



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CIVIL APPEAL NO 5 OF 2019**

**[INITIALLY MOMBASA HIGH COURT CIVIL APPEAL NO 282 OF 2018]**

**MANUCHAR KENYA LIMITED.....APPELLANT**

**VS**

**DENNIS ODHIAMBO OLWETE.....RESPONDENT**

**(Appeal from the Ruling of Hon. E.K. Makori, CM**

**delivered on 26<sup>th</sup> November 2018 in Mombasa CMCC NO 1933 OF 2014)**

**JUDGMENT**

1. This appeal was initially filed in the High Court at Mombasa as *Civil Appeal No 282 of 2018*.
2. In a ruling delivered by **Chepkwony J** on 26<sup>th</sup> March 2019, the High Court declined to assume jurisdiction over the matter on the ground that the subject matter was a work injury claim. This is how the matter came before me.
3. The appeal arises from the ruling by **Hon. E.K. Makori, CM** delivered on 26<sup>th</sup> November 2018, in *Mombasa CMCC No 1933 of 2014*.
4. The impugned ruling was in response to a Notice of Motion dated 18<sup>th</sup> October 2018 in which the Appellant (Defendant in the lower court) sought the following remedies:
  - a. That there be a stay of execution of the decree and certificate of stated costs emanating from the judgement entered on 8<sup>th</sup> May 2015, against the Appellant in default of appearance and defence;
  - b. That the judgment entered against the Appellant on 8<sup>th</sup> May 2015 and all consequential proceedings including judgment delivered upon formal proof and assessment of damages made on 18<sup>th</sup> January 2016, the decree and certificate of stated costs emanating therefrom as well as ongoing execution processes be set aside and the Appellant be granted leave to defend the suit;
  - c. That the Respondent and his appointed auctioneers and agents, MS Makini Auctioneers be compelled to unconditionally release back to the Appellant Crane/Forklift registration number KHMA 184K removed by the Auctioneers on 16<sup>th</sup> October 2018;
  - d. That costs of the application be borne by the Respondent.
5. The application was canvassed before **Hon. E.K Makori, CM** by way of written submissions who in a ruling delivered on 26<sup>th</sup> November 2018 issued the following directions:
  - a. The judgment delivered by **Hon. Nang'ea** dated 18<sup>th</sup> January 2016 stands regular in so far as service of summons and failure to enter defence is concerned;
  - b. Application for stay of execution and setting aside judgment was dismissed on 17<sup>th</sup> July 2018 an appeal at review ought to have been filed;

c. The court could not confer on itself powers of a superior court to purport to review orders by **Hon. Nang'ea**; only a superior court could do that;

d. The two warring positions of the Court of Appeal decision in WIBA matters in **Civil Appeal No. 133/2011** and **Constitutional Petition No. 196/2018 (Ogola J)** could only be resolved by superior courts;

e. Consequently, the Appellant to question the jurisdiction issues either by way of appeal or judicial review;

f. A period of 30 days is granted to the Appellant to move to superior court for whatever reasons;

g. Meanwhile, there being a regular/valid judgment which is for execution within the said 30 days, the Appellant to deposit the entire decretal sum in a joint interest earning account of the Advocates herein;

h. The forklift be released forthwith upon payment of the decretal sum to the joint account and the Appellant to pay the Auctioneer's fees before release;

i. Costs of the application be borne by each party in view of the orders issued;

j. Liberty to apply.

6. Being dissatisfied with the ruling by the lower court, the Appellant filed the present appeal.

7. In its Memorandum of Appeal dated 20<sup>th</sup> December 2018, the Appellant raises the following grounds:

a. The learned Honourable Magistrate erred in fact and in law by failing to take full account of the undisputed averments made on oath and a letter placed before him by the Appellant's representative in the proceedings of 17<sup>th</sup> July 2018 ignoring the indications as the court's earlier directions on the morning of 17<sup>th</sup> July 2018 therefore erroneously holding that he could not ascertain or know whether the events of that morning were as stated to him on the application before him in turn unjustly declining the Appellant's plea for setting aside of judgment;

b. The learned Honourable Magistrate failed to recognize the place of insurer in light of existing employment and labour laws of Kenya thereby erroneously observing that the taking up of the matter by the insurer was not reason enough but a dereliction of the Appellant's duties which could not be used as a reason to set aside judgment in the matter;

c. The learned Honourable Magistrate misapprehended the law on *res judicata* as regards an application dismissed unheard and thereby arriving at an erroneous finding to the effect that the Appellant had no lee way to bring a fresh application and should only have sought for review or appealed as against the earlier orders dismissing the earlier application unheard and in turn declining to apply his discretion judiciously as regards the application before him;

d. The learned Honourable Magistrate misapprehended the law as to reviews erroneously holding that review powers are a preserve of a superior court that he could not confer upon himself thereby declining to exercise his inherent as well as discretionary powers regarding the application before him;

e. The learned Honourable Magistrate misapprehended the law on hierarchy of courts and judicial precedent on pronouncements on jurisdiction thereby declining to make any pronouncements on his court's jurisdiction over the matter instead holding that "the two warring positions" in the Court of Appeal's decision on WIBA matters in **Civil Appeal No. 133 of 2011** and the **High Court Constitutional Petition No. 196 of 2018 (Ogola J)** could only be resolved by superior courts and that the Appellant should question jurisdiction either by way of an appeal or judicial review;

f. The learned Honourable Magistrate erred in both law and in fact by failing to make a determination whether judgment on record could properly be executed in the absence of proper notice of entry of judgment and whether attachment and removal of the Appellant's forklift, a tool of trade, was lawful and procedural in light of the provisions of law cited before him by the Appellant contesting the validity of warrants instead of granting leave to the Appellant to move the superior court in 30 days for whatever reasons and to pay Auctioneer's fees and deposit the entire decretal sum in a joint account of the Advocates within 30 days as a precondition for the release of the forklift with each party bearing their own costs.

8. In his ruling dated the 26<sup>th</sup> November 2018, the learned trial Magistrate states the following:

**"For this court-there exists those two decisions whereas the Court of Appeal has finally settled who should hear these matters-being the Director of Occupational Safety, the Petition before Justice Ogola seeks to determine what happens to the avalanche of cases already filed in the Magistrates courts at various levels of determination including for example what happens to a matter like this one-which has already been determined. How should transition be handled. I cannot purport to prophesy what Judge Ogola will determine and leave that issue at that stage".**

8. At the time of writing this judgment, the Supreme Court had, in its decision in **Law Society of Kenya v Attorney General & another [2019] eKLR** affirmed the decision of the Court of Appeal in **Attorney General v Law Society of Kenya & another [2017] eKLR**.

10. In its decision delivered on 17<sup>th</sup> November 2017, the Court of Appeal had set aside orders made by the High Court (**Prof. J.B Ojwang J** [as then was]) in 2009, declaring Sections 4, 16, 21(1), 23(1),25(1)(3),52 (1)(2) and 58(2) unconstitutional.

11. It follows, therefore that at the time the learned Magistrate delivered his ruling on 26<sup>th</sup> November 2018, the aforesaid statutory provisions had been restored and were fully operational.

12. Among these provisions is Section 16 of WIBA which provides:

**16. 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 against 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.**

13. However, the learned Magistrate was also faced by a subsequent decision of the High Court (**Ogola J**) in **Juma Nyamawi Ndungo & 5 others v Attorney General [2019] eKLR**. At the interlocutory stage, **Ogola J** recorded the following consent order:

**1. The application dated 16<sup>th</sup> July 2018 is allowed as prayed in the following terms:**

**That the honourable court be and is hereby pleased to issue a conservatory order in the form of a stay order staying the operation of the provisions of Section 16, 23, 53(c) and 53(d) of the Work Injury Benefits Act No. 13 of 2007 and to give an interim relief allowing all cases by any litigants in the magistrate's courts of the Republic of Kenya arising from injuries at place of work to proceed for hearing, mention and or any action in furtherance of their hearing and determination and or conclusion and enforcement of the Judgment delivered in the said cases pending the hearing and determination of the constitutional petition herein.**

**2. The parties to file their submissions to the petition. The Petitioners to do so within 14 days after the responses are filed. All other persons to do so within 21 days of service by the Petitioners.**

**2 a. The Respondent to file response within 14 days.**

**3. The petition will be heard on 17<sup>th</sup> October 2018.**

14. To say that some confusion had been created on the subject matter of this appeal is not incorrect. Indeed, the Supreme Court itself stated as much in the conclusion of its decision in **Law Society of Kenya v Attorney General & another** (supra). The learned Justices of the Apex Court stated thus:

**“We are greatly dismayed that the learned judge did not take judicial notice of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have held his horses and acknowledge the hierarchy of the courts and wait for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may also be contrary to this decision. The findings and Orders expressed in that judgment must therefore be read in the context of the decision of the Court of Appeal and our finding and Orders in this appeal. That is all there is to say on that matter.”**

15. Against this background, I am sympathetic with the learned Magistrate, who declined to grant substantive orders and instead referred the matter to unspecified superior courts.

16. Much water has washed the stone and as I consider this appeal, the Apex Court has spoken. At paragraph 85 of its decision, the Supreme Court pronounced itself as follows:

**“In agreeing with the Court of Appeal, we note that is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of 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 finalised under Section 52 aforesaid.”**

17. The upshot of the decision by the Court of Appeal as confirmed by the Supreme Court is that all work injury claims arising after enactment of WIBA in 2007 were to be processed within the procedure set out in the Act and the original jurisdiction of the courts was thus ousted.

18. As held by the Court of Appeal in the celebrated case of **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] eKLR** jurisdiction is the authority by which a court decides matters that are litigated before it and without it the court has no basis to make any move, other than to down its tools.

19. Reading from the judgment by **Hon. Nange'a, CM** dated 18<sup>th</sup> January 2016, the accident in which the Respondent was injured occurred on 8<sup>th</sup> August 2014. That was after enactment of WIBA and according to the decision by the Supreme Court in **Law Society of Kenya v Attorney General & another** (supra), the Magistrate's Court had no jurisdiction to try the matter.

20. In the result, I find and hold that the judgment delivered by **Hon. Nang'ea, CM** on 18<sup>th</sup> January 2016 and all consequential orders were irregular for want of jurisdiction.

21. I therefore direct that any assets, including money, held on account of the said judgment be released to the Appellant.

22. In the circumstances of this appeal, I will make no further orders except to say that each party will bear their own costs.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Muyaa for the Appellant

Mr. Ganzala h/b for Mr. Mbuya for the Respondent