



REPUBLIC OF KENYA



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**Hassen v Kithaka (Appeal E089 of 2025)
[2025] KEELRC 2508 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2508 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E089 OF 2025
JW KELI, J
SEPTEMBER 18, 2025**

BETWEEN

MELIHUN HASSEN APPELLANT

AND

ANTHONY MURIITHI KITHAKA RESPONDENT

(Being an Appeal from the Ruling and Order of the Hon. L. Ambasi (CM) delivered on 17th March, 2025 in MCELRC Miscellaneous Application number E002/2025)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Ruling and Order of the Hon. L. Ambasi (CM) delivered on 17th March, 2025 in MCELRC Miscellaneous Application number E002/2025 between the parties filed a memorandum of appeal dated the 26th of March 2025 seeking the following orders:-
2. The Ruling and Order of Honourable Lucy Ambasi, delivered at Nairobi on 17th March, 2025 be set aside.
3. This Honourable Court finds and holds that the Magistrate's Court lacks jurisdiction to hear and determine the matter in the circumstances.
4. The costs of this appeal and the proceedings leading to this appeal be borne by the Respondent.
5. In response to the Memorandum of Appeal, the Respondent filed a Reply dated 18th June 2025 where he argued that the Magistrate's Court is vested with jurisdiction to hear employment disputes by legislation subject to the value of the subject matter. The value of the award by the Director of Occupational Safety and Health fell within the pecuniary jurisdiction of the trial court. The Respondent also stated that the Appellant had committed an offence under the [Work Injury Benefits Act](#) by failing to settle the award issued by the Director, and jurisdiction to deal with such offences is conferred on the Magistrate's Court pursuant to Legal Notice No. 6024 of 22nd June 2018. Further,



the Respondent affirmed that the trial Magistrate carefully considered the legal arguments made by both parties before reaching her decision; that the employment and labour relations court having appellate jurisdiction over this matter should not consider factual matters; that the Appellant should have filed a judicial review case to quash the decision of the Director rather than approaching the court by way of appeal; under Section 52 (2) of the *Work Injury Benefits Act*, the employment and labour relations court should entertain appeals from decisions of the Director but not of the Magistrate's Court; the Appellant failed to appeal the decision of the Director within 90 days as provided under Section of the *Work Injury Benefits Act* and so the employment and labour relations court lacks jurisdiction to determine the present appeal; and that the present appeal was filed out of time. Finally, the Respondent stated that the present appeal is a delaying tactic intended to keep him from enjoying the fruits of the award.

Grounds Of The Appeal

6. That the Honourable Trial Magistrate erred and misdirected herself in finding that the Appellant's preliminary objection of jurisdiction is unmerited.
7. That the Honourable Trial Magistrate misdirected herself in finding that the Court was seized with jurisdiction to enforce the Director of Safety and Health's award.
8. That the Honourable Trial Magistrate erred in failing to consider the legal arguments and judicial authorities presented by the Appellant in support of the preliminary objection.
9. That the Honourable Trial Magistrate erred in law in finding for the Respondent. This finding occasioned grave injustice to the Appellant.
10. That the Honourable Trial Magistrate erred in law and in fact in disregarding vital legal and issues while making her ruling on the preliminary objection.
11. That the Honourable Trial Magistrate erred in law and in fact in failing to consider and apply the law appropriately.
12. That the Honourable Trial Magistrate erred in law and in fact in failing to appreciate that in view of the nature of the case, it was unjust to adopt the Director of Safety and Health's award when the Respondent was employed by a company and not the Appellant.
13. That the Honourable Trial Magistrate erred in law and in fact by dismissing the Appellant's preliminary objection hence arriving at her ruling contrary to law.
14. That the Honourable Trial Magistrate's ruling cannot stand in view of the numerous judicial pronouncements stipulating in no uncertain terms that a magistrate's court lacks jurisdiction to issue enforcement orders in respect of an award by the Directorate of Occupational Safety and Health.
15. That the Honourable Trial Magistrate's ruling cannot stand in view of the clear pronouncement by the Court of Appeal in Owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd [1989] eKLR.
16. That the Honourable Trial Magistrate's conclusions have no basis in law and amount to denying justice to the Appellant.

Background To The Appeal

17. The Respondent filed a miscellaneous application against the Appellant vide a Notice of Motion dated the 27th of January 2025 seeking the following orders:-



Spent

18. The court adopts the assessment of the Director of Occupational Safety and Health Services dated 2nd October 2024, as an order of the court.
19. A decree be issued in accordance with the assessment of the Director of Occupational Safety and Health Services for the sum of Kenya Shillings Two Hundred and Ninety Nine Thousand, Five Hundred and Twenty (Kshs. 299,520/-).
Costs of the application be paid by the Respondent.
(pages 13-14 and 25-28 of Appellant's undated ROA).
20. The Respondent filed his supporting affidavit sworn on 27th January 2025, and list of documents of even date alongside the notice of motion (see pages 15-18 and 29-32 of ROA).
21. The application was opposed by the Appellant who entered appearance and filed a notice of preliminary objection dated 3rd February 2025 challenging the jurisdiction of the court to entertain the matter (page 35 of ROA).
22. The court issued directions that the preliminary objection and application be disposed of by way of written submissions. The parties complied (pages 36-45 of ROA)
23. The Trial Magistrate Court delivered its ruling on the 17th of March 2025, dismissing the Appellant's preliminary objection and allowing the Notice of Motion dated 27th January 2025 (ruling at pages 48-51 of ROA).

Determination

24. The appeal was canvassed by way of written submissions. Both parties filed.
25. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:-
“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
26. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 *De Lestang V.P (As He Then Was) Observed At Page 94*:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”



Issues for determination

27. In his submissions dated the 27th of June 2025, the Appellant identified the following issues for determination:

Whether the trial court has jurisdiction to adopt the assessment of the Director of Occupational Safety and Health Services as an order of the court.

Whether the appeal is merited.

28. On his part, the Respondent submitted generally on the grounds of appeal in his submissions dated the 30th of June 2025.
29. The court finds that the appeal is based on the ruling of the trial court dismissing the the Notice of preliminary objection by the appellant to the extent the court had no jurisdiction thus the issue for determination in the appeal is –

Whether the trial court has jurisdiction to adopt the assessment of the Director of Occupational Safety and Health Services as an order of the court.

30. The Applicant herein filed an Application dated 27th January, 2025, seeking for the following orders:-
- i. That the application be certified as urgent service be dispensed with and heard ex-parte.
 - ii. The court adopts the assessment of Director of Occupational Health and Safety services dated 2nd October, 2024 as an order of the court.
31. A decree be issued in accordance with the assessment of Director of Occupational Health and Safety services for the sum of Kenya Shillings Two Hundred and Ninety Nine Thousand Five Hundred and Twenty (Kes 299,520).
Costs of the Application be paid for by the Respondent.
32. In response the appellant filed Notice of Preliminary Objection dated 3rd February, 2025 on the Grounds THAT;
33. That this jurisdiction to hear and determine matters pertaining to enforcement of decision pertaining Director of Occupational Health and Safety services.
34. That the respondent shall be prejudiced if compelled to submit to the jurisdiction of the court.
35. The trial court considered the objection and application jointly in its ruling dated 17th March 2025 and held it had jurisdiction.

Decision

36. The application before the trial court was for enforcement of the decision of DOSH. The application was by way of notice of motion dated 27th January 2025. The appellant entered appearance through the law firm of Hassan N Lakicha & Company advocates and in response filed a notice of preliminary objection dated 3rd February 2025 and challenged only the jurisdiction of the court to adopt the DOSH award of compensation. The appellant is thus estopped from raising any other issue outside the preliminary objection as the same was not canvassed before the trial court. Further the court upholds



definition of preliminary objection in the landmark decision IN Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd [1969] E.A.696 where the court defined a preliminary objection as; -

“a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion” (emphasis given). By raising a preliminary objection only in response to the application the appellant waived right to object as the proper party, thus employer. it was assumed all facts of the award had been ascertained as correct and only issue was the jurisdiction of the court to enforce the award.

37. The appellant in support of his position that the trial court erred in finding it had jurisdiction to adopt the DOSH award relied on the decision of the court. The Employment and Labour Relations Court in *Haji v CG Retread (MSA) Limited* (Miscellaneous Application E006 of 2024) [2024] KEELRC 784 (KLR) held: "22. The respondent has relied on the judgment in *Attorney General v Law Society of Kenya & Another* [2017] eKLR. This was the decision by the Court of Appeal. The Supreme Court in the judgment delivered on December 2019 in Supreme Court Petition No. 4 of 2019 *Law Society of Kenya v Attorney General & Another* emphasized the applicable procedures where a party is aggrieved by the decision of the director. One must appeal to this court. Where the issue is for enforcement of the director's award of compensation, WIBA currently has no enforcement mechanism and the procedure is to invoke the inherent powers of the court under Article 162(2) of *the Constitution*." 24. In a recent ruling delivered on 22nd October, 2024, the Employment and Labour Relations Court in *Omollo v Securex Agencies (K) limited* (Miscellaneous Application E097 of 2024) [2024] KEELRC 2540 (KLR) stated thus: 8. This Court hasn't lost sight of the fact that the Employment and Labour Relations Court Procedure Rules, 2024, came into effect on 18th August 2024. A purposive reading of Rule 59, will reveal that this Court has jurisdiction to entertain an application such as the instant application and render itself on the same. 25. Lastly, in *Wambui v Kheis Industries Limited* (Employment and Labour Relations Appeal E056 of 2024) [2025] KEELRC 113 (KLR) a decision delivered this year, the court held thus: 33 "This court therefore while conceding the trial Magistrate was right to refer the applicant to the Employment and Labour Relations Court for adoption of his award nevertheless ... "The court has Jurisdiction under article 162(2) of *the Constitution* and Section 12 of *Employment and Labour Relations Court Act*. The trial magistrate however has not been extended Jurisdiction to award DOSH orders under the Chief Justice's Gazette Notice No. 6024 of 2018." II. Whether the Appeal is merited 26. Your Ladyship we submit that the Appeal is merited and the Appellant prays for the prayers sought. 27. Whereas the trial magistrate relied on the case of *Joash Shisia Cheto Versus Thepot Patrick Charles* [2022] eKLR, to confer jurisdiction to itself, the same judgment is express that majority of judicial decisions favour the Employment and Labour Relations Court to be having jurisdiction. Paragraph 16 of the trial Magistrate's Ruling quotes the wordings of the judge in the case. One would then wonder why the magistrate proceeded to take the minority position. 28. The magistrate also relied on Gazette notice No. 6024 of 10th June 2018 to confer upon itself jurisdiction in the matter. However, in *Wambui v Kheis Industries Limited* (supra) the court was express that the trial magistrate however has not been extended Jurisdiction to award DOSH orders under the Chief Justice's Gazette Notice No. 6024 of 2018.



38. The trial court relied on the decision of the court (Manani J) in *Joash Shisia Cheto Versus Thepot Patrick Charles* [2022] e KLR where the Learned Judge found that the court had jurisdiction to adopt the awards under its inherent jurisdiction and in only one case he found the court could not. The Judge found that there were decisions to effect that the magistrates could adopt the awards where the pecuniary jurisdiction allowed. In this case the monthly salary of the respondent was Kshs. 31,200 (paragraph 8 of the ruling (page 49 of the ROA). The magistrate applying the decision of the court held she had jurisdiction and dismissed the preliminary objection.
39. The Court of Appeal has since determined appeal against decision in J in *Joash Shisia Cheto Versus Thepot Patrick Charles* [2022] e KLR under *Charles v Cheto* (Civil Appeal E046 of 2022) [2025] KECA 784 (KLR) (9 May 2025) (Judgment). The court established the forgoing as relates jurisprudence in adopting of awards by DOSH by reproducing the decision of the court at at paragraph 52- The general position established by a majority of these decisions is as follows: -
- a. The law does not provide for mechanisms of enforcing the Director’s award against a reluctant employer.
 - b. In the face of this lacuna, the holder of the award can move the court to seek for enforcement of the award. A majority of the decisions favour the view that the ELRC can be moved for this purpose pursuant to its jurisdiction under article 162 of *the Constitution* as read with section 12 of the ELRC Act. Only one decision holds the view that the ELRC cannot be moved for this purpose. A few share the view that the Magistrate’s court may be moved where pecuniary jurisdiction allows.
 - c. The proceedings for enforcement may be in summary form by way of miscellaneous causes or in the form of ordinary causes but confined to matters of enforcement only.
 - d. Unless by way of appeal under section 52 of the WIBA, it is not open to the court to consider the merits of the Director’s award or indeed go on a fact finding mission. This jurisdiction is the preserve of the Director” The court then held- “54
40. Applying the principles in paragraph 51 to the case before me, it then becomes clear that the factual contestations before me in so far as they were not raised through an appeal under section 52 of the WIBA or Judicial Review, are not matters I should delve into. I will therefore do the only thing I ought to do in the cause: adopt the Director’s award” The court on other issues raised by the appellant of not being employer among others held-“In this case, the learned Judge correctly observed that sections 51 and 52 of the WIBA are silent on the avenues for redress for a party who becomes aware of the proceedings before the Director after the time for lodging an objection and/or filing an appeal against the Director’s decision has already lapsed. We agree with the learned Judge that the solution in such circumstances would be to lodge a Motion for Judicial Review to quash the award before adoption by the court, and on first seeking to have the adoption proceedings stayed. Notably, the appellant sat back and took no steps to that end.
50. The remedy identified by the learned Judge appears to be the only viable course of action in the circumstances. The appellant, who took no steps to seek judicial review of the Director’s award, was misdirected in seeking to present a case for what he mis-perceived as breach of his constitutional right to a fair hearing, a claim that came too late in the day. Likewise, any attempt to seek leave of the ELRC to file objection proceedings out of time, and to stay adoption proceedings pending the intended objection, would also amount to a futile attempt to invoke the court’s jurisdiction, which only arises on an appeal against a Director’s written reply to an objection. In the present case, the respondent’s



suit was essentially in the nature of adoption proceedings, which stood to succeed in the absence of any objection by the appellant to the Director's award.

51. The appellant's disaffection with the Director's decision on the ground that he was not the respondent's employer, and therefore not liable; that he had not been notified of the proceedings before the Director; and that, therefore, his right to a fair hearing were violated, were misplaced. Such grounds can only find relevance in an appeal contemplated in section 52(2) of the WIBA by way of judicial review of the Director's decision.
52. Even though the appellant further alleged that he was notified by the respondent's advocates of the Director's award dated 5th September 2019 after the time for appealing the same had lapsed, his remedy still lay in orders staying the respondent's suit, and in filing a judicial review motion to quash the Director's award. He failed to do so despite his advocates having received a copy thereof via email from the respondent's counsel on 26th January 2021; and despite the respondent proceeding to seek adoption of the Director's award in the suit filed on 18th March 2021. In view of the foregoing, we find no fault in the learned Judge's decision to adopt and pave way for enforcement of the award." The court of appeal then observed- "As the learned Judge correctly observed, there is a lacuna in the law with regard to the procedure for enforcement of the Director's decision in that there is no express provision of the WIBA stipulating the procedure for enforcement. Be that as it may, Employment and Labour Relations Courts have aptly held that enforcement of the Director's decisions properly lies with the ELRC as the court with the jurisdiction to deal with employment and labour relations claims and for connected purposes." Conversely, appellant relied on the decision *Wambui v Kheis Industries Limited* [2025] KEELRC 113 (KLR)(24th January 2025) where the court held, "This court therefore while conceding the trial Magistrate was right to refer the applicant to the Employment and Labour Relations Court for adoption of his award nevertheless finds it is provident for this court to adopt the award dated 6th December 2023 of Kshs.584,100/= by the Directorate of Occupational Safety and Health in favour of the appellant as an order of this court. The court has Jurisdiction under article 162(2) of *the Constitution* and Section 12 of *Employment and Labour Relations Court Act*. The trial magistrate however has not been extended Jurisdiction to award DOSH orders under the Chief Justice's Gazette Notice No. 6024 of 2018." This is a persuasive and not binding decision.
53. The court was of the considered opinion that the Court of Appeal in *Cheta v Charles* did not overrule the position that where pecuniary jurisdiction allows the Magistrate may enforce the award as established general principle under paragraph 52 of the appealed decision by Manani J. The jurisdiction of the appellate court is to be exercised cautiously as guided in *Mbogo V Shah* [1968] EA Page 93 De Lestang V.P (As He Then Was) Observed At Page 94:

I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion." In the instant case there was a lacuna in the law on the enforcement of decisions of the Director under WIBA. The Learned Magistrate applied the decision of the court upheld by the Court of Appeal. The matter was within the pecuniary jurisdiction of the court. The magistrate was exercising her jurisdiction under the jurisdiction of the court as Gazetted. For the foregoing reasons I was not satisfied that the decision is clearly wrong, because the learned magistrate misdirected herself or because she has acted on extraneous matters or because she has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (*Mbogo v Shah*).



54. In the upshot, the Ruling and Order of the Hon. L. Ambasi (CM) delivered on 17th March, 2025 in MCELRC Miscellaneous Application number E002/2025 is upheld with costs of the appeal awarded to the respondent.

It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Wanjala

Respondent: Ms. Chenger h/b Biyongo

