



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

APPEAL NO. 6 OF 2021

(Formerly High Court Civil Appeal No. 116 of 2014 at Mombasa and being an appeal from the judgment and the decree of Hon. G.O Kimanga, Resident Magistrate in RMCC No. 2077 of 2012 delivered on 27.08.2014)

ALPHAS ALEX JOY SHAPAYA.....APPELLANT

- VERSUS -

ALBA PETROLEUM LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th February, 2022)

RULING

The High Court (D.O Chepkwony J) delivered a decision in the present matter on 01.10.2020 titled “**Judgment**” and it was stated therein as follows:

“17. According to the pleadings and evidence tendered before the trial court, as per the Record of Appeal, the Appellant sustained injuries in the course of his employment with the respondent. In view of this, the Court is satisfied that this appeal ought to have been filed before the Employment and Labour Relations Court (ELRC). This Court cannot clothe itself with jurisdiction of other constitutional organs that have been bestowed with the jurisdiction to entertain the same. Accordingly, this Court declines jurisdiction to hear this Appeal and orders that the same be transferred to the Employment and Labour Relations Court, Mombasa, for hearing and determination.

17. Costs shall abide the outcome of the Appeal because the issue of jurisdiction has been raised at the instance of the Court. It is ordered accordingly.”

The matter was transferred to the Employment and Labour Relations Court and was mentioned on 27.10.2021 when by consent of the parties’ advocates it was ordered thus:

1. The judgment delivered on 01.10.2020 be construed to have the effect that appeal is now transferred in this Court for hearing and determination as per the first paragraph 17 therein; and is deemed a ruling accordingly.
2. Parties to rely on the record of appeal and submissions on record.
3. Leave is granted for parties to file supplementary submissions on jurisdiction of subordinate courts to handle injury claims; appellant to file by 01.12.2021 and respondent by 01.02.2022.
4. Mention on 08.02.2022 at 9.00am for directions on judgment.

On 08.02.2022 Counsel for the appellant was absent but had filed supplementary submissions on the issue of jurisdiction through Mathew Nyabena & Company Advocates. Counsel for the respondent Ms. Gaguri Advocate of Miller & Company Advocates was present as was scheduled and submitted that no submissions would be filed for the respondent and further, that the Court should proceed to render ruling on the issue of jurisdiction.

The background to the issue for determination (and as submitted for the appellant) is as follows:

1. It is submitted for the appellant that section 16 of the Work Injury Benefits Act, 2007 (WIBA) provides that no action shall lie by

an employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee's employer and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

2. Further, Ojwang J (as he then was, and later, Judge of the Supreme Court) in **Law Society of Kenya –Versus- Attorney General & Another, Petition 185 of 2008 at Mombasa [2009]eKLR** delivered judgment on 04.03.2009 declaring section 16 of WIBA as unconstitutional. The appellant in the present case instituted a suit against the respondent claiming for general damages, costs and interest in RMCC No. 2077 of 2012 at Mombasa flowing from an injury said to have occurred on 18.08.2010. The plaint was filed on 03.10.2012. The defence was filed on 26.10.2012. The suit was heard and the trial court delivered judgment on 27.08.2014 by finding that the case was without merit and had not been sufficiently proved to the required standard of a balance of probability. The suit was dismissed with costs to the respondent. The appellant was dissatisfied and filed the present appeal in the High Court.

3. The said decision by Ojwang J had been subject of appeal proceedings. The Court of Appeal's judgment delivered on 17.11.2017 in **Nairobi Civil Appeal No. 133 of 2011 – Attorney General –Versus- Law Society of Kenya & Another [2017] eKLR** found that the section was not unconstitutional. In particular, the Court of Appeal upheld the constitutionality of sections 4, 16, 21(1), 23(1), 25 (1) (3), 52 (1) (2) and 58 of the Work Injury Benefits Act, 2007 (WIBA). The provisions under WIBA require injuries under the WIBA to be adjudicated upon by the Director of Occupational Safety and Health Services (the Director) and expressly bars institution of court proceedings by an aggrieved employee save under the provisions of the Act. The right to approach the courts as of first instance is curtailed and the Employment and Labour Relations Court is designated as an appellate court from the decision of the Director per section 52 (2) of WIBA. The Supreme Court delivered its judgment in **Law Society of Kenya –Versus- Attorney General & Another [2019]eKLR (Maraga CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)** on 03.12.2019 in which it dismissed the appeal and upheld the decision by the Court of Appeal.

4. It is clear that as at the time the Court of Appeal and the Supreme Court delivered their respective judgments finding and upholding constitutionality of section 16 of the WIBA as constitutional and thereby varying the decision by Ojwang J declaring the section unconstitutional, the suit subject of the present appeal had been instituted and then determined prior to varying of the decision by Ojwang J then at the High Court. It is submitted for the appellant that the High Court had jurisdiction to declare section 16 of WIBA unconstitutional and the appellant in reliance upon that declaration filed the present suit in the lower court. It is submitted that in view of the declaration by Ojwang J of unconstitutionality of section 16 of WIBA, the appellant could not have filed his dispute before the Director of Occupational Health and Safety because the declaration of unconstitutionality of section 16 operated as a legitimate bar so that the appellant was entitled to file the suit in the lower Court.

The respondent in the instant case did not file submissions on the issue. The Court has dealt with exactly similar issue in **Perfect Scan Limited –Versus- Harrison Kahindi Said ELRC Appeal No. 18 of 2020at Mombasa [2021]eKLR**. The Court considers that there is no reason to deviate from its findings and holdings in that similar case thus,

“First, it is true that the issue of jurisdiction was not disputed before the Magistrate’s Court or in the memorandum of appeal. It is also true that the parties submitted themselves to the jurisdiction of the Magistrate’s Court and they pleaded as much. It was not an issue urged before the learned Magistrate but upon this Court’s directions, parties filed further submissions on that point. The Court considers that as undisputed between the parties, jurisdiction is everything and once it is established that the Court lacks jurisdiction, then the Court or other decision maker must down its tools. That which is done without jurisdiction is a nullity. The court considers that the issue of jurisdiction is preliminary and a crucial point of law which every decision maker must bear in mind and where appropriate, address and decide upon it prior to substantively embarking to consider merits of the dispute at hand. In the instant case, both parties have been given an opportunity to address the issue of jurisdiction in view of the difficult legal and historical circumstances of the present appeal. To that extent the Court considers that none of the parties is prejudiced for want of pleading or submission in that regard; particularly on whether this Court enjoys necessary jurisdiction to hear and determine the present appeal. As already pointed out, the issue of jurisdiction goes to the Court’s foundation to embark and decide the appeal. The Court considers that it does not enjoy inherent appellate jurisdiction and a party invoking the Court’s appellate jurisdiction must establish the constitutional or statutory basis for doing so. In any event, the Court further considers that of its own motion it is bound to ascertain existence of its jurisdiction in any matter that comes before it. Accordingly, the Court will address the jurisdictional concerns and whether the Court enjoys the necessary jurisdiction to determine the appeal.

Second, it is clear from the authorities cited that a declaration that a statute is unconstitutional operates retrospectively from the date of commencement of the statute. The converse principle must be that where a statute is challenged on account of alleged unconstitutionality and it is declared constitutional, the declaration of constitutionality (like in the instant situation of the relevant sections of WIBA like section 16 that had been impugned) of the statute is retrospective from the time the statute commenced.

Third, under the law of the case doctrine and sound application of judge- made law, the Court considers that the final position in law on the constitutionality of sections of WIBA that had been impugned is as decided by the Court of Appeal and affirmed by the Supreme Court. Thus, despite the earlier decision by the High Court declaring, *inter alia*, section 16 of WIBA as unconstitutional, the retrospective and finally binding judge-made law was that the section was constitutional from the date WIBA had commenced or come into operation is as per the decision by the Court of Appeal as affirmed by the Supreme Court. The Court’s view is that the High Court’s decision that was set aside might have created a legitimate expectation for the respondent to file the suit as was done but by reason of the decision by the Court of Appeal as affirmed by the Supreme Court, the purported legitimate expectation appears to have run into a complex situation because the Magistrate’s Court was thereby held not to have had jurisdiction once WIBA came into operation – but in circumstances whereby the judgment appealed against had already been delivered. Further it appears to the Court that jurisdiction is only conferred to Courts by the Constitution or relevant statute and not judge-made law and, in the Court’s view, judge-made law only approves or disapproves, by way of interpretation, the existence or lack of jurisdiction in view of the relevant constitutional and statutory provisions. Thus, only suits filed in courts prior to coming into operation of WIBA and under

the previously prevailing statutory provisions had been saved (by the Court of Appeal decision as affirmed by the Supreme Court) to have been instituted, continued, heard and determined in accordance with that previous regime. The respondent's suit would therefore appear not to have been one such suit but the Court also considers that the judgment subject of the appeal herein had been delivered in view of the unconstitutionality of section 16 of WIBA as had been declared by the High Court. The Court further observes that the parties have not made submissions on the fate of judgments such as the one subject of the appeal and in view of the subsequent Court of Appeal decision affirmed by the Supreme Court that the section was in law constitutional – and the Court considers that it has no basis to delve into the fate of the judgment. In any event parties have not submitted on that issue and the Court will let the issue to rest.

Fourth, section 12(1) of the Employment and Labour Relations Court Act, 2011 confers the Court with exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations. WIBA is the law that provides for resolution of disputes in the nature of injury claims by employees and employers like it was the respondent's claims herein. The WIBA in section 52 confers the Court appellate and not original jurisdiction. The Court has found that section 16 of WIBA applied to the dispute between the parties herein by reason of the final case law being the decision by the Court of Appeal as affirmed by the Supreme Court in the cited judgments. That being the case, the Court considers that jurisdiction to entertain an appeal, in injury claims like the one herein, would only fall in accordance with provisions of section 52 of WIBA and, as envisaged in section 12 of the Employment and Labour Relations Court Act, 2011, the said section 52 of WIBA is the written law conferring appellate jurisdiction to this Court to entertain appeals in injury claims – and the appellant or the respondent has not cited to the Court the relevant written law conferring the Court the necessary jurisdiction to hear and determine the present appeal as filed before the Court. The Court therefore finds that it lacks jurisdiction to hear and determine the appeal on its merits.

Fifth, the Court has considered the submission for the respondent that the appellant would be estopped from belatedly raising the issue of jurisdiction but the Court has already found that as settled trite law, jurisdiction is everything and it would not serve ends of justice for the Court to blind itself to the all-important question of whether this Court enjoyed valid jurisdiction to decide the dispute at hand on merits and by way of the present appeal. The Court will not therefore delve into the merits of the appeal as set out in the memorandum of appeal on account of want of relevant jurisdiction. As agreed between the parties and on account of the cited authorities, the Court must down its tools once it has been established that the Court lacks jurisdiction.”

While upholding the foregoing opinion as applicable to the instant case, the Court further finds that the appellant has not established a constitutional or statutory provision which confers the Employment and Labour Relations Court appellate jurisdiction to entertain an appeal from the trial Court's decision in the instant matter.

In the circumstances, the appeal herein is liable to striking out. The Court has considered the unique circumstances of the appeal, the historical background and that the respondent filed no supplementary submissions on the issue of jurisdiction as had been directed and, each party shall bear own costs of the proceedings.

In conclusion the appeal is hereby determined preliminarily with orders:

1. The appeal is hereby struck out.
2. Each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH

FEBRUARY, 2022

BYRAM ONGAYA

JUDGE