



**Komen v Vegpro (K) Limited & another (Civil Appeal 4 of 2018)
[2025] KEHC 13629 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL 4 OF 2018
RB NGETICH, J
OCTOBER 2, 2025**

BETWEEN

ALEXANDER MZEE KOMEN APPELLANT

AND

VEGPRO (K) LIMITED 1ST RESPONDENT

JOSEPH KAGUMA KAMAU 2ND RESPONDENT

RULING

1. This is a ruling on preliminary objection dated 24th September, 2024 by the 1st Respondent on ground that this court lacks jurisdiction to entertain the application and appeal herein on ground that it emanated from a work injury claim and pursuant to Section 52 of the Work Injury and Benefits Act. The Appellant herein instituted a suit seeking compensation from the Respondents for the injuries he sustained as a result of a road traffic accident that occurred on 21st September, 2015 in the course of employment. Paragraph 7 and 8 of plaint dated 23rd September, 2016, the Appellant pleaded for both particulars of negligence and breach of contract against the 1st Respondent, its servant, agent and or employee.
2. The matter was heard and concluded and on 10th April, 2018 the trial court delivered its judgment. The Appellant being aggrieved by the said judgment appealed to this Honourable court.
3. On 18th April, 2023 this court dismissed this appeal for want of prosecution which prompted the Appellant/Applicant to file an application dated 20th May, 2024, seeking to set aside orders of 18th April, 2023 dismissing the Appellant's appeal herein for want of prosecution and reinstate the same and that Costs of this application be provided for.
4. The application is based on the grounds that this this appeal was dismissed for want of prosecution on the 18th April, 2023 and the Honorable Court has wide and unfettered discretion to set aside orders



when justice so demands, that the Applicant is bound to suffer irreparable loss unless the order is set aside.

5. They aver that the Appellant/Applicant herein instructed the firm of Gekonga and Company Advocates to file a suit against the Respondents herein seeking compensation for the injuries he sustained as a result of a road traffic accident that occurred on 21st September, 2015 which was duly filed and the matter proceeded to full hearing and the Honourable court delivered its judgment on 10th April, 2018 and upon advising the Applicant on the terms of the judgment, he was aggrieved by it and instructed the advocates to appeal against the judgment and this appeal was filed.
6. when the matter came up for directions on 21st January, 2020, the court directed that it be given time to look at the ruling of the superior court on handling of WIBA matters.
7. That the WIBA matters were suspended-pending the interpretation of the superior court's ruling and thus there was confusion on when the matters would proceed or otherwise and it is upon the Chief Justice issuing directions through a legal notice on how to proceed and dispose WIBA matters that they started following up on the matter that they were informed at the registry that the appeal had been dismissed for want of prosecution.
8. The 1st Respondent's preliminary objection is brought under the provisions of Section 52(2) of the Work Injury and Benefits Act, Section 12(1) (a) of the [Employment and Labour Relations Court Act](#) on the following points of law:-
 - i. That the Notice of Motion Application dated 20th May, 2024 is mala fide, is misconceived, incompetent, vexatious, frivolous and an abuse of the process of the Honorable Court, brought in bad faith and bad in law as the same if filed contrary to Section 52 (2) of the Work Injury and Benefits Act (WIBA) which provides that appeals on work injury claims shall lie with the Industrial Court (Employment and Labour Relations Court).
 - ii. That the Applicant's appeal cannot be reinstated pursuant to Section 52 (2) of the WIBA as this Honourable court lacks the jurisdiction to entertain the appeal, the proper forum being the Employment and Labour Relations Court.
 - iii. That in due regard to the foregoing, the Applicant's application is incompetent, bad in law, defective and an abuse of the Court process as this Honourable Court is not seized of the Jurisdiction to hear and determine the Application or the Appeal in respect of the said issues raised in this Claim.
9. Therefore, for the aforementioned reasons the Applicant's application dated 20th May, 2024 should be dismissed with costs to the 1st Respondent.

Respondent's Submissions

10. The 1st Respondent anchors their submissions on the following issues for the Court's determination;
 - a. Whether there is a valid preliminary objection.
 - b. Whether this Court lacks jurisdiction to entertain the Applicant's application and the appeal filed herein.
 - c. Whether the Present Application is an abuse of the process of the court.
11. On whether there is a valid preliminary Objection, they submit that the test or the soundness of a preliminary objection was put forth in the case of Mukhisa Biscuits Manufacturing Company Limited



- Vs- west end distribution Lid (1969) EA 696 cited with approval in the case of Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others (2015).
12. That the matter before court qualifies as a Preliminary Objection as it raises points of law i.e. the issue of jurisdiction which can be determined without making inquiry and further production of evidence. The 1st Respondent places reliance in the case of John Mugo Gachuki-Vs-New Nyamakima Co Ltd (2011) eKLR Civil Case No. 456.
 13. It is their humble submission that there is a sound valid preliminary objection before the Honourable Court as the issues raised in the 1st Respondent's Preliminary Objection i.e. the issue of the jurisdiction of this Honourable Court need no further inquiry by way of adducing evidence.
 14. On whether this Court lacks jurisdiction to entertain the Applicant's application and the appeal filed herein, they submit that it is settled law that jurisdiction is everything and without it, the court has no power to make one more step, and must down its tools. The Black's Law Dictionary, 11th Edition, defines Jurisdiction as "a court's power to decide a case or issue a decree."
 15. That the question of jurisdiction and its relevance was well established in the locus classicus case, Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR. The 1st Respondent further relies in the case of Geoffrey Macharia Muraya v Nelson Nzioki Kimeu & another [2022]JeKLR and further, in Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others, Civil Application & Another V Kenya Commercial Bank Limited & 2 Others, [2012] eKLR.
 16. They submit that guided by the above cited decisions, it is important at this juncture to consider the jurisdictional question, namely: Where does the jurisdiction of the court flow from? They submit that the jurisdiction of the court flows from *the Constitution* and Acts of Parliament.
 17. That in this instant case, the jurisdiction in respect to work injury claims is derived from the *Work Injury Benefits Act* (hereinafter referred to as "WIBA") at Section 16 of the Act.
 18. That Section 52 (2) on the other hand provides for appeals from the decision of the Director that; "An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision."
 19. That in view of the above provisions of WIBA, they submit that jurisdiction on work injury claims lie with the Director of Occupational Safety and Health in the first instance whereas hereinafter referred to as "ELRC" is clothed with appellate jurisdiction over the decisions of the Director.
 20. They further submit that the ELRC was established as a specialized court pursuant to Article 162(2) of *the Constitution* and Article 165 (5) (b) of *the Constitution*, prohibits the High Court in mandatory terms from exercising jurisdiction over matters reserved for courts contemplated under Article 16(2). They submit that the High Court lacks the jurisdiction to determine WIBA matters since work injury matters arise out of an employment relationship and are therefore a reserve of the ELRC and they thus submit that this Honourable Court lacks the jurisdiction to determine the appeal filed before it.
 21. That the jurisdiction granted to the ELRC by Section 52(2) of WIBA is only an appellate jurisdiction on claims arising from the Dosh and this jurisdiction can only be exercised by the ELRC and not the High Court. They are guided by a plethora of decisions as discussed hereunder. They rely in Mass Investments Limited v Stephen Masila Kyalo [2018] eKLR.
 22. That it is not in doubt that the subject matter of the application dated 20th May, 2024 and the appeal sought to be reinstated by the said application, is based on a work place injury that occurred at the 1st Respondent's place of work, as such the matter arises from a contract of employment. They



submit that *the Constitution* of Kenya establishes the ELRC and clothes it with jurisdiction in respect to employment matters. That WIBA further clothes the ELRC with the appellate jurisdiction to determine appeals on work injury claims as established hereinabove. That accordingly, the proper forum to deal with the Applicant's application and appeal is the ELRC.

23. That it was intended that work injury claims are determined through a Director of Work Injury Benefits, responsible for management of the Act (Section 53 of the *Work Injury Benefits Act*). Section 2 refers to 'Director of Occupational Safety and Health Services. They place reliance in *Chandaria Industries Limited v John Kimaguti Masisa (2021) eKLR*, In the case of *West Kenya Sugar Co. Limited v Matayo Ingoshe & others (2021) eKLR*, in the case of *Perfect Scan Limited v Harrison Kahindi Said (2021) eKLR* formerly known as High Court Civil Appeal No.160 of 2016 at Mombasa and in *Spinners & Spinners Limited v Spinners & Spinners Limited [2017] eKLR*.
24. The 1st Respondent further places reliance in the Court of Appeal case in *Elizabeth Njeri Nderi and Sarah Wangithi Mwangi (suing as legal representatives of Peter Nderi Kinyua (Deceased) V Highway Carriers Ltd.*
25. They submit that guided by the above cited decisions; it is their submission that this Honourable Court derives its jurisdiction from article 165 of *the constitution* which expressly provides that it shall not have jurisdiction in respect of matters falling within the jurisdiction of the specialized courts established under Article 162 (2) of *the Constitution*.
26. They reiterate that the claim in question is in the nature of a work injury, and the court competent to handle the Applicant's application dated 20th May, 2024 and the appeal sought to be reinstated is the ELRC and not the High Court. They urge that this Court is guided by the above decisions in arriving at a finding that the 1st Respondent's Preliminary Objection dated 24th September, 2024 is merited as the Applicant's application and the appeal are lodged in the wrong forum.
27. It is their submission that a suit filed without jurisdiction is a nullity and where a court holds that it lacks jurisdiction, it must down its tools as without jurisdiction a court has no powers to make one more step. They urge that this Honourable Court finds that the Applicant's application and appeal filed in a court without jurisdiction are a nullity and the same should be dismissed. They are guided by the Court of Appeal decision in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR*.
28. That without prejudice to the foregoing it is their further submission that the Applicant's application and appeal filed herein are fatally defective as the appellate jurisdiction granted to the ELRC under Section 52 of WIBA relate only to the decision of the Dosh. That Section 52 (2) expressly provides that only the decision made by the Director and objected to by a party may be appealed against. To this end, it is our submission that the appeal sought to be reinstated arises from the decision of the magistrate's court and not the Director and cannot be entertained by the Court in terms of Section 52 of Wiba.
29. They submit that the Applicant's Claim was filed after the commencement of WIBA therefore the applicable law in respect to his Claim was WIBA. That the Applicant failed to file his Claim in terms of the provisions of WIBA as provided under Section 16 of WIBA therefore any action arising from the said claim including the application and appeal herein are a nullity.
30. They submit that a court cannot arrogate jurisdiction to itself exceeding that which is conferred upon it by law.



31. They further submit that where there is a clear procedure outlined in statute for seeking redress of a grievance, such procedure must be strictly followed. In that regard, they rely on the decision in Saidi Mohamed v Diamond Industries Ltd [2018] eKLR.
32. It is their submission that Applicant's application and appeal arise from a suit filed in a court without jurisdiction and no lawful powers can flow from the same. As such they submit that the application dated 20th May, 2024 is incompetent, bad in law and defective as this Honourable Court is not seized of the jurisdiction to hear and determine the application and the appeal sought to be reinstated therein pursuant to the provisions of Section 52 (2) of WIBA.
33. On Whether the Present Application is an abuse of the process of the court, they submit that from the above submissions, the Applicant's application dated 20th May, 2024 as drawn and filed is frivolous, vexatious, incompetent, misconceived, fatally defective, and a blatant abuse of the court process, therefore being unsustainable, bad and a nullity in law.
34. They further submit that the Application is merely scandalous, frivolous and vexatious. They rely in decision of the court in County Council of Nairobi Vs Ezekiel Kibet Rutto [2013] eKLR cited in Vivian Muia Vs Mzoori Ltd [2017] eKLR on what a frivolous application is. They further rely In Twin Buffalo Safaris Limited V's Business Partners International Limited [2015] eKLR.
35. It is their humble submission that the Applicant's application dated 20th May, 2024 is frivolous and an abuse of the court process and ought to be struck out as this court lacks the jurisdiction to hear and determine the application and the appeal sought to be reinstated. That the application lacks legal basis and/or foundation and is only meant to vex the 1st Respondent and waste precious judicial time.
36. That without prejudice to the foregoing, it is worth to note that the orders that the Applicant is seeking to set aside were issued on 18th April, 2023 yet the application was filed in May 2024 over a year later. They submit that the maxim justice aids the vigilant and not the Applicant has exhibited a pattern of indolence, his appeal was dismissed for failure to prosecute the same and it took him over one year to file this application seeking reinstatement of the said appeal. That it is trite law that an application such as the application herein should be filed without unreasonable delay. That no explanation has been provided for the delay in filing the application and it is their submission that the application is an afterthought, the delay in filing the same is inordinate, unreasonable and inexcusable and should not be entertained by this Honourable Court.
37. That for the reasons set out in these submissions, the 1st Respondent submits that the Applicant's application dated 20th May, 2024 is fatally defective for lack of jurisdiction by the Honourable Court and the same should be dismissed with costs to the Respondent.

Appellant's Submissions

38. The Appellant submits that the employment relationship between the Appellant and the 1st Respondent is not denied and the only bone of contention is that the suit giving rise to this appeal is purely a work injury claim and the claim giving rise to this appeal emanates from a hybrid claim where both negligence and breach of contract were pleaded and further the subject accident herein was a road accident in the course of employment.
39. The Appellant herein submits that in cases where the cause of action arises from a road traffic accident in the course of employment the courts treat the same as a road traffic accident as opposed to a work injury claim.



40. That some courts have gone ahead and made determination in such hybrid suits and have treated the same as road traffic accident as opposed to work injury claims.
41. They rely on the case of Simiyu Daniel V Benson Mull Makau (2020) eKLR where the cause of action arose from a road traffic accident in the course of employment between the Appellant and the Respondent and the High Court went ahead and determined the matter not as a work injury claim but as a road accident claim based on negligence.
42. That further in the case of Petronila Tsisika Anyanda (Suing as the administrator and personal representative of the estate of the late Philip Luvale Mwanje V Butali Sugar Company Limited, the appeal arose from the decision of the trial court in Kakamega CMCC NO. 400 of 2021 in which the trial court dismissed the suit by the Appellant against the respondent in respect of a road traffic accident that arose in the course of employment and the appellate court determined the matter as a road traffic accident as opposed to a work injury claim.
43. It is their submission that courts have dealt with road accident claims in the course of employment on a case to case basis and it is their submission where a road traffic accident occurs in the course of employment same has been decided as a road traffic accident as opposed to a work injury and that is a lacuna that the law is yet to give directions on.
44. They submit that this Honourable court deals with this appeal as one emanating from a hybrid claim where both negligence and breach of contract were pleaded.
45. That It is with the above discourse that they humbly submit that this Honourable court has the jurisdiction to determine the application and appeal before it.
46. That if this Honourable court in the alternative, will deem it fit that the claim from which this appeal arises emanated from a work injury claim and as such the appeal is not properly before it, they beseech this Honourable court to be guided by the Chief Justice practice directions as per the legal notice no 5476 of 28th April, 2023.
47. That the Chief Justice gave directions on how to dispose Wiba matters that are already in courts in the spirit of legitimate expectation of the litigant that matters will be concluded in the forums that they were filed in.
48. That clearly from the submissions above, this Honourable court has the jurisdiction to hear the Appellant's Application and appeal. There is a legitimate expectation that the matter having been filed in this court the it will be heard and determined here.
49. The Appellant submits that this Honourable court has the jurisdiction to entertain the application and appeal before it as it emanates from a hybrid claim where both negligence and breach of contract were pleaded thus as held by most courts, the same are determined as road traffic accidents as opposed to a work injury claim.
50. The Appellant prays that 1st Respondent's preliminary objection be dismissed and the court do proceed to hear and determine the application and appeal before it.

Analysis and Determination

51. I have carefully considered the Notice of Preliminary Objection dated 24th September, 2024, the rival submissions by both parties, and the record before this Court. The central issue for determination is whether this Court has jurisdiction to entertain the application dated 20th May, 2024 and the appeal arising from the judgment of the trial court delivered on 10th April, 2018.



52. The Respondent's objection is anchored on Section 52(2) of the *Work Injury Benefits Act* (WIBA), Section 12 of the *Employment and Labour Relations Court Act*, and Article 162(2)(a) and Article 165(5)(b) of *the Constitution*, which reserve employment and labour disputes for the Employment and Labour Relations Court (ELRC). It is argued that since the claim arose from injuries sustained by the Appellant in the course of his employment, it constitutes a work injury claim falling squarely within the jurisdiction of the ELRC, and not the High Court.
53. On the other hand, the Appellant contends that the suit giving rise to the appeal was a hybrid claim, combining allegations of negligence and breach of contract. The Appellant further argues that since the accident was a road traffic accident occurring in the course of employment, the same has been treated by some courts as a road traffic negligence claim rather than a pure work injury matter. Reliance was placed on *Simiyu Daniel v Benson Muli Makau* [2020] eKLR and *Petronila Tsisika Anyanda v Butali Sugar Co. Ltd* [2023] eKLR, where appellate courts determined such claims as road traffic negligence suits.
54. The law on jurisdiction is settled. Jurisdiction flows from *the Constitution* or statute. Parties cannot by consent confer jurisdiction where none exists. The principle was firmly established in *Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others* [2012] eKLR and *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1.
55. Article 165(5)(b) of *the Constitution* expressly provides that the High Court shall not have jurisdiction in respect of matters reserved for the courts established under Article 162(2). Article 162(2)(a) establishes the ELRC to hear and determine disputes relating to employment and labour relations. Section 12 of the ELRC Act and Section 52(2) of WIBA further clothe that court with jurisdiction over appeals in respect of decisions arising from work injury claims.
56. The Court of Appeal in *Daniel N. Mugendi v Kenyatta University & 3 Others* [2013] eKLR underscored that once *the Constitution* and statute have demarcated the jurisdictional boundaries between the High Court and specialized courts, those boundaries must be respected. Similarly, in *Elizabeth Njeri Nderi & Another v Highway Carriers Ltd* [2021] eKLR, it was reiterated that work injury claims are to be processed under WIBA, with appellate recourse lying to the ELRC.
57. The Appellant's argument that this is a hybrid claim pleaded both in negligence and breach of contract cannot by itself confer jurisdiction on this Court. The pleadings disclose that the injuries arose in the course of employment, and the cause of action was intimately connected with the employment relationship. Whether the accident occurred in the course of road transport duties or within the workplace does not alter the fact that the claim arises from a work injury in the course of employment.
58. I am also mindful of the jurisprudence that where litigants had filed suits in court before the full operationalization of WIBA, courts have in certain circumstances invoked the principle of legitimate expectation and the Chief Justice's practice directions to conclude such cases. However, in the present matter, the appeal being sought to be reinstated is itself rooted in a work injury claim instituted in 2016, long after WIBA had come into effect. The applicable law is therefore WIBA, which ousts this Court's jurisdiction.
59. Further, the objection raised is a pure point of law within the meaning of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. The issue of jurisdiction can be determined on the face of the pleadings without recourse to evidence.
60. I am persuaded that the claim falls within the exclusive jurisdiction of the Employment and Labour Relations Court, and that this Court is barred under Article 165(5)(b) from entertaining it. The proper forum for ventilation of the Appellant's grievances lies in the ELRC.



Disposition

61. In the result, I find merit in the 1st Respondent’s Preliminary Objection dated 24th September, 2024. This Court lacks jurisdiction to entertain the application dated 20th May, 2024 and the appeal arising herein. The appeal is accordingly struck out. The Appellant is at liberty to move the Employment and Labour Relations Court. Costs shall be in the cause.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 2ND DAY OF OCTOBER, 2025.

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RACHEL NGETICH

JUDGE

In the presence of:

Ms. Otieno holding brief for Achando for 1st Respondent.

No appearance for Appellant.

CA, Elvis.

