



**West Kenya Sugar Co. Ltd v Ambetsa (Appeal E004 of 2021)
[2022] KEELRC 13198 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
APPEAL E004 OF 2021
JW KELI, J
NOVEMBER 10, 2022**

BETWEEN

WEST KENYA SUGAR CO. LTD APPELLANT

AND

EDWARD ALPHEW AMBETSA RESPONDENT

JUDGMENT

1. The Respondent filed a suit Webuye PMC Case No 251 of 2017 against the Appellant for injuries said to have been sustained at the workplace vide a Plaint dated 13th November 2017 seeking the following reliefs:-
 - a. 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 or further relief that this Honourable Court may deem fit and just to grant (page 5).
2. The Appellant filed defence and denied admission of jurisdiction (Page 22). While the suit was pending the Appellant filed Notice of Preliminary Objection dated 28th February, 2020 2021 challenging the competence of the suit and/or the proceeding of the matter before the trial court on the following grounds:-
 - 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.
3. The Appellant’s submissions on the objection at the trial court were dated 18th March 2021 (pages 92-95).
 4. The Plaintiff filed written submissions dated 11th February 2021 on the Preliminary Objection (pages 85-91).
 5. The Preliminary Objection was canvassed by way of the filed written submissions and the trial court delivered its Ruling on the 14th July 2021(pages 96 and 97). It is the said Ruling that is challenged vide the instant appeal.
 6. The Appellant being aggrieved by the Ruling of Hon. M. Munyekenye (SPM) in Webuye CMCC No 251 of 2017 between Edward Alphew Ambetsa v West Kenya Sugar Co. Ltd delivered on the 14th July 2021 filed the Memorandum of Appeal dated 24th July 2021 (page 1-2) challenging the said Ruling of the trial court on the following grounds:-
 - a. That the learned trial magistrate erred in law and fact in making the aforementioned decision based on complete misapprehension of the law.
 - b. That the learned trial magistrate erred in law and fact by failing to hold that the court did not have jurisdiction to handle claims relating to work injury as provided in the [Work Injury Benefits Act](#) No 13 of 2017 which governs claims of that nature.
 - c. That the learned trial magistrate erred in law and fact in making a decision based on a misapprehension of the [Constitution](#) and the Supreme Court decision to wit :- Supreme Court in Supreme Court Appeal No 4 of 2019; [Law Society of Kenya v The Attorney General and Central Organisation of Trade Union\(K\)](#).
 - d. That the learned trial magistrate erred in law and fact by failing in making aforesaid decision without addressing himself to the law/statute from which the jurisdiction to handle work injury claims is derived from.
 - e. That the learned trial magistrate erred in law and fact in making an erroneous decision that had no backing in law.
 7. The Court gave directions that the instant appeal be canvassed by way of written submissions. The parties complied.

Determination

Issues for determination.

8. The Appellant in their submission to challenge the Ruling of the trial court primarily for relying on the decision of Justice Radido in Kisumu ELRC Appeal No 4 of 2019 between [West Kenya Sugar Ltd v Tito Lucheli Tangale](#) (2021) opined the following are the issues for determination in this appeal:-
 - a. Whether the trial magistrate court properly applied itself on the issue of jurisdiction



- b. Whether the instant appeal is merited.
9. The Respondent in their written submissions identified the following issues for determination in the appeal:-
 - a. Whether the learned trial magistrate completely misapprehended the law.
 - b. Whether the learned magistrate had jurisdiction to determine the matter.
 - c. Whether the Respondent had legitimate expectation.
 10. The Court having read the impugned ruling, the memorandum of appeal and the having considered the submissions by the parties is of the considered opinion that the issue for determination is whether the appeal is merited.
 11. 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) EA 123. In the instance appeal, the impugned ruling is on matters of law so the court will re-evaluate the law and authorities relied on in determining the preliminary objection by the trial court.

Decision on merit of the appeal

Appellant's submissions

12. The Appellant submits that the learnt Hon. Magistrate grossly misdirected herself by relying on the unreported case in ELRC Kisumu Appeal No, 4/2019 West Sugar Co Ltd v Tito Lucheli Tangale where the High Court found that cases that were filed between 22nd May 2008 and 3rd December 2019 were properly before the court. That the reason advanced by the court was that the claimant had legitimate expectation to have the suit heard and determined by the magistrate. The Respondent submits that the decision of the High Court relied on by the trial court was inferior to the decisions of the Court of Appeal and Supreme Court as per hierarchy to wit Supreme Court Petition No 4 of 2019 *Law Society of Kenya v Attorney General and another* and Court of Appeal Nairobi Civil Appeal No 133 of 2011 *Law Society of Kenya v Attorney General and another* which pronounced the law on work injury claims jurisdiction.
13. The Appellant submits that the decisions of the Supreme Court and Court of Appeal on the subject matter of work injury claims jurisdiction have been applied in other High Court decisions where the Preliminary Objection was upheld and held that the magistrate court had no jurisdiction to hear and determine the suit and the plaint struck off namely 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 *WIBA* having been declared constitutional by the two superior courts whose decisions operated retrospectively from date of the law commencement, the High Court (by Ojwang J) decision could no longer be relied on. A similar holding was in Mombasa ELRC Civil Appeal No 18 of 2020 *Perfect Sean Limited v Harrison Kabindi Said*.
14. That the magistrate court acted in total disregard of Supreme Court decision in Petition No 4 of 2019 particularly under paragraph 85 where the court stated in mandatory terms the matters filed pre-*WIBA* where to be handled by magistrates courts and the matters post *WIBA* by the Director *WIBA* in the first instance.



15. The Respondent submits that the magistrate court has no jurisdiction over the suit filed post 2nd June 2008 when WIBA came into force applying the Supreme Court and Court of Appeal decisions as upheld in Nandi Tea Estates Limited v John Mabiabo Onyango(2021) eKLR.
16. On the legitimate expectation by parties already before court, the respondent submits that the magistrate court misapprehended the doctrine of legitimate expectation, that the litigants who filed their cases before 2nd June 2008 (pre-WIBA enactment) are the ones who had legitimate expectation that their cases would be concluded under the judicial process they had invoked as per paragraph 85 of the Supreme Court decision(*supra*).
17. In conclusion the Appellant submits that the suit filed bereft of jurisdiction suffers one fate only and that is being struck off and to buttress that submission relied on the decision of Musyoka J in Mini Bakeries (NRB) limited v Levi Karuz Omedo (2002) eKLR where the court held: ‘a suit or appeal filed before the court which has no jurisdiction is incompetent and is not available for transfer to the court with jurisdiction. The fate that such suit or appeal should suffer is that of being struck off.’” That the position was also stated in Mombasa ELRC Civil Appeal No 21 of 2019 Heritage Insurance Company Limited v David Fikiri Joshua and another(2021) eKLR where the High Court upheld the Preliminary Objection filed in lower court and struck off the suit as it was filed on the 17th March 2015 long after enactment of WIBA on 2nd June 2008.

The Respondent’s submissions

18. The Respondent submits that the trial court delivered its ruling on the preliminary objection resting its decision on case of Kisumu ELRC Appeal No 4 of 2019 West Kenya Sugar Co. Ltd v Tito Lucheli Tangale which at that time had not been reported but is now reported as West Kenya Sugar Co. Ltd v Tito Lucheli Tangale(2021) eKLR. That the trial court also took into consideration the cited authority of the Supreme Court in Petition No 187 of 2008 Law Society of Kenya & another v Attorney General (2009) eKLR and further discussed it while relying on the West Kenya Sugar Co. Ltd decision(*supra*) where the court found as at time of Ojwang J decision of the High Court in Nairobi Petition No 185 of 2008 finding Section 16 of WIBA unconstitutional no stay order was given either by the High Court or the superior courts ending with the decision of 3rd December 2019 by Supreme Court that the appellant relied on.
19. The Respondent submits 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 its submissions relies on the decision in Kiplagat Korir v Dennis Kipngeno Mutai(2006) 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 relies on the provisions of the Constitution Article 159(2)(d).
20. The Respondent submits that it was not clear whether the Court of Appeal stayed the High Court declaration of unconstitutionality of section 16 and other provisions of WIBA and thus the provisions of Section 16 and other sections of WIBA stood void and was the law upto and until the time the Court of Appeal rendered its Judgment on 17th November 2017.
21. The Respondent submits that the preliminary objection was antithetical to the his right to access justice as sending the plaintiff away from the seat of justice would amount to great injustice.
22. The Respondent further submits that the doctrine of legitimate expectation applies as there was no stay order of the High Court by the Court of Appeal as held by justice Radido sitting in Kisumu ELRC in the West Kenya Sugar Co. Ltd case(*supra*)



23. The Respondent further submits that any differing decision that would be given by the honourable court would be in conflict with the earlier decision by court of similar jurisdiction and as such set uncertain precedence on the issue of jurisdiction to the subordinate courts to determine work injury claims. That the instant appeal essentially seeks review of the earlier judgment of the court sitting at Kisumu where the Appellant's Appeal was dismissed and this imputes abuse of court process. The respondent to buttress this submission relies on the decision of the Court of Appeal in *Muchanga Investments Limited v Safaris Unlimited(Africa) Ltd and 2 others* Civil Appeal No 25 of 2002 where the court defined the term abuse of court process to mean where a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice.

The Court Decision On Merit Of The Appeal

24. The trial court ruling subject of appeal is dated 25th May 2021 by Hon. SPM Barasa in CMCC Webuye Civil Case No 215 of 2017. The trial court acknowledged that the Preliminary Objection was based on Supreme Court Petition No 4 of 2019 *Law Society of Kenya v Attorney General and another*. The trial court also upheld the landmark decision on jurisdiction *Owners of the Motor Vessel Lilian "S" v Caltex Oil (Kenya) ltd* 1989 eKLR. At the last page of the ruling it is stated: ' the Honourable Judge in ELRC Kisumu Appeal No 4 of 2019 found all cases which were filed between 22nd May 2008 and 3rd December 2019 in courts are properly before courts, this case is such a case. In this court's understanding, the decision of the ELRC court gave interpretation to the Supreme Court decision that this court need not belabour on, this court is bound by the decision of the superior court... the upshot is that this court finds and holds that it has requisite jurisdiction to determine and hear this case on the strength of the cited case in ELRC Kisumu Appeal No 4 of 2019. The preliminary objection is dismissed with costs to the plaintiff which shall be in cause.'
25. The court then finds that the ruling having been entirely based on the decision in ELRC Kisumu Appeal No 4 of 2019 and without consideration of the decisions of the Court of Appeal and the Supreme Court on the *WIBA* constitutionality, the trial court erred in law as the appellant had relied on the Supreme Court decision in Petition No 4 of 2019 which the trial court should have considered and reached its own conclusion.

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

26. 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)

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.” The foregoing is a lengthy import of the parts of the judgment of Court of Appeal which the court found necessary for clarity and emphasis purpose.

27. 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:-

“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)

28. 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)
29. 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).
30. 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 section 52 of *WIBA* Act. Sections 52 (1) and (2) of *WIBA* further provides:-
- (1) The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.
 - (2) An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.”
31. 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 section 52 of *WIBA*.
32. 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 22nd May 2008 to 3rd 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 of the Court of Appeal and Supreme Court decisions as analysed above which decisions are binding on this court .
33. The Court finds that there other contrary decisions to the Kisumu ELRC decision of the court as cited by the Appellant 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 decision operated retrospectively from date of the law commencement and that 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 Kabindi 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.

34. 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 submission 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”.

35. In view of the foregoing 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 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 2nd June 2008, the instant suit being dated 13th November 2017, the court finds and determines merit in the appeal and finds that the magistrate court erred in holding it had jurisdiction to hear and determine the suit.

Conclusion and disposition

36. The Appeal is held to be with merit and is allowed. The Court orders that the magistrate court has no jurisdiction to hear and determine work injury related claims filed upon commencement of *Work Injury Benefits Act*.
37. The Ruling of the trial court in Webuye CMCC No 251 of 2017 Edward Alpheu Ambetsa v West Kenya Sugar Ltd delivered on the 14th July 2021 is set aside and in its place substituted with an order that the Preliminary Objection dated 28th February 2020 is upheld and the suit dated 13th November 2017 struck off for want of jurisdiction.
38. In order to temper justice with mercy and considering the conflicting decisions of the court on the jurisdiction on work injury related claims the court orders each party to bear own costs both in this appeal and in the trial magistrate’s court.
39. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 10*TH NOVEMBER 2022.

**J. W. KELI,
JUDGE.**



In The Presence of:-

Court Assistant : Brenda Wesonga

For Appellant : Ms Nyabuto

For Respondent: Mulama holding brief for Abok

