



REPUBLIC OF KENYA



KENYA LAW
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**Katana v Tarmal Wire Products Limited (Appeal 20 of 2020)
[2023] KEELRC 3458 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3458 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 20 OF 2020
M MBARÚ, J
DECEMBER 19, 2023**

BETWEEN

BEJA MBETSA KATANA APPELLANT

AND

TARMAL WIRE PRODUCTS LIMITED RESPONDENT

RULING

1. The ruling herein relates to Notice of Preliminary Objections dated 16 November 2023 by the respondent on the grounds that;

This appeal be struck out with costs on the grounds that this court lacks jurisdiction to head and determine this appeal by reason of the provisions of the *Work Injury Benefits Act*, 2007 and on account of the practice directions given by the chief Justice *vide* Gazette Notice No. 5476 published in the Kenya Gazette of 28 April 2023 being incapable of conferring jurisdiction on this court.

2. Both parties attended and agreed to address the objections by way of written submissions.
3. The respondent submitted that following the Supreme Court Petition in *Attorney General v Law Society of Kenya 7 another* [2017] eKLR and in *Law Society of Kenya v Attorney General & another* [2019] eKLR, the question arises as to whether this court has jurisdiction to hear and determine the appeal herein by reason of the practice directions issued by the Chief Justice *vide* Gazette Notice No.5476 on 28 April 2023. The practice directions have the effect of conferring jurisdiction on this court to hear and determine work related injuries on account of legitimate expectation. Can practice directions confer jurisdiction?
4. In *University of Lagos & another v M. I. Aigoro* (SC 32/1984) [1984] ‘Practice Directions’ were defined as directions given by the appropriate authority stating the way and manner a particular rule of court should be complied with, observed or obeyed. The practice directions have no force of law.



5. Practice directions provide a source of civil procedural law but do not have the force of law. they cannot stand against a conflicting statutory rule.
6. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* [2012] eKLR, the court held that a court's jurisdiction flow from either the constitution of legislation or both. Therefore, where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed.
7. In *Sammy Ndungu Waity v Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR the court held that where the constitution or any other law establishes an organ with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate.
8. Practice directions are only guidelines with roots from already existing laws and their own standing do not have the force of law. Following *Attorney General v Law Society of Kenya & another* [2017] eKLR and in *Law Society of Kenya v Attorney General & another* [2019] eKLR the jurisdiction of this court to hear and determine work injuries was ousted by the doctrine of legitimate expectation. The court held that prior to the enactment of the *WIBA*, litigation relating to work injuries had gone on and a number of suits had progressed to decree stage, some were still being heard while others were at the preliminary stage. All these matters were being addressed under the then existing regimes of law. Claimants in those pending cases have a legitimate expectation that upon the passage of *WIBA*, their cases would be concluded under the judicial process which they had invoked.
9. For any work injury that arose after the commencement of the Act, 2 June 2008, such claims should have been commenced based on the procedure under the *WIBA* therefore ousting the jurisdiction of the courts and matters to be heard by the Director of Occupational Safety and Health Services (Director). The Court of Appeal and Supreme Court in the judgments *Attorney General v Law Society of Kenya 7 another* [2017] eKLR and in *Law Society of Kenya v Attorney General & another* [2019] eKLR were well aware of suits filed after the commencement of the *WIBA* but held that the High Court was wrong in declaring Section 16 thereof unconstitutional, notwithstanding the impact.
10. The practice directions are ultra vires and inconsistent and do not comply with the existing law as they have the effect of overturning and reversing the law as pronounced in *Attorney General v Law Society of Kenya 7 another* [2017] eKLR and in *Law Society of Kenya v Attorney General & another* [2019] eKLR. Whatever action is done on the strength of the Practice directions are in effect a nullity.
11. The position taken by the court in *Mumias Sugar Company Limited v Nalinkumar M. Shah* Civil Appeal No. 21 of 2011 is bad law in that upon the judgments by the Court of Appeal and Supreme Court, in the hierarchy of courts, the lower courts are bound.
12. The appellant filed this case in the lower court on 26 August 2014 during which time there was no law barring him from lodging a claim, before the Court of Appeal rendered its decision in November 2017.
13. The judgment of the Court of Appeal on 17 November 2017 came at a time when *WIBA* was already in force in 2 June 2008. In *Heritage Insurance Company Limited v David Fikiri Joshua & another* [2021] eKLR the court in addressing the judgement of the Court of Appeal held that by declaring Section 16 of *WIBA* constitutional was retrospective to the date the Act came into operation on 2 June 2008. Hence, courts had no jurisdiction to preside over *WIBA* matters filed from 22 May 2008 to 17 November 2017.
14. The High Court judgement in declaring sections of *WIBA* unconstitutional created a legitimate expectation that only matters which had been filed in court prior to the enactment of *WIBA* could be



- heard to finality as held in *West Kenya Sugar Co. Ltd v Libuyi* (Appeal E013 of 2021). And in the case of *Perfect Scan Limited v Harrison Kabindi Said* [2021] eKLR the court held that a declaration that a statute is unconstitutional operates retrospectively from the date of commencement of the statute. Litigants had a legitimate expectation that from the High Court Judgment, a party could file a work injury claim in court until the judgment of the Court of Appeal.
15. The respondent submitted that the objections herein be allowed and the appeal be struck out with costs.
 16. The appellant submitted that Section 16 of *WIBA* which came into effect on 12 November 2007 and the Chief Justice Practice Directions issued through Gazetted Notice published on 29 April 2023 and the law allowed for appeal to the court following award of compensation and also taking into account of the history of work injury claims pending before different courts. In *Law Society of Kenya v Attorney General & another* High Court Petition No.185 of 2008 challenged the constitutionality of *WIBA* and upon judgment on 4 March 2009, the High Court declared various sections including Section 16 of the Act unconstitutional. Aggrieved, the Attorney General filed appeal No.133 of 2017 and on 17 November 2017 the Court of Appeal held that the High Court erred in declaring the *WIBA* unconstitutional including the provisions of Section 16 of the Act. The matter proceeded to the Supreme Court in Petition No.4 of 2019 and in its judgment on 4 December 2019 the court agreed with the Court of Appeal to the extent that *WIBA* was not unconstitutional and all claims should be heard in terms of Section 52 thereof and further, while a party has a legitimate expectation to have a dispute resolved under the invoked legal regime, *WIBA* provisions were constitutional.
 17. The judgment by the Supreme Court on 4 December 2019 was issued after this appeal had been lodged and when Section 16 of *WIBA* had been declared unconstitutional. Parties then had a legitimate expectation that those claims and appeals that had been filed under the legal system invoked would be heard. Through Legal Notice No.5474 published on 28 April 2023 practice directions issued in terms of Article 159, 161(2)(a) of the *Constitution* and Section 10 of the *Judicature Act*, Section 5(1) of the *Judicial Service Act* following judgment in *Law Society of Kenya v Attorney General & another*, Supreme Court of Kenya Petition No. 4 of 2019. Consequently, all claims filed with respect to compensation under *WIBA* ought to proceed to conclusion under the legal regime invoked. In the case of *Attorney General v Juma Nyamawi Ndungo* Civil Appeal No.158 of 2019 the court held that during the pendency of the appeal, the Chief Justice published Practice Directions with regard to pending claims based on *WIBA* that provide guidance in such matters.
 18. The instant appeal is properly before this court and should be heard on the merits.

Determination

19. On the record is a Memorandum of Appeal filed on 20 August 2020. The appeal relates to the judgment delivered in Mombasa CMEL Case No.1677 of 2014 delivered on 6 August 2020.
20. The matter was filed at the lower court and concluded with a judgment on 6 August 2020.
21. Indeed, the principles under *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA are that a preliminary objection should be raised on a pure point of law on the understanding that, once raised and found valid, it can dispose off the suit at that stage. It should therefore be addressed at the earliest to avoid parties going into a full trial and incurring unnecessary costs where such matter is determined with finality.
22. On the Record of Appeal, proceedings at the lower court commenced in the year 2014. At such moment, the matter challenging the provisions of *WIBA* and the proper forum to file a claim



was addressed in High Court Case No.185 of 2008 which declared various provisions of *WIBA* unconstitutional.

23. An order of the court remains valid unless it is reviewed, set aside or upon appeal, it is overturned as held in *Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others* [2014] eKLR. such an order, once issued, unless overturned by an appellate court remains an order of the court and is enforceable, the issue of jurisdiction notwithstanding. The horizontal application of jurisprudence would only apply where the same court of concurrent jurisdiction would be faced with a similar matter and seized of the same facts, made a different finding then calling for vertical jurisprudence from the appellate court. in such circumstances, the appellate court decision would apply.
24. In this regard, upon the High Court judgment in Case No.185 of 2008, the appellant filed his case before the lower court which was heard and a determination made on the merits, the subject of this appeal.
25. Upon Court of Appeal Civil Appeal No.133 of 2017, *WIBA* and its provisions were found constitutional and the judgment of the High Court set aside. The matter went to the Supreme Court of Kenya, Petition No.4 of 2019 and the court upheld the Court of Appeal judgment on 4 December 2019. The Supreme Court held that;

In searching for the purpose, therefore, it is also legitimate to seek to identify the mischief sought to be remedied. The historical background of the legislation is one of the factors to consider in that regard and this allows the provision (s) to be understood within the context of the grid of other related provisions and of the Constitution as a whole. In this light, it is necessary to reflect on *WIBA*; how it came into being and its purpose.

26. The court hence put into account the background and context of *WIBA*. One such purpose was to have the Director address all work injuries at the shop floor and to allow an employee who is injured at work a remedy that was easily accessible. If dissatisfied with the award of compensation, to file an appeal to this court.
27. Should *WIBA*, taking effect on 12 November 2007 apply retroactively or retrospectively? This question was addressed by the Supreme Court of Kenya directly in its judgment in the following terms;

In addressing this issue, the Court of Appeal in the present matter stated thus:

“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. 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 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....”



The Legislative practice where a new judicial forum is created to replace an existing system is meant to ensure finalization of all proceedings pending in the previous system before the forum where they were commenced. ...

28. Above taken into account, the Chief Justice Practice Directions published on 28 April 2023 were in tandem with Article 48 of the Constitution which creates the right to access justice. Such rights seen in the context of Article 159 of the Constitution read together with the Judicature Act, the Civil Procedure Act and the rules thereto as well as the Employment and Labour Relations Court Act, 2011 and the rules thereto have the objectives of consolidating and standardising practice and procedures for the courts to enhance access to justice and to facilitate timely and efficient disposal of cases.
29. The appeal herein having been filed with the court prior to the Practice Directions published on 28 April 2023 cannot be said to negate the legitimate expectation on the appellant to be heard before the court where such matter was heard upon the High Court judgment in Case No.185 of 2008 and Civil Appeal No.133 of 2017 and the judgment of the Supreme Court in Petition No.4 of 2019. Matters clarified therefrom, the court given constitutional and legal authority to interpret the law and secure access to justice, the appeal is proper.
30. The cited cases by the respondent in Sammy Ndungu Waity v Independent Electoral & Boundaries Commission & 2 others [2019] eKLR; West Kenya Sugar Co. Ltd v Libuyi (Appeal E013 of 2021); and in the case of Perfect Scan Limited v Harrison Kabindi Said [2021] eKLR where the court held that a declaration that a statute is unconstitutional operates retrospectively from the date of commencement of the statute, must be given context as done in the Supreme Court judgment in Petition No. 4 of 2019 giving a history as to how WIBA came to be. Similarly, the Constitution, 2010 has a historical bearing. Each context applies.
31. Accordingly, the Practice Directions through Gazette Notice No.5476 of 28 April 2023 do not negate the law but apply to consolidate and standardise practice and procedures for the courts to enhance access to justice and to facilitate timely and efficient disposal of cases.
32. Objections dated 16 November 2023 are without merit and are hereby dismissed. costs shall abide the outcome of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 19TH DAY OF DECEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... **and**

