



**West Kenya Sugar Co Ltd v Mukubwa (Employment and Labour Relations Appeal 20 of 2023) [2023] KEELRC 1620 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1620 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 20 OF 2023**

**JW KELI, J**

**JUNE 29, 2023**

**(FORMERLY BUNGOMA ELRC APPEAL NO. E12 OF  
2021)**

**BETWEEN**

**WEST KENYA SUGAR CO LTD ..... APPELLANT**

**AND**

**GEORGE MUKUBWA ..... RESPONDENT**

*(Appeal against the Ruling and Order of Hon. Z.J. Nyakundi (PM)  
delivered on the 26/8/2021 at Butali SPM Civil Suit No. 113 OF 2017)*

**JUDGMENT**

1. The Appellant being dissatisfied by Ruling of Hon. Z.J. Nyakundi (PM) delivered on the 26<sup>th</sup> August 2021 at Butali SPM Civil Suit No. 113 OF 2017 filed Memorandum of Appeal dated 6<sup>th</sup> September 2021 seeking the following orders:-
  - a. The Appeal herein be allowed and the order made on 26/8/ 2021 be set aside in its entirety.
  - b. That this Honorable court be pleased to hold that the subordinate court has no jurisdiction to hear and determine Work Injury Benefits claims in line with the provisions of section 16,23 and 53 of the *Work Injury Benefits Act* and in line with the Supreme Court decision in Supreme Court Appeal No. 4 of 2019 Law Society of Kenya v The Attorney General and Central Organization of Trade Union(K).
  - c. That the Plaintiff's/ Respondent's suit (Butali SPMCC NO. 113 OF 2017 George Mukubwa v West Kenya Sugar Co. Ltd) be struck out.
  - d. 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 in holding that the court had jurisdiction to handle WIBA claims based on a ruling dated 5<sup>th</sup> July 2021 in which the learned magistrate had earlier pronounced that it had jurisdiction to handle WIBA claims which the appellant herein was not a party to.
  - ii. That the learned trial Magistrate erred in law and fact by holding that the court was functus officio notwithstanding that fact that the court had not heard the parties herein on their preliminary objection.
  - iii. That the learned trial Magistrate erred in law and fact in holding that the ruling herein to apply to all WIBA claims irrespective of representations without having heard the parties in those other claims.
  - iv. That the learned trial Magistrate erred in law and fact by granting the appellant leave to appeal against a ruling in a matter which the appellant was not a party to it.
  - v. That the learned trial Magistrate erred in law and fact by failing in making the aforesaid decision without addressing himself to the law from which jurisdiction to handle work injury claims is derived from.
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 26<sup>th</sup> April 2023 and received in court on the 27<sup>th</sup> April 2023. The Respondent's submissions drawn by Abok Odhiambo & Company Advocates were dated 8<sup>th</sup> May, 2023 and received in court on the 15<sup>th</sup> May, 2023.

### **Background to the appeal**

4. The Respondent filed a suit Butali SPMCC CASE NO. 113 OF 2017 against the Respondent for injuries alleged to have been suffered at the workplace vide a Plaint dated 12<sup>th</sup> June, 2017 seeking the following reliefs:-
  - a. General damages
  - b. Special damages of Kshs. 10,000/-.
  - c. Costs of this suit
  - d. Interest on (a), (b) and (c) above at court rates
  - e. Any other of further relief that this honourable court may deem fit and just to grant. (pages 3 & 18 of the record are all pleadings by the plaintiff before the lower court)
5. The Respondent entered appearance and filed defence and all their pleadings and documents (pages 19-50 is the defence case).
6. While the suit was pending the respondent/Appellant filed notice of preliminary objection dated 29<sup>th</sup> January 2020 pleading 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 2017 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)'(page 51)

7. It appeared to the court that the Appellant had been sued in several matters where the said Notice of Preliminary Objection was also filed.
8. The trial court delivered a ruling on the notice of preliminary objection by the respondent /appellant on the 26<sup>th</sup> August 2021. (page 58-59) The ruling was to the effect that the magistrate court had vide a ruling dated 5<sup>th</sup> July 2021 pronounced itself on the issue of jurisdiction and any aggrieved party had a right to prefer appeal. The court stated that it had granted the appellant 45 days leave to prefer an appeal against its ruling in CMC NO. 56 OF 2015. The learned magistrate further ordered the foregoing order to apply to all work injury claims irrespective of their representation. It the said order the appellant is aggrieved against(page 58-59). In the Ruling in Butali CC no 56 of 2015 (page 60-63) where the respondent was also a party the learned Magistrate upheld the judgment by Justice Radido in Kisumu Appeal No. 4 of 2019 to effect that the magistrate court had jurisdiction to handle WIBA matters filed before the pronouncement of the Supreme Court decision in Petition No. 4 of 2019 on the 3<sup>rd</sup> December 2019 and to effect that all WIBA matters shall be fixed for hearing because there was nothing that stopped the court for doing so.

## **Determination**

### **Issues for determination.**

9. The Appellant in their written submissions identified the following issues for determination:-
  - a. Whether the learned trial magistrate completely misapprehended the law(ground 1 to 5)
  - b. Whether the learned trial magistrate had jurisdiction to determine the matter (ground1 to 5)
  - c. Whether the respondent had legitimate expectation
  - d. Whether the learned trial magistrate erred in law and fact by holding that the court was functus officio on issue of jurisdiction on WIBA matters without having heard the preliminary objection herein.
10. The Respondent in his written submissions identified the following as issues for determination in the appeal:-
  - a. Whether there are recent developments in the law regarding work injury claims filed before the Magistrates' court.



- b. Whether the trial magistrate court has jurisdiction to hear and determine work injury claims in view of the recent developments in the law
  - c. Whether the instant appeal is merited.
11. The Court having read the impugned ruling, the memorandum of appeal and the having considered the submissions by the parties was of the considered opinion that the issues for determination were as follows:-
- a. Whether the learnt trial court magistrate misapprehended the law in making the ruling and Whether the learned trial magistrate erred in law and fact by holding that the court was functus officio on issue of jurisdiction on WIBA matters without having heard the preliminary objection herein.
  - b. Whether there are recent developments in the law regarding work injury claims filed before the Magistrates' court.
  - c. Whether the learned trial magistrate has jurisdiction to determine the matter (ground 1 to 5)
12. 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 instant appeal, the impugned ruling is on matters of law so the court will re-evaluate the law and authorities relied on by the parties in determining the appeal.
- Whether the learnt trial court magistrate misapprehended the law in making the ruling and Whether the learned trial magistrate erred in law ad fact by holding that the court was functus officio on issue of jurisdiction on WIBA matters without having heard the preliminary objection herein.
13. The trial court ruling subject of the instant appeal was delivered by Hon. Z.J. Nyakundi on 26<sup>th</sup> August 2020. The learned Magistrate on the Preliminary Objection by the Appellant / Respondent held as follows:-“The court vide a ruling dated 5/7/2021 pronounced itself on the issue of jurisdiction, any aggrieved party has a right to prefer an appeal. Counsel for the defendant produced to the court two decisions from ELC Mombasa Appeal No. 18/2020 and Appeal No. 21 of 2019, the court holds that the court cannot rewrite another ruling on the basis of those two decisions , the court is functus official , if at all they at variance with the decision in ELRC Kisumu in Appeal No. 4 of 2019, that is an issue that the Court of Appeal will address with a view to harmonise the decisions, not this court. For avoidance of doubt this court has granted the defendant 45 days leave to preferred and appeal against the court ruling in CC No. 56 of 2015. This Order to apply to all work injury claims irrespective of their representations.”

### **Appellant’s submissions**

14. The appellant submits that the learned Magistrate grossly misdirected himself by relying on the unreported case in ELRC Kisumu Appeal No. 4 of 2019 *West Kenya Sugar Co. Ltd V Tito Lucheli Tangale* where the High Court found that cases that were filed between 22<sup>nd</sup> May 2008 and 3<sup>rd</sup> December 2019 were properly before the courts for reason of legitimate expectation to have the matters heard and determined by the magistrates. That the trial Magistrate relied on a decision of the High Court while it is an established principal of law that the decision of the High Court cannot override decisions of the Supreme Court on basis of hierarchy. That the Supreme Court and the Court of Appeal pronounced themselves on jurisdiction of magistrate courts in WIBA matters in Court of



Appeal No.133 of 2011 Attorney General v Law Society of Kenya and another as affirmed by the Supreme Court in Petition No. 4 of 2019 2011 Attorney General v Law Society of Kenya and another and to buttress the foregoing submissions the appellant cited the authority of the court in Mombasa ELRC Civil Appeal No. 21 of 2019 Heritage Insurance Company Limited V David Fikiri Joshua & Another 2021 e KLR where the court relying on the Supreme Court and Court of appeal decisions on WIBA aforesaid upheld the appellant's preliminary objection and held that the magistrate's court had no jurisdiction to hear and determine the matter. That the court struck out the 1<sup>st</sup> respondent's plaint. That the court in that case relied on the Court of Appeal No.133 of 2011 Attorney General v Law Society of Kenya and another as affirmed by the Supreme Court in Petition No. 4 of 2019 2011 Attorney General v Law Society of Kenya and another and stated that WIBA having been declared constitutional by the two superior courts, it was good law and binding retrospectively from the date of its commencement.

15. That the learnt magistrate completely failed to acknowledge the fact that the plaintiff/ respondent filed the suit during the subsistence of the WIBA and that it therefore ought to have been heard and determined in accordance with section 16,23 and 52 of WIBA which provisions of law were still subsisting.
16. On whether the plaintiff had legitimate expectation the appellant submits that the litigants who filed cases before the 2/6/2008(pre-WIBA enactment) are ones who had legitimate expectation as per paragraph 85 of the Supreme Court Decision(supra) where the court stated that matters filed pre-WIBA were to be heard and determined under the judicial process invoked while matters filed post-WIBA (after 2/6/2008) were to be finalised under section 52 of the WIBA by the Director of Occupational safety and health.

#### **Respondent's submissions on the issue**

17. The Respondent submits that the learnt magistrate properly applied itself on the issue of jurisdiction and properly found itself clothed with the same to enable it to hear and determine the claim. That the appellant is forum shopping, looking for and actively devising means to defeat the respondent's cause of action which they submit it is properly before the trial court.
18. The Respondent then proceeds to submit on jurisdiction and largely relied on the decision of the court in ELRC Kisumu Appeal No. 4 of 2019 West Kenya Sugar vs Tito Luchele Tangale upheld by the learned magistrate to effect that it addressed a lacuna in the decision by the Supreme Court on fate of pending matters before the court which held that the parties who had their cases pending in court before the delivery of the decision of the Supreme Court Petition No. 4 of 2019 2011 Attorney General v Law Society of Kenya and another had legitimate expectation that their matters would be concluded by the court as there was no stay of the High Court declaration that WIBA was unconstitutional. The Respondent further submits that they lodged the suit before the magistrate court in 2017 and as such substantive issues have since arisen since the filing of the suit and which issues ought to be determined by the trial court and to buttress this position rely on the decision in Kiplagat Korir v Dennis Kingeno Mutai (2006) e KLR Where the High Court at Kericho(Kimaru J as he then was) 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 legitimate expectation the respondent submits that the doctrine applies to his case and that the principle had its underpinnings in administrative law and it provides for a situation where the persons who approach public bodies expect to be treated in a pre-determined manner and expect a pre-determined outcome and it would amount to a violation of the doctrine of such persons to be treated otherwise.



## Decision

19. It was the opinion of the court that the learned magistrate did not deliver a considered opinion on the instant preliminary objection but upheld his decision in Butali CC NO. 56 of 2017 where the court found the Appellant was the 2<sup>nd</sup> respondent. The court finds that the position taken by the trial court was a proper practice as the preliminary objection raised the same issue of jurisdiction on which the court had pronounced itself on and stated that the decision was to apply to all WIBA matters. The trial court did address itself on the authorities submitted in the instant case and stated its reason why it did not change its mind on the matter being that the authorities were of courts of equal status. The court finds that was a sound reasoning of the law. The trial court stated there was a lacuna in the Supreme Court decision as held by Justice Radido in ELRC Kisumu Appeal No. 4 of 2019 *West Kenya Sugar v Tito Luchele Tangale*.

The court has previously addressed itself on the issue as follows:-

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

20. 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)

21. 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.

21. 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)
22. 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)
23. 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 ).



24. 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).
25. 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.
26. 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 22<sup>nd</sup> May 2008 to 3<sup>rd</sup> 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 Supreme Court decision as analysed above which decision is binding on this court .
27. 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.
28. 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”.
29. 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 2<sup>nd</sup> June 2008, the instant suit having been filed in 2017 was before the wrong forum.



30. 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 Alphew 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 on the jurisprudence on WIBA matters.

Whether there are recent developments in the law regarding work injury claims filed before the Magistrates' court.

31. The respondent submits that the Chief Justice and the President of the Supreme Court of Kenya vide Gazette Notice No. 5476 issued on the 28<sup>th</sup> April 2023 being practice directions related to pending court cases regarding claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision in the much contested case of Law Society of Kenya v Attorney General and another, Petition No. 4 of 2019(2019)e KLR. The respondent submits that the practice directions reiterated principles in ELRC Kisumu Appeal No. 4 of 2019 West Kenya Sugar Co Ltd v Tito Lucheli Tangale (2021)eKLR and placed reliance on the case.

## Response

32. The appellant did not submit on this issue perhaps because the Gazette was issued on the 28<sup>th</sup> April 2023 while the appellant filed their submissions earlier on the 27<sup>th</sup> April 2023.

## Decision

33. The court issued hearing directions on the 27<sup>th</sup> March 2023 before the issuance of the practice directions in Kenya Gazette No. 5476 issued on the 28<sup>th</sup> April 2023. The directions were issued by the Chief Justice and the President of the Supreme Court of Kenya under the legal framework of *the Constitution* of Kenya, the *Judicature Act*, the *Judicial Service Act*, the *Employment and Labour Relations Court Act* and the *Work Injury Benefits Act*. The practice directions state as follows:-

‘Practice Directions Relating To Pending Court Claims Regarding Compensation For Work Related Injuries and Diseases Instituted Prior To The Supreme Court Decision In Law Society of Kenya v Attorney General And Another, Petition No. 4 of 2019; (2019) ECLR

In Exercise of the powers conferred under Articles 159 (2) and 161 (2) (a) of *the Constitution* of Kenya, section 10 of the *Judicature Act*, and Section 5 (1) and 2 (c) of the *Judicial Service Act*, the Chief Justice issues the following Practice Directions—

Citation 1. The Practice Directions may be cited as “Practice Directions relating to pending court claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision in Law Society of Kenya v. Attorney General & Another, Petition No. 4 of 2019; [2019] eKLR” (hereinafter referred to as the Supreme Court decision) Commencement

2. These Practice Directions shall come into force upon the date of issue.



Application 3. The Practice Directions shall apply to the Employment and Labour Relations Court and Magistrates appointed and gazetted by the Chief Justice pursuant to section 29 (3) and (4) of the Employment and [Labour Relations Act](#), 2011 to preside over cases involving employment and labour relations.

Objectives 4. The Objectives of the Practice Directions are to—

- (a) consolidate and standardize practice and procedure in the Employment and Labour Relations Court and the Magistrates Courts in relation to claims for compensation for work related injuries and diseases instituted prior to the Supreme Court decision dated 3rd December, 2019, which are pending in courts;
- (b) enhance access to justice;
- (c) facilitate timely and efficient disposal of cases that were filed prior to the Supreme Court decision; and
- (d) ensure uniformity in court experience.

Judgment of the Supreme Court 5.

The Supreme Court vide a judgment rendered on 3rd December, 2019, determined that sections 16, 23 (1), 25 (1) and (3), 52 (1) and (2) as well as section 58 (2) of the [Work Injury Benefits Act](#) (WIBA) are consistent with the former Constitution and [the Constitution](#) 2010, specifically;

- (a) Section 16 as read with sections 23 and 52 of the WIBA does not limit access to courts but creates a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of alternative dispute resolution mechanism starting with an investigation and award by the Director of Occupational Safety and Health Services and thereafter, under section 52 an appeal mechanism to the Employment and Labour Relations Court (formerly the Industrial Court).
- (b) Retrospective operation of statutes is not per se illegal or in contravention of [the Constitution](#) and section 58 (2) clearly expresses the intention that the Act shall apply retrospectively. Consequently, section 58 (2) of the Act does not take away the right to legal process, or extinguish access to the courts or to take away property rights without due process.
- (c) Be that as it may, claimants with pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process invoked (d) Also noting that many claims have not been finalized and due to passage of time, it has not been feasible to withdraw them and follow the alternative dispute resolution route. Further, considering the resolution passed by the Law Society of Kenya's meeting held on 21st March, 2023 urging that practice directions be issued for all pending claims be finalized in the respective courts.

Consequently, 6. (a) All claims with respect to compensation for work related injuries and diseases filed in various courts before the commencement of WIBA shall proceed to conclusion under the Workmen's Compensation Act, Cap 236 (repealed).

- (b) All judgments and rulings relating to work related injuries claims pending before the Employment and Labour Relations Court and the Magistrates Court shall be delivered by the same court.



Claims Filed after Commencement of WIBA but before the Supreme Court decision 7. Taking into account that High Court vide its judgment dated 4th March, 2009 in *Law Society of Kenya v. Attorney General & Another* (2009) eKLR declared some of the provisions in WIBA including Sections 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional. Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in court. As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in *Attorney-General and 2 Others v Ndi and 79 Others; Prof. Rosalind Dixon and 7 Others (Amicus Curiae)* (Petition 12, 11 and 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) to lodge their claims in court. Therefore, (a) All claims with respect to compensation for work related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment and Labour Relations Courts or the Magistrates' Courts shall proceed until conclusion before the said courts. (b) All pending judgments and rulings relating to compensation for work related injuries and diseases before the Employment and Labour Relations Court and the Magistrates' Courts shall be delivered by the same court.

Claims Filed after the Supreme Court Decision 8. (a) All claims with respect to compensation for work related injuries and diseases shall commence before the Director of Occupational Safety and Health Services. (b) All appeals emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court. (c) Such appeal shall be heard and determined through the appropriate appellate mechanism within the judicial hierarchy.

Sanctions for Non-Compliance 9. Non-compliance with these Directions shall result in such penalty as the Courts may order.

Miscellaneous 10. The Chief Justice may amend these Practice Directions from time to time.

Dated the 24th April, 2023.

Martha K. Koome, Chief Justice and President of the Supreme Court.”(Emphasis mine)

34. The court appreciates that the Chief Justice has authority to issue practice directions under Section 27 of the Employment and *Labour Relations Act* which reads:- “27. Rules and Regulations (1) The Chief Justice, make rules for regulating the practice and procedure of the Court. (2) Without prejudice to the generality of subsection (1), such rules may provide for— (a) regulating the sittings of the Court and the selection of Judges for any purpose; (b) prescribing forms and fees in respect of proceedings in the Court and regulating the costs of and incidental to any such proceedings; (c) prescribing the time within which any requirement of the rules is to be complied with; (ca) delegating judicial, quasi-judicial and non-judicial duties to the Registrar; and (d) any other matter required under this Act or any other written law.” The court finds that practice directions became necessary as this court took different positions on the interpretation of legitimate expectation of parties with cases before the magistrate courts before the pronouncement of the court of Appeal and the Supreme Court on WIBA jurisdiction.
35. The practice directions address the fate of cases filed and pending in court post WIBA and before the Supreme court decision delivered on 3<sup>rd</sup> December 2019. The court further observes there was a resolution passed by the Law Society of Kenya’s meeting held on 21st March, 2023 as stated in the directions, urging that practice directions be issued for all pending claims be finalized in the respective courts. The court finds that the foregoing Practice Directions would give life to the cases like the instant one which the court would, save for the directions have struck out. *The Constitution* of Kenya in Article 159(1-2) provides for exercise of judicial authority as follows:-



“ 159. Judicial authority (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— ‘(a) justice shall be done to all, irrespective of status; ‘

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.”

36. The court is required to promote access to justice under Article 48 of *the Constitution* which reads:- “The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

37. The court in exercise of its judicial power in the matter then finds the question would be whether the appellant would suffer any prejudice pursuant to the Practice Directions. Article 159 (2)(d) provides that justice shall be administered without undue regard to procedural technicalities and that means the court should focus on substantive justice. There is no tangible prejudice to be suffered by the appellant in the instant case. The magistrates have same capacity as the Director if not better due to experience to handle work injury claims which involves assessment of damages a routine duty of the lower courts.

38. The court finds by doctrine of necessity the WIBA practice directions as gazetted by the Chief Justice pass muster in the eyes of the court so as to promote access to justice to litigants who are caught up with WIBA cases filed in court in the period between Justice Ojwang decision and the Supreme Court decision. In the upshot the practice directions having expressly granted jurisdiction to the magistrates to handle WIBA matters filed in court before the delivery of the Supreme Court decision of 3<sup>rd</sup> December 2019 , then the appeal fails.

Whether the learned trial magistrate has jurisdiction to determine the matter (ground 1 to 5)

39. The answer on issue of jurisdiction then is that pursuant to the Chief Justice and President of the Supreme Court Practice Directions Vide Gazette Notice No. 5476 issued on the 28<sup>th</sup> April 2023 relating to pending Court claims regarding compensation for work related injuries and diseases instituted prior to the Supreme Court decision in *Law Society of Kenya v Attorney General And Another*, Petition No. 4 Of 2019; [2019] e KLR, the magistrates courts are now clothed with jurisdiction in work related injuries and disease claims pending in court before the delivery of the Supreme Court decision in *Law Society of Kenya v Attorney General And Another*, Petition No. 4 Of 2019 on 3<sup>rd</sup> December 2019.

## Conclusion

40. In the upshot the appeal dated 6<sup>th</sup> September 2021 is hereby dismissed for the foregoing reason of the Chief Justice practice directions vide Gazette Notice No.5476 issued on the 28<sup>th</sup> April 2023 to effect that WIBA matters filed before the delivery of the Supreme Court decision on the 3<sup>rd</sup> December 2019 be heard and determined by the magistrates.

41. The court to temper justice with mercy in view of the recent development of the practice directions issued while the appeal was pending, orders each party to bear own costs in the appeal.



42. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 29TH JUNE 2023.**

**JEMIMAH KELL,**

**JUDGE.**

**In The Presence Of:-**

Court Assistant : Lucy Wesonga

For Appellant : Tuwei

For Respondent:- absent

