito Lucheli Tangale \[2021\] eKLR*](#) and [*Palmac Agriculture Services Limited v Benard Ondieki Getiro \[2020\] eKLR*](#) in so far as they suggest a contra position are, with respect to my brother and sister Judges, an inaccurate exposition of the law on the matter.

14. To drive the point further, it is perhaps important to point out that my brother in [*West Kenya Sugar CO Ltd v Tito Lucheli Tangale \[2021\] eKLR*](#) indeed appreciated that the Court of Appeal and the Supreme Court had invoked the principle of legitimate expectation to save those claims that were pending in court at the time the WIBA came into force. He expressed himself on the issue as follows:-

“The Court of Appeal and the Supreme Court invoked the doctrine to give life and therefore render justice to the Claimants who had lodged their work-injury claims with the Courts prior to the coming into effect of the [*Work Injury Benefits Act.*](#)”

15. It is therefore important to note that the trial Judge in the West Kenya case did not hold that the Court of Appeal and Supreme Court applied the principle of legitimate expectation to save suits filed in courts after the High Court decision. He only used parity of reasoning to suggest that if the principle had been invoked to save claims filed prior to the coming into force of the [*WIBA*](#), it could also be invoked to save claims that were filed after sections of the Act were declared unconstitutional before the Court of Appeal reversed the finding of unconstitutionality of the impugned sections. Whether this reasoning is appropriate is debatable.

16. The effect of the decisions by the Court of Appeal and Supreme Court reversing the pronouncement of the unconstitutionality of portions of [*WIBA*](#) was to restore the position of the law in respect of the Act to what it was prior to the High Court’s decision. It has been argued, and I agree with this position, that the decisions of the Court of Appeal and the Supreme Court applied retroactively to erase any gaps in the application of the Act. The consequence of this is that the Act is deemed to have been good law and continued to apply from inception (see [*Heritage Insurance Company Limited v David Fikiri Joshua & another \[2021\] eKLR*](#)).



Determination

17. Having regard to the observations in the earlier parts of this ruling, it is apparent that the Respondent's case was improperly filed before court. It ought to have been filed before the Director as prescribed by the WIBA. This is because at the time the cause of action arose in the current matter in 2017, the WIBA, which was assented to in 2007, was already in force and was the applicable law as subsequently confirmed by the Court of Appeal and Supreme Court.
18. Consequently, the Appellant's objection to the trial court's jurisdiction to entertain the case had merit. The trial court erred in rejecting the point of law.
19. The upshot is that the court reverses the trial court's decision dismissing the objection to its jurisdiction to entertain the case. Instead, this court allows the preliminary objection and strikes out Chief Magistrate's Civil Case No 7577 of 2017 before the Chief Magistrate's Court, Nairobi between the parties to this action.
20. Costs of both the lower court case and the appeal are granted to the Appellant.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF APRIL, 2023.

B O M MANANI

JUDGE

In the presence of:

.....for the Appellant

.....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

