Twiga Construction Company Limited v Osoro (Appeal E068 of 2020)
[2023] KEELRC 1080 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1080 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E068 OF 2020

NZIOKI WA MAKAU, J

APRIL 27, 2023

BETWEEN

TWIGA CONSTRUCTION COMPANY LIMITED ..... APPELLANT

AND

RICHARD MOGAKA OSORO ..... RESPONDENT

(Being an appeal from the whole of the Ruling of Honourable P. Muholi (Mr.) Senior Resident Magistrate delivered on the 23rd day of September 2020 in CMCC No. 2192 of 2019 at Nairobi)

JUDGMENT

1. A brief background to this Appeal is that the Appellant/Plaintiff filed suit against the Defendant before the lower court vide a Plaint dated 29th March 2019, seeking damages for sustaining severe bodily injuries at work as a result of negligence by the Defendant's Supervisor/Agent. In response, the Defendant denied the said allegations and thereafter filed a Preliminary Objection on the ground that the Trial Court lacks the jurisdiction to hear and determine the suit pursuant to the Supreme Court decision in Petition No. 4 of 2019, *Law Society of Kenya v The Attorney General & another*. The Defendant therefore sought for the suit to be referred to the appropriate forum as per the provisions of the *Work Injury Benefits Act* 2007 (hereinafter "WIBA 2007). In its Ruling, the Honourable Trial Magistrate observed that the case was filed when the court had not declared the *WIBA* unconstitutional and that the Plaintiff thus had a legitimate expectation the matter would be heard. The Trial Court then found that the Plaintiff's case should be heard under the regime he had commenced.

2. Being dissatisfied with the Ruling of Honourable P. Muholi (Mr.) Senior Resident Magistrate delivered on 23rd September 2020 in Nairobi CMCC No. 2192 of 2019 at Nairobi – *Richard Mogaka Osoro v Twiga Construction Company Limited*, the Appellant filed a Memorandum of Appeal dated 22nd October 2020 based on the following grounds:

a. The Learned Magistrate erred in law and fact by misconstruing the findings of the Supreme Court in Petition No.4 of 2019 on the scope and applicability of legitimate expectation with respect to the Respondent's claim.

b. The Learned Magistrate erred in law and fact in failing to appreciate and consider the Appellant's judicial authorities emphasizing the importance of Jurisdiction prior to hearing a suit.

3. The Appellant thus beseeches this Honourable Court for Orders that the Ruling of the Learned Magistrate made on 23rd September 2020 be set aside and that this Court allows the Preliminary Objection dated 28th May 2020. It further seeks for the suit be transferred to the Director of Occupational Safety and Health Services to hear and determine the Respondent's claim. In the alternative, the Appellant prays that the suit is struck out for want of jurisdiction and the costs of this Appeal awarded to the Appellant. The matter was disposed by way of written submissions.

4. **Appellant's Submissions**

The Appellant submits that the key issue herein is the jurisdiction of the trial court to hear and determine the instant suit and that Nyarangi JA at the Court of Appeal in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, stated that jurisdiction is everything and without it, a court has no power to make one more step and that where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence and a court of law should down its tools in respect of the matter the moment it opines that it is has no jurisdiction. The Appellant submits that the provisions under the *WIBA* 2007 addressing the question of jurisdiction on compensation for occupational injuries are sections 16, 23(1) and 52(1) and (2). That to summarise these provisions, the Supreme Court in its Judgment in Petition No. 4 of 2019, *Law Society of Kenya v The Attorney General & another* stated as follows:

> "...Section 16 cannot be read in isolation because if read with Section 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions...Section 16 of the Act....is only the initial point of call for decisions in workers 'compensation...What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court."

5. The Appellant also submits that in a similar case, *Manuchar Kenya Limited v Dennis Odhiambo Olwete* [2020] eKLR, the Court declined to hear the appeal that had initially been filed at the Civil Division of the High Court in Mombasa on the basis that the court lacked jurisdiction to hear the matter because it was a work injury claim. That the case was then thereafter transferred to the Employment and Labour Relations Court where it was heard and, in its judgment, the Court held as follows:

> " Reading from the judgment by Hon. Nange'a, CM dated 18th January 2016, the accident in which the Respondent was injured occurred on 8th August 2014. That was after enactment of WIBA and according to the decision by the Supreme Court in *Law Society of Kenya v Attorney General & another* (supra), the Magistrate's Court had no jurisdiction to try the matter. In the result, I find and hold that the judgment delivered by Hon. Nang'ea, CM on 18th January 2016 and all consequential orders were irregular for want of jurisdiction."

6. It is the Appellant's submission that considering the above provisions under the *WIBA* 2007 and the findings of the Supreme Court in respect of the same provisions, the Director of Occupational, Health and Safety Services has the jurisdiction to handle work injury claims and not the Magistrates Court. That the Trial Court should therefore down its tools because the cause of action in the matter herein arose on 18th October 2018.

7. As to the applicability of the principle of legitimate expectation, the Appellant submits that the issue in contention herein is in regards to the interpretation of what the Supreme Court meant on the applicability of legitimate expectation in pending cases. That the Court of Appeal in Civil Appeal No. 133 of 2011, *Attorney General v Law Society of Kenya & another* stated that the claimants in the pending cases had legitimate expectations that upon the passage of the Act, their cases would be concluded under the judicial process which they had invoked. That the Supreme Court in *Law Society of Kenya v The Attorney General & another* (*supra*) agreed with the Appellate Court and reiterated that claimants in those pending cases have legitimate expectation to conclude their cases under the judicial process they had invoked. The Supreme Court in its Judgment also opined that it is best that all matters are finalized under section 52 of the *WIBA* as the most prudent way for the judicial system to operate. It is the Appellant's submission that since the instant suit was filed in 2019, which is eleven (11) years after the commencement of the *WIBA* 2007, the principle of legitimate expectation is not applicable to this suit.

8. The Appellant further relies on the case of *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* [2014] eKLR where the Court stated inter alia on conditions to invoke legitimate expectation, that there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*. The Appellant submits that as at the time of filing this instant suit, the *WIBA* 2007 required all employees who suffered injuries and occupational diseases contracted in the course of employment to lodge their claims to the Director of Occupational, Health and Safety Services for compensation. That in view of the foregoing, it reiterates the decision of the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR that a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law and cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. The Appellant urges this Court to grant the prayers sought in this Appeal.

9 **Respondent's Submissions**

The Respondent submits that the High Court declared the provisions of sections 16 and 58 of the *WIBA* unconstitutional until 17th November 2017 when the Court of Appeal overturned the court's findings and reinstated the said provisions in Civil Appeal No. 33 of 2011 (*supra*). That it should also be noted that sections 16 and 58 remained unconstitutional until 3rd December 2019 when the Supreme Court made a final determination. It is the Respondent's submission that the unconstitutionality of sections 16 and 58 of *WIBA* 2007 was pursuant to a valid judgment of a competent court of law and which judgment had not been set aside and/or stayed when he filed his suit. That the court therefore had jurisdiction as the section barring filing of suits under this forum had been declared unconstitutional and he cannot be punished for the change of law which he had no control of. That he as the Plaintiff in the suit invoked the old regime i.e. Common Laws & *Workman Compensation Act* and has legitimate expectation that the matter will be determined under the said regime. That this was the exact position the Court of Appeal when it addressed the issue of legitimate expectation.

10. The Respondent submits that the Supreme Court in its decision found and stated that legislative practice where a new judicial forum is created to replace an existing system is meant to ensure finalisation of all proceedings pending in the previous system before the forum where they were

commenced. That while addressing the issue of pending matters, both the Court of Appeal and the Supreme Court agreed with the findings of Ojwang' J. (as he then was) in Petition No. 185 of 2008 that all pending litigations that had been commenced on the basis of either the *Workman Compensation Act* or Common Law or of a combination of both regimes of law shall continue to be presented in a proper case, finalised on the basis of the operative law prior to the entry into force of the *WIBA*.

11. The Respondent further cites Kisumu Civil Appeal No. 4 of 2019 in which Radido J. stated that claimants who had filed their suits between 22nd May 2008 and 3rd December 2019 on the belief that the judge declared law was the valid law in place, are entitled to successfully assert legitimate expectation in having claims heard to a conclusion before the courts where they had been lodged. It is the Respondent's submission that Justice Radido's Ruling is the latest and most applicable in the present case and that this Court should thus dismiss the Appellant/Defendant's application with costs.

12. The appeal relates to an issue that has dogged the Courts since the passage of the *Work Injury Benefits Act*, 2007. This Act was intended to ease the lodging and payment of work injury claims. Far from it, the law brought untold confusion once the challenges to the various aspects of the new Act were made. The first challenge was the High Court decision before Ojwang' J. (as he then was) where the Learned Judge held that various sections of the *WIBA* were null and void. This opened the floodgate of cases that were filed with a legitimate expectation that there would be a resolution with those sections of the Act having been expunged by the Learned Judge. This situation is what Radido J. addressed in the case of *West Kenya Sugar Co Ltd v Tito Lucheli Tangale* [2021] eKLR (Kisumu ELRC Appeal No. 4 of 2019 (Originally Kakamega High Court Civil Appeal No. 129 of 2018). The Learned Judge held as follows at paragraphs 41-46:-

> 41. What is clear to this Court is that until set aside and or vacated, a Court order and this includes judge-made law or judge declared law is valid, and a litigant or citizen can order his or her life in the firm belief that the declared law is the law at the particular point in time.
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> 42. Therefore, in this Court's view, those citizens or employees who lodged their claims with the Courts from 22 May 2008 when the High Court issued stay orders to 4 March 2009 when a final declaration of inconsistency was made were acting on the strength of the law.
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> 43. The Court was not informed whether the Court of Appeal stayed the declaration by the High Court but its research has shown that on 10 July 2009, the Court of Appeal dismissed a Motion seeking stay of execution (see Nairobi Civil Appl. No. 144 of 2009 (UR 97/2009) and reported as *Attorney General v Law Society of Kenya & ar* [2009] eKLR.
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> 44. The consequence being that the declaration by the High Court that section 16 of the *Work Injury Benefits Act* was still the law up to the time the Court of Appeal delivered judgment on 17 November 2017.
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> 45. Equally not disclosed was whether the Supreme Court issued any stay orders of the Court of Appeal judgment until it rendered itself on 3 December 2019.
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> 46. In the Court's respectful view, bar any stay orders, all claims which were lodged with the Courts from 22 May 2008 to 3 December 2019 being claims underpinned by judge-made or judge declared law were validly within the jurisdiction of the Courts.

13. The Appellant challenges the finding of the Hon. Learned Magistrate in respect to the plaint filed on 29th March 2019. A clear reading of the decision of Radido J. which I am in entire agreement with, is that the claim before the Learned Magistrate was properly before the said Magistrate as the law as declared by Ojwang' J. (as he then was) held true and parties could act knowing section 16 of the *WIBA* had been taken off the books. In my considered view the Learned Magistrate did not err when he held as he did. That was the correct exposition of the law. From the foregoing, the Court finds no merit in the Appeal. The Learned Magistrate did not fall into error of law or fact in finding that he had the jurisdiction to proceed with the suit before him. As such I would decline to interfere with the decision of the Learned Magistrate. However, in light of the decision of the Supreme Court and for the proper administration of justice and given the effluxion of time, I will refer the Plaintiff's claim to the Director Occupational Safety and Health for an assessment and award per the provisions of the law.

14. On the issue of costs, each party will bear their own costs of the motion in the appeal but the Appellant will bear the Respondent's (Plaintiff's) costs in the lower court as misapprehension of the law is what has led to this impasse. Ruling hereof to be availed to the Learned Magistrate for records.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL 2023

NZIOKI wa MAKAU

JUDGE