

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 375 OF 2023**

**FORMERLY KIAMBU CIVIL APPEAL NO. E098 OF 2021**

**SWIVEL MARKETING LIMITED** ..... **APPELLANT**  
**VERSUS**  
**JANE WANJUGU WANGOMBE** ..... **RESPONDENT**

*(Being an Appeal from the Ruling and Orders of the Chief Magistrate's Court at Gatundu delivered by Hon. Letizia Wachira, Chief Magistrate on 24 May 2021 in Gatundu CMCC No. 245 of 2019)*

**JUDGEMENT**

1. This appeal arises from a dispute that originated from a road traffic accident involving the Respondent, who was at all material times an employee of the Appellant. It is common ground that at the time of the accident, the Respondent was being conveyed to her place of work. The vehicle in question, registration number KCK 403X, was registered in the name of the Appellant and was provided by the employer for the express purpose of conveying staff.
2. The Respondent instituted the suit against the Appellant, framing her claim in negligence and seeking general and special damages for personal injuries sustained. The Plaintiff averred that the accident was caused by the negligence of the Appellant's driver or agent.

3. The Appellant entered appearance and filed a Statement of Defence. Crucially, as noted by the trial Magistrate in the impugned Ruling, the Appellant's Defence, at paragraph 13, contained an admission of the court's jurisdiction. This admission would later form the bedrock of the trial court's refusal to entertain the jurisdictional objection. The matter proceeded through the pre-trial directions under Order 11 of the Civil Procedure Rules, during which the issue of jurisdiction was not canvassed by either party.
4. On 7 October 2020, the Advocates then on record for the parties recorded a consent judgment on liability. The terms of this consent were that liability for the accident was apportioned at 80% against the Defendant (Appellant) and 20% against the Plaintiff (Respondent). Following this compromise on liability, the court proceeded to enter judgment on 18 January 2021, adopting the consent as an order of the court and presumably assessing quantum based on the agreed liability ratio.
5. Subsequent to the entry of judgment, the Appellant, seemingly realised the nature of the outcome, engaged new counsel and filed an application dated 8 February 2021 seeking to set aside the consent judgement and the decree resulting therefrom. The grounds of this Application were weighty. The Appellant averred that it had never instructed previous Advocate to enter into the consent. Instead, the Advocate had been instructed solely by the Appellant's insurance company, which had taken over the conduct of the defence under the subrogation clause of the insurance policy. The Appellant claimed it was a stranger to the consent and had not been consulted or informed of the proceedings.
6. The Appellant argued that the claim was, in fact and in law, a work injury claim governed by Work Injury Benefits Act (WIBA). Consequently, the learned Magistrate's Court lacked the requisite jurisdiction to hear and determine, rendering the proceedings, including the consent, a nullity.

7. In the Ruling delivered on 24 May 2021, the trial court dismissed the Appellant's Application. the court held that since the Appellant had admitted jurisdiction in its Defence and failed to raise the issue during pre-trial, it was estopped from raising it post-judgment. The learned Magistrate characterized the jurisdictional objection as a fishing expedition intended to derail the cause of derail.
8. The trial court invoked the principle that a consent judgement is binding and can only be set aside on limited grounds such as fraud or collusion, which were not, in the court's view, sufficiently demonstrated. The court found that the Advocate on record had the apparent authority to bind the Appellant, and any internal lack of communication between the insurer and the insured did not invalidate the consent *vis-a-vis* the Respondent.
9. Aggrieved by this decision, the Appellant lodged the instant appeal raising the following grounds:
  - (i) That the learned Magistrate erred in law and in fact by holding that consented recorded on 7 October 2020 was properly recorded and thus binding on the parties;
  - (ii) That the learned Magistrate erred in law and in fact by holding that the Appellants former Advocates in the case at the subordinate Court had the authority to enter into a binding consent on behalf of the Appellant;
  - (iii) That the learned Magistrate erred in law and in fact by holding that subordinate Court had the jurisdiction to hear and determine the matter despite the Appellant's submission that the matter was wrongly before the Court as it was a WIBA matter;
  - (iv) That the learned Magistrate erred in law and fact by ignoring the glaring evidence submitted by the Appellants against the Respondent's claim and in arriving at a decision which is not supported by or is against the weight of the evidence;

- (v) That the learned Magistrate misapprehended the law by reaching a conclusion that is inconsistent with the binding and persuasive authorities of the superior courts and thereby arriving at a wrong conclusion by disregarding the doctrine of *stare decisis*.
10. The appeal was canvassed by way of written submissions.
  11. The Appellant submitted that the accident occurred while the Respondent was being conveyed to work in an employer-provided vehicle. They rely on section 10(5) of WIBA, which deems such a conveyance to be in the course of employment. Consequently, they argue that Section 16 of the Act bars any civil action for recovery of damages, substituting it with the statutory compensation scheme. They assert that the Director of Occupational Safety and Health Services (DOSHS) has exclusive original jurisdiction.
  12. Citing ***Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR***, the Appellant argues that jurisdiction is a fundamental issue that can be raised at any stage, even on appeal. They contend that the admission of jurisdiction in the Defence was an error of law that cannot confer jurisdiction where the statute has expressly removed it.
  13. The Appellant argues that the consent was entered into by an Advocate instructed by the insurer without the Appellant's express authority. They submit that while the Insurance (Motor-Vehicle Third Party Risks) Act obligates an insurer to satisfy judgments, it does not empower the insurer to compromise suits in a manner that binds the insured without their consent, especially where the forum is incompetent. They rely on ***Bokwe v Mogogosieki Tea Factory KEELRC*** to argue that the court must intervene to prevent injustice where a party has been denied a hearing on the merits.

**Analysis & Determination**

14. Upon review of the record and the submissions, the following issues crystallise for determination:
- (i) Whether the conveyance of the Respondent to her place of work constituted an injury in the course of employment under Section 10(5) of WIBA.
  - (ii) Whether WIBA confers exclusive original jurisdiction upon the Director of Occupational Safety and Health Services, thereby ousting the jurisdiction of the Magistrate's Court;
  - (iii) Whether the Appellant's admission of jurisdiction in the Statement of Defence operates as an estoppel, precluding the challenge to jurisdiction on appeal;
  - (iv) Whether the consent judgment entered on 7 October 2020 is valid and binding, or whether it is liable to be set aside on grounds of mistake, lack of authority, or want of jurisdiction;
  - (v) Whether the trial court's decision contravened the doctrine of *stare decisis* and the weight of evidence

**Nature of Claim**

15. The threshold question is whether the claim before the trial court was a WIBA claim or a standard tortious claim for negligence. The distinction is not merely semantic; it determines the entire adjudicatory pathway of the dispute.
16. The Appellant asserts that the Respondent was injured while traveling in the Appellant's vehicle, registration KCK 403X, which was provided for staff transport. The Respondent has not controverted this fact in the trial court record provided. Section 10(5) of WIBA is explicit and unambiguous:

*For the purposes of this Act, the conveyance of an employee to or from the employee's place of employment for the purpose of the employee's employment by means of a vehicle provided by*

*the employer for the purpose of conveying employees is deemed to be in the course of the employee's employment*

17. This statutory provision operates to bring what might otherwise be a simple road traffic accident within the specialized regime of work injury benefits. By operation of law, the accident occurring in the employer's vehicle during the commute to work is treated as if it occurred on the factory floor or in the office. It converts a potential negligence claim into a statutory compensation claim.
18. Having established that the injury occurred in the course of employment by virtue of Section 10(5), the next step is to examine the jurisdictional consequences. Section 16 of WIBA provides:

*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*
19. Section 23(1) mandates that the Director of Occupational Safety and Health Services shall make such inquiries as are necessary to decide upon any claims or liability in accordance with the Act. Section 52 provides for appeals from the Director's decision to the Employment and Labor Relations Court.
20. The legal landscape regarding these sections was settled by the Supreme Court in ***Law Society of Kenya v Attorney General & Another eKLR (Petition No. 4 of 2019)***. The apex Court, resolving a decade of uncertainty following the 2009 High Court decision that had declared parts of WIBA unconstitutional, firmly reinstated the validity of Sections 16, 23, and 52.

21. The Supreme Court held that WIBA does not unconstitutionally oust the jurisdiction of the courts but rather creates a mandatory alternative dispute resolution (ADR) mechanism that must be exhausted before approaching the courts. The Director acts as the tribunal of first instance. The Supreme Court stated:

*"The intention of section 16 of WIBA was not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act was subject, initially, to a process of dispute resolution."*

22. The implications for the present appeal are profound. Since the accident occurred in 2019 (post-2007 Act commencement and effectively governed by the 2019 Supreme Court interpretation which clarified the law), the proper and exclusive forum for the Respondent to lodge her claim was the office of the Director of Occupational Safety and Health Services. The Magistrate's Court had no subject-matter jurisdiction to entertain a suit for damages arising out of a work-related injury against the employer at the first instance.
23. The learned Magistrate's finding that jurisdiction was neither here nor there because the matter had proceeded through pre-trial is, with respect, a grave misdirection. Where a statute creates a specialized forum for a specific category of disputes, the general jurisdiction of the civil courts is ousted until the statutory mechanism is exhausted. Where a dispute resolution mechanism is prescribed by an Act of Parliament, it must be strictly adhered to.

#### Admission of Jurisdiction in Pleadings

24. The Respondent's anchor argument, accepted by the trial court, was that the Appellant admitted jurisdiction in paragraph 13 of its Defence. The legal

question is: Can a party, by admission, confer subject-matter jurisdiction upon a court that lacks it by statute?

25. The law on this issue is robust and settled. Jurisdiction is a creature of the Constitution or statute. It is not a commodity that parties can trade, waive, or confer by agreement. In ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd KLR 1***, the Court of Appeal famously stated:

*"Jurisdiction is everything. Without it, a court has no power to make one more step... A court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction."*

26. Furthermore, in ***Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] KECA 293 (KLR)***, the Court of Appeal reaffirmed that:

*"Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume...[source](#) at any stage of the proceedings even on appeal."*

27. The Supreme Court in ***Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR)*** reiterated that a court cannot arrogate to itself jurisdiction exceeding that which is conferred by law.

28. Applying these principles, the Appellant's admission in the Defence was legally ineffectual. A defendant cannot, by typing a sentence in a pleading, override the Work Injury Benefits Act which vests jurisdiction in the Director. The admission was an error of law, and errors of law do not create jurisdiction. The learned Magistrate erred in elevating a pleading error above a statutory mandate. The fact that the Appellant raised the jurisdictional point belatedly, after the consent judgment, does not cure the defect. If the court

lacked competence *ab initio*, the proceedings were a nullity from the moment the Plaintiff was filed.

### Validity of the Consent Judgement

29. Having determined that the trial court lacked jurisdiction, the consent judgment entered therein is essentially a fruit of a poisonous tree. A court cannot validly record a judgment—by consent or otherwise—in a matter over which it has no authority. However, given the prominence of the consent judgment argument in the trial court, it is necessary to analyze the principles governing it, particularly the role of the insurer-instructed Advocate.
30. The general rule, encapsulated in ***Flora N. Wasike v Destimo Wamboko eKLR***, is that a consent judgment constitutes a contract between the parties and can only be set aside on grounds that would justify setting aside a contract, namely: fraud, collusion, mistake, or misrepresentation.
31. However, this principle is not absolute. The court retains an inherent power to set aside a consent judgment if it is in the interests of justice, particularly where there is a fundamental defect in the process. In ***Bokwe v Mogogosiek Tea Factory [2024] KEELRC 721 (KLR)*** the Court emphasized that procedural technicalities, such as the existence of a consent, should not override the constitutional right to a fair hearing or the administration of substantive justice.
32. The Appellant contends the Advocate was instructed by the insurer and entered the consent without the Appellant's knowledge. This touches on the agency relationship in insurance subrogation. While Section 10 of the Insurance (Motor-Vehicle Third Party Risks) Act imposes a duty on insurers to satisfy judgments, and policy terms typically grant insurers the right to control litigation, this right is not unfettered.

33. The Advocate on record represents the insured (the Defendant), not just the insurer. The Advocate owes a fiduciary duty to the client, the Appellant. If an Advocate enters into a consent judgment that admits liability in a forum that lacks jurisdiction, solely on the instructions of an insurer and to the detriment of the insured, who may face reputational damage, excess payments, or higher premiums, the Advocate arguably exceeds their mandate.
34. While *Kenya Commercial Bank Ltd v Specialized Engineering Co Ltd [1980] KLR 485* establishes that an Advocate has ostensible authority to compromise a suit, this authority presumes a valid suit. An Advocate cannot validly consent to jurisdiction where the statute bars it. The consent judgment in this case purported to confer jurisdiction on the Magistrate's Court to determine liability for a work injury. Since parties and their Advocates cannot confer jurisdiction by consent, the consent judgment was void *ab initio* on jurisdictional grounds, rendering the question of the Advocate's specific instructions secondary but reinforcing the injustice suffered by the Appellant.

#### Doctrine of Stare Decisis

35. The Appellant submitted evidence that other courts within the same Gatundu Law Courts station, specifically in **CMCC No. 31A of 2019** and **CMCC No. E228 of 2021**, had struck out suits arising from the exact same accident on the grounds that they were WIBA matters.
36. The doctrine of *stare decisis* and the principle of judicial consistency require that similar cases be treated similarly. It is fundamentally unjust for one employee injured in accident X to have their case struck out and referred to the Director, while another employee injured in the same accident X has their case determined by a Magistrate simply because of a pleading error by the defendant. The learned Magistrate ought to have taken judicial notice of the nature of the accident and the decisions of concurrent courts, and indeed her own previous decisions if applicable, to ensure consistency in the application of the law.

37. As a first appellate court, I am mandated to re-evaluate the evidence on record (*Selle & Another v Associated Motor Boat Co. Ltd EA 123*). The evidence establishes that the Respondent was an employee of the Applicant. She was injured in a vehicle provided by the employer for staff transport. This brings the claim within section 10(5) of WIBA.
38. Based on these uncontested facts, the conclusion is inescapable: The trial court lacked jurisdiction to hear the suit. The proceedings were a nullity. The consent judgment, being a product of proceedings conducted without jurisdiction, cannot stand.
39. While I am cognizant that setting aside the judgment inconveniences the Respondent, jurisdiction is a question of law that cannot be bypassed for convenience. However, to ensure the Respondent is not left without recourse, she must be directed to the proper statutory forum.
40. In conclusion, the appeal is meritorious. Accordingly, I make the following orders:
- (i) The appeal is hereby allowed.
  - (ii) The Ruling and Orders of the Chief Magistrate's Court at Gatundu delivered on 24 May 2021 in CMCC No. 245 of 2019 are hereby set aside.
  - (iii) The Consent Judgment recorded on 7 October 2020 and the subsequent Decree issued on 18 January 2021 in Gatundu CMCC No. 245 of 2019 are hereby set aside and declared null and void for want of jurisdiction.

- (iv) The Plaintiff and proceedings in Gatundu CMCC No. 245 of 2019 are hereby struck out.
- (v) The Respondent is at liberty to lodge her claim for compensation with the Director of Occupational Safety and Health Services in accordance with the provisions of the Work Injury Benefits Act.
- (vi) Each party shall bear their own costs of this appeal and of the suit in the trial court.

**Dated and Delivered at THIKA this 16 day of JANUARY 2026**

**HELENE R. NAMISI  
JUDGE OF THE HIGH COURT**

Delivered virtually in the presence of:

For Appellant: N/A  
For Respondent: Ms Fozah  
Court Assistant: Lucy Mwangi