West Kenya Sugar Co Ltd v Mutonyi (Employment and Labour Relations Appeal E007 of 2021) [2022] KEELRC 13197 (KLR) (10 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13197 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2021

JW KELI, J

NOVEMBER 10, 2022

BETWEEN

WEST KENYA SUGAR CO LTD ..... APPELLANT

AND

JACKTONE ISAYA MUTONYI ..... RESPONDENT

JUDGMENT

1. The respondent filed a suit Webuye SPMCC Case No 216 of 2017 against the appellant for injuries said to have been sustained at the workplace *vide* a plaint dated November 6, 2017 and received by the trial court on even date seeking the following reliefs:-

    a. General damages

    b. Special damages of Kshs 10,000/-.

    c. Future medical costs as particularised at paragraph 6

    d. Costs of this suit

    e. Interest on a, b and c above at court rates

    f. Any other relief that this honourable court may deem fit and just to grant. (pages 4-6)

2. The appellant entered appearance and filed defence and denied admission of jurisdiction (page 26). While the suit was pending the appellant filed notice of preliminary objection dated March 13, 2020 (page 87) 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.

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)'.

3. The appellant's/respondent's submissions on the objection at the trial court were dated March 18, 2021 and filed on the March 23, 2021 by Onyinkwa & Co Advocates (pages 95-98).

4. The respondent's / claimants submissions at the trial court on the objection were dated February 11, 2021 and filed on the March 23, 2021 by Abok Odhiambo & Co Advocates (pages 88-94).

5. The preliminary objection was canvassed by way of the filed written submissions and the trial court delivered its ruling on the July 14, 2021(pages 99 and 100). 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 216 of 2017 between Jacktone Isaya Mutonyi v West Kenya Sugar Co Ltd delivered on the July 14, 2021 filed the instant memorandum of appeal dated May 19, 2022 seeking to challenge the 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/cases 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 written submissions drawn by Onyinkwa and Company Advocates challenge the ruling of the trial court primarily for relying on the decision 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 completely misapprehended the law

    b. Whether the trial court had jurisdiction to determine the matter

    c. Whether the respondent had legitimate expectation.

9. The appellant in their written submissions drawn by Abok Odhiambo and Company Advocates 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.

10. The court having read the impugned ruling, the memorandum of appeal and 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]EA123. 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 of 2019 *West Sugar Co Ltd v Tito Lucheli Tangale* where the High Court found that cases that were filed between May 22, 2008 and December 3, 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.

13. The appellant submits that the decision relied on by the trial court was of the High Court. That the decision of the High Court relied on by the trial court was inferior, in terms of hierarchy of court, to the cited Supreme Court decision relied on by the appellant that both the Court of Appeal and Supreme Court decisions in 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* [2017]eKLR have exhaustively pronounced themselves on the issue of the magistrate's courts to hear and determine WIBA matters.

14. 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 High Court 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 further struck out the 1st respondent's plaint relying on the 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* (2017)e KLR decisions and stated that WIBA having been declared constitutional by the two superior courts it was good law and binding retrospectively from date of its commencement. That the High Court further held that the 1st respondent could no longer rely on the High Court decision in Nairobi petition No 185 of 2008 Law Society of Kenya v Attorney General and another. The appellant submits that in Mombasa ELRC civil appeal No 18 of 2020 *Perfect Sean Limited v Harrison Kahindi Said* the court made a similar finding.

15. The appellant urges the court to take note of paragraph 91 in Supreme Court petition No 4 of 2019 *Law Society of Kenya v Attorney General and another* where the court held that the trial judge in Mombasa petition No 196 of 2018[2019]eKLR *Juma Nyamawi Ndungo and 5 others v Attorney General* should have acknowledged the hierchy of courts.

16. The appellant further submits that the magistrate court acted in total disregard of the *Work Injury Benefits Act* which was subsisting at time of filing the suit and did not address the Act legality in her entire ruling. That the trial court failed to acknowledge that the suit having been filed during the subsistence of WIBA, the claim ought to have been heard and determined in accordance with section 16, 23 and 52 of the WIBA.

17. The appellant further submits that the magistrate court acted in total disregard of Supreme Court decision in Supreme Court petition No 4 of 2019 *Law Society of Kenya v Attorney General and another* particularly under paragraph 85 where the court stated in mandatory terms the matters filed pre-WIBA were to be handled by magistrates' courts and the matter post WIBA by the Director WIBA in the first instance.

18. The appellant submits that the Hon Magistrate in her ruling admitted that the subordinate court is bound by the decision of the superior court and therefore she contradicted herself by holding she had jurisdiction (page 100). That further the magistrate court delivered her decision two years post the Supreme Court decision(supra).

19. The respondent submits that the magistrate court has no jurisdiction over the suit filed post June 2, 2008 the entry into force date of WIBA applying the Supreme Court and Court of Appeal decisions (supra) as upheld in *Nandi Tea Estates Limited v John Mabialo Onyango* [2021] e KLR.

20. The appellant submits that the honourable magistrate lacked jurisdiction to hear and determine the matter being a work injury related claim. That section 16 of WIBA which is couched under mandatory terms provides that liability for compensation on the part of the employer and recovery of damages in respect of an occupational accident or disease shall be in accordance with the provisions of the statute.

21. On the legitimate expectation by parties already before court, the appellant submits that the magistrate court misapprehended the doctrine of legitimate expectation, that the litigants who filed their cases before June 2, 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).

22. 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 March 17, 2015 long after enactment of WIBA on June 2, 2008.

The Respondent's submissions

23. The respondent submits that the appellant is engaging in forum shopping, looking for an avenue from different courts to obtain a favourable judgment different from decision in Kisumu Employment and Labour Relation Court No 4 of 2019 (supra) over their dismissed preliminary objection. That Justice Radido of ELRC Kisumu already delivered judgment in similar appeal being Kisumu ELRC appeal No 4 of 2019 *West Kenya Sugar Co Ltd v Tito Lucheli Tangale* where the appellant tried to appeal against the ruling of the trial court magistrate.

24. That the appellant is forum shopping as even Justice Radido in his decisions noted the appellant had erroneously filed their appeal before the High Court instead of the Employment and Labour Relation Court.

25. The respondent submits that the appeal is a waste of judicial time. That the appeal is misconceived for reason that office of the director of occupational safety and health is not a judicial or quasi judicial body mandated to assess quantum of damages of work injuries as this function is a preserve of courts and the Director would be usurping powers of court and further the court should jealously guard judicial authority and relies on the decision of the High Court in *Juma Nyamawi Ndungo & 5 others v Attorney General Mombasa Law Society(interested party)*[2019]eKLR where the court held judicial authority of assessment of damages can only be exercised by the court and independent tribunals under 2010 Constitution. The High Court upheld the decision of the Court of Appeal in *Justus Mutiga &2 others v Law Society of Kenya and another* [2018]eKLR where the Court of Appeal held that computation of monies awarded to parties as damages is a judicial function which cannot even be performed by the registrar of the court. In that case the Court of Appeal upheld its decision in *Telcom Kenya Ltd v John Ochada* in civil appeal No 60 of 2013 to the same effect.

26. The respondent disagrees with the appellant that the two superior courts cannot be overridden by the decision of Justice Radido. The respondent submits the appellant is misguided for the reason that the law is ever progressive and what might have been a good law a while back might not necessary be the position in future litigation. That the law is not settled as Justice Radido observed that it was not clear whether the superior courts stayed the declaration of the High Court. That the law is ever prospective and never applies retrospectively as alluded by the appellant and as such Justice Radio properly applied his mind in 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 and relies on the decision in *Jemimah Nyambura Mwangi v Kenya School of law* [2022]eKLR where the High Court(Judge J.A Makau) held:-' 14. I do agree that the law applicable in this matter should have been the law before the enactment of *Kenya School of Law Act* , 2012 as the law does not operate retrospectively as provided under section 23(3) of the *Interpretation and General Provisions Act*.."

27. The respondent further submits that it is not in dispute that WIBA came into effect June 2, 2008. That Justice Ojwang declared section 4, 7(1), 10(4). 16, 25(1)(3),52(1)(2) and 58(2) of WIBA inconsistent with the *Constitution* which decision was appealed against but the appellant never applied for stay of

execution or implementation of declaration thereto. It is the submission of the respondent that for lack of stay of High Court declaration, that was the law until November 17, 2017 when the Court of Appeal rendered its decision.

28. The respondent submits that the court has jurisdiction as the assessment of damages is a judicial function and relies on the decision of the High Court in *Juma Nyamawi Ndungo & 5 others v Attorney General and Mombasa Law Society (interested party)*(2019)e KLR and the decision of Justice Maureen Onyango in *Johnson Waweru Kamau v Safaricom Limited* where the court held it had jurisdiction over WIBA matters.

29. The respondent further 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).

30. The respondent further submits that the doctrine of legitimate expectation applies as there was no stay order of the High Court declaration of various provisions of WIBA as unconstitutional by the Court of Appeal as held by justice Radido sitting in Kisumu ELRC in the *West Kenya Sugar Co Ltd case*(supra).

31. The respondent submits that the decision in *Mini Bakeries (Nrb) limited v Levi Karuz Omedo*[2002]eKLR was not applicable as it related to transfer of suit and not WIBA matter as is the case presently.

The Court Decision On Merit Of The Appeal

32. The trial court ruling subject of the instant appeal is dated July 14, 2021 by Hon SPM M. Munyekenye in SPMCC Webuye civil case No 216 of 2017 between same parties in the appeal. The trial court stated that the preliminary objection was based on Supreme Court petition No 187 of 2008 *Law Society of Kenya v Attorney General and another*[2009]eKLR. The trial court relied on the decision in Kisumu ELRC appeal No 4 of 2019(supra) At the last page of its ruling the trial court held: 'The Employment and Labour Relations Court on delivering its decision held that on relying on judge made law, cases which were filed between May 22, 2008 and December 3, 2019 are properly before court by the litigants since there had been no stay of the High Court case. I find that the decision of the Employment and Labour Relations 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 which though unreported its authenticity is not in question. The upshot is that this court finds and holds that it has requisite jurisdiction to hear and determine this case on the strength of the cited case in ELRC Kisumu appeal No 4 of 2019 *West Kenya Sugar v Tito Luchele Tangale* . The preliminary objection is thus dismissed with costs to the plaintiff which shall be in cause."(page 100)

33. The court finds that the ruling was entirely based on the decision ELRC Kisumu appeal No 4 of 2019 *West Kenya Sugar v Tito Luchele Tangale* and was without consideration of the decisions of the Court of Appeal and the Supreme Court on the WIBA constitutionality. The court determines that 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 ?

34. 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 indeed a lengthy import of the parts of the judgment of Court of Appeal which the court found necessary for clarity and emphasis purpose.

35. 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 Ccourt 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)

36. 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).

37. 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 finalized under section 52 of WIBA Act(emphasis given). Sections 52 (1) and (2) of WIBA further provides:-

> " 52.
>
> (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."

38. Applying the foregoing decisions of the Court of Appeal and Supreme Court which are binding on this court, the court finds and determines that 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.

39. 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 May 22, 2008 to December 3, 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 . The court is not persuaded with the argument that the High Court declarations having not been stayed by the court or Court of Appeal would continue to be valid law post the pronouncement of the WIBA as constitutional and in view of the glaring guide on the legitimate expectation application scope under paragraph 85 of the Supreme Court decision. The court also finds it is moot to consider the impact of the High Court decision in *Juma Nyamawi Ndungo & 5 others v Attorney General Mombasa Law Society(interested party)*(2019)e KLR which was outrightly condemned by the Supreme Court and found to be rendered out of order and the court will say no more on the same. It would also be moot to consider the argument on the validity of the WIBA in terms of judicial authority to assess damages by the Director as submitted by the appellant when the Supreme Court has already pronounced itself that WIBA is constitutional. It is further moot to consider the argument on retrospectivity of the superior courts decisions when the Supreme Court in paragraph 85 held that 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(emphasis given).

40. 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.

41. 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".

42. 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 June 2, 2008, the instant suit having been filed on the November 6, 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.

43. In this case the court upholds its recent decision delivered on the November 3, 2022 on a similar issue as the instant appeal being Bungoma ELRC appeal No E0002 of 2021 *West Kenya Sugar Co Ltd v Evans Ambule Soita*(unreported) 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.

44. On the fate of the suit the appellants relied on the decision of Musyoka J in *Mini Bakeries (Nrb) limited v Levi Karuz Omedo* (2002)e KLR 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." The respondent submits that the decision is not relevant as it referred to transfer of suit and not a WIBA matter as is the case presently but failed to cite a supporting authority. The court finds that the authority in *Mini Bakeries (Nrb) limited* is consistent with the Court of Appeal decsion in *Owners of the Motor Vessel Lilian "S" v Caltex Oil (Kenya) ltd* 1989 eKLR (supra) to the effect that the court jurisdiction is everything and without it the court cannot take one more step. The court upholds the decision in *Mini Bakeries (Nrb) limited* and finds it cannot order transfer of the suit from the lower court to the Director of WIBA having held the Magistrate Court had no jurisdiction. The suit cannot stand and its only fate is to be struck off.

Conclusion and Disposition

45. 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*(WIBA).

46. The ruling of the trial court in Webuye CMCC No 216 of 2017 Jacktone Isaya Mutonyi v West Kenya Sugar Co Ltd delivered on the July 14, 2021 is set aside and in its place substituted with an order that the preliminary objection dated March 13, 2021 is upheld and the suit dated November 6, 2017 struck off for want of jurisdiction.

47. The court in order to temper justice with mercy and taking into consideration 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.

48. It is so ordered.

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

J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

For Appellant : Nyambuto (Ms)

For Respondent:- Mulama holding brief for Abok