

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL CAUSE NO. E176 OF 2025

SIDIAN BANK.....APPELLANT/APPLICANT

VERSUS

DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES1ST RESPONDENT

KIPNGETICH NGENOH VICTOR 2ND
RESPONDENT

CORAM

Before Lady Justice J.W. Keli

C/A Otieno

RULING

1. The Appellant's Application was dated 10th November 2025, in which the Appellant seeks leave to amend the Memorandum of Appeal dated 5th June 2025 and specifically for the following orders-
 - a) That the Appellant be granted leave to amend its Memorandum of Appeal dated 5th June 2025 as set out in the draft amended Memorandum of Appeal annexed thereto.
 - b) That the draft amended Memorandum of Appeal be deemed as duly filed and served upon payment of requisite court fees.
 - c) Costs be in the cause.

Grounds of the application

2. The Memorandum of Appeal indicates the wrong date of the decision that the Appellant is appealing against. The Appellant's intention was to appeal against Directorate of Occupational Safety and Health Services letter dated 9th April 2025 received by the Appellant on 9th May 2025 having dismissed the Appellant's objection dated 6th March 2024. The appeal was to be in line with Section 52 (2) of the Work Injury Benefits Act, 2007. That the error was an oversight on the part of the Attorney handling the matter, and that the proposed amendments are important in helping this court arrive at a just conclusion in this matter. It would be in the interest of justice to allow the application. The Respondents will not suffer prejudice if this application is allowed. Further grounds to be adduced at the hearing thereof.
3. The application was supported by the Mercy Nyanjiru Advocate sworn on the 10th November 2015, who annexed the draft amended appeal.
4. The Application is opposed by the 2nd Respondent's Replying Affidavit dated 25th November 2025. The 2nd Respondent raised a new jurisdictional issue in its response. The Appellant filed a Supplementary Affidavit sworn on 4th December 2025 to respond to the issue.

Issues for determination

- a) Whether the Honourable Court has jurisdiction to determine the appeal and Application dated 10th November 2025?
- b) Whether the Appellant's Application dated 10th November 2025 for amendment of the Memorandum of Appeal should be allowed?

Whether the Honourable Court has jurisdiction to determine the appeal and Application dated 10th November 2025?

The appellant's submissions

5. The Appellant's Application seeks leave to amend the Memorandum of Appeal to reflect the decision that the Appellant is appealing is the one dated 9th April 2025 and not 14th November 2024. The 2nd Respondent in opposing the Application on the grounds that the Appellant's objection to the decision of Director of Occupational Safety and Health Services was lodged past 60 days thus it was incurably defective, that the Honourable Court does not have jurisdiction to entertain the Appeal and the Application as Appeal was lodged after statutory timeline, that the Director's Reply to the Objection dated 9th April 2025 is not a new decision which were are attempting to respond to and that the Court cannot acquire jurisdiction through amendments of dates. The 2nd Respondent was injured in the cause of his employment with the Appellant on 20th May 2024 and a claim was lodged with the Director of Occupational Safety and Health Services. The Director heard the claim and issued his award on 14th November 2024. The Appellant, through its insurer, filed an objection to the award on 6th March 2025. The Director responded to the Objection vide its reply dated 9th April 2025 received by the Appellant at its offices on 8th May 2025. The receipt of the Director's Reply to the Objection by the Appellant is at the heart of this case on whether this Honourable Court has jurisdiction to hear this appeal or the Application dated 10th November 2025. My Lady, in the Supplementary Affidavit sworn on 4th December 2025. The Appellant has attached the Director's Reply to the Objection dated 9th April 2025 received by the Appellant on 8th May 2025, and the Appellant's insurer letter, which confirms the Director's Reply was received by it on 9th May 2025 despite being dated 9th April 2025. For clarity the said documents are

attached to the Appellant's record of Appeal at pages 12 and 13. Thus, the 2nd Respondent cannot claim he was not aware of when the Appellant received the Director's reply to the Objection. The 2nd Respondent raised issue that the Appellant's Objection to the Director's award was incurable defective as it was raised past the statutory timeline lapsed. The Appellant submits that the moment the Director of Occupational Safety and Health Services replied to the Appellant's Objection vide its reply dated 9th April 2025, the issue of whether the objection was raised past the statutory timeline became moot. The Director's reply dated 9th April 2025 received by the Appellant on 8th May 2025 caused the Appellant to invoke this Honourable Court's appellate jurisdiction as provided for by Section 52 (2) of the Work injury Benefit Act. In *Onchieku v China Communications [2023] KEELRC 21 (KLR)* Justice BOM Manani held: Construction Company Limited 18. Under sections 51 and 52 of the WIBA, a party who is dissatisfied with the Director's decision under the Act is entitled to object to that decision in writing. The objection is to be lodged with the Director within sixty (60) days of the Director's decision. Upon receipt of the objection, the Director is required to respond to the objection within fourteen (14) days and in writing. He may vary or uphold his initial decision with reasons given to the objector. A copy of the Director's response is to be sent to any other person affected by the decision. If either of the parties to the dispute is still unhappy with the reviewed decision by the Director, he may appeal to the Employment and Labour Relations Court. Such appeal must be lodged within thirty (30) days of the Director's response to the objection. From the record, after the Director was notified of the accident by the Respondent, he caused to be assessed the compensation due to the Claimant. This assessment is evidenced in the DOSH demand dated November 27, 2019. This assessment comprises the Director's decision against which the parties to the action were entitled to object within sixty (60) days of the decision.

There is no evidence that any of the parties objected to the decision within the sixty (60) days provided for under section 51(1) of the WIBA.

6. The Claimant's advocates wrote to the Director on May 19, 2020 objecting to the assessment. This was more than four (4) months down the line from November 27, 2019. There is no evidence that the Director has reacted to the Claimant's lawyers' letter aforesaid. This could possibly be because the Director considers that there was no objection to his assessment in terms of section 51(1) as the purported objection was presented inordinately out of time. 24. There being no decision by the Director to the Claimant's Advocates' letter of May 19, 2020, there is nothing to trigger an appeal to the court under section 52(2) of the Act. Consequently, what the Claimant has filed before this court is not an appeal as contemplated under section 52(2) of the WIBA." In this case though the objection was lodged out of time, it is not disputed that the Director of Occupational Safety and Health Services responded to Objection vide its reply dated 9th April 2025. It is that reply that triggered the appeal to this court as provided by Section 52 (2) of the WIBA. The said section provides: "52 (2) An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such decision. The law is crystal clear, that an objector has 30 days after receiving the Director's reply to appeal against that decision. As submitted above, the Appellant received the Director's reply dated 9th April 2025 on 8th May 2025 as shown by its receiving stamp. The Appellant filed its Memorandum of Appeal on 5th June 2025 which is dated same day. The Memorandum of Appeal dated 5th June 2025 was filed within the 30 days as provided by Section 52 (2) of the WIBA. In light of the above submissions, the Appellant submits that the Honourable Court has jurisdiction to hear and determine the Application dated 10th November 2025 and the appeal filed herein.

The 2nd respondent's submissions

7. The Appellant seeks to substitute the impugned date, 14th November, 2024, with 9th April, 2025 and to recast the appeal as arising from the DOSH reply to the invalid objection. This is a substantive shift in legal strategy designed to bypass Section 51(1). The jurisprudence is settled that amendments are intended to clarify or perfect pleadings, not to manufacture jurisdiction where none exists. In *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Court held that jurisdiction is everything and without it a court must down its tools. An amendment that seeks to alter the operative date of a statutory decision so as to fabricate jurisdiction ought to be impermissible. In *Kenya Ports Authority v. Modern Holdings (EA) Limited* [2017] eKLR, the Supreme Court reiterated that statutory timelines are not procedural technicalities but substantive requirements that go to the root of jurisdiction. To allow an amendment that circumvents such timelines would be tantamount to rewriting the statute through judicial discretion, which the Courts ought to refrain from. Therefore, the proposed amendment is not a legitimate exercise of the Court's discretion but a calculated attempt to evade statutory requirements. To permit it would erode the doctrine of finality in litigation and prejudice the Respondent's vested right to rely on limitation as a complete defence. Additionally, it would confer jurisdiction retrospectively, contrary to the ratio decidendi in *Theopot Patrick Charles v. Joash Shisia Cheto* (Civil Appeal E046 of 2022) [2025] KECA 784 (KLR) and settled authority that jurisdiction cannot be created by consent, waiver or amendment. The Appellant's manoeuvre is therefore not a benign correction but a calculated attempt to smuggle a lapsed claim under the guise of Section 52. The amendment would reward procedural indifference and encourage forum shopping. It is therefore the 2nd Respondent's submission that this Honourable Court ought to reject such stratagems and to strike out the Application and Appeal for incompetence.

Decision

8. The applicant seeks leave of the court to make an amendment in the memorandum of appeal to correct the date of the impugned decision of the 1st respondent. There is no dispute as to the date of the decision of the 1st respondent on the objection, being 9th April 2025. The respondent contends that the amendment seeks to alter the operative date of a statutory decision so as to fabricate jurisdiction, the objection before the 1st respondent having been raised outside the statutory period. The court noted that it was not in dispute the objection was raised outside the statutory 60 days. Notwithstanding that, the 1st respondent admits that it entertained the objection, processed it, and sent a response to the applicant. It is that response dated 9th April 2024 (page 32 of the ROA) that the applicant seeks reflected vide the amendment to the appeal.

9. The relevant legal framework as it relates to the jurisdiction of the court is the WIBA. Section 51 provides for objection to the decision of the 1st respondent as follows- *‘51.(1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director an objection against such decision. (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.’* It is this provision that the appellant invoked and filed an objection, but outside the 60 days, and the same was entertained and processed by the 1st respondent, and the decision dated 9th April 2025 was issued. The appellant on receipt of the decision filed the instant appeal dated 5th June 2025 pursuant to section 52(2) of the Act to wit- *‘(2) An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.’*

There is evidence that the appellant received the decision on 8th May 2025 and filed an appeal within 30 days. I find the jurisdiction of the court as regards the appeal was properly invoked. The cause of action was the objection decision and not the original decision of 14th November 2024.

Whether the Appellant's Application dated 10th November 2025 for amendment of the Memorandum of Appeal should be allowed?

10. The Court of Appeal set out the criteria for exercise of discretion in application for leave to amend pleadings in Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] KECA 31 (KLR) The Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:

- a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b) the amendments should be timeously applied for;
- c) power to amend can be exercised by the court at any stage of the proceedings;
- d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation. The decision cited in St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] KEHC 2539 (KLR), where Justice DB Nyakundi held: "The law as regards the grant of leave to amend is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and

there is no injustice if the other party can be compensated by costs.’’ The reason for the amendment is only to reflect the date of issuance of the decision appealed against, being the decision of the 1st respondent on the objection. I find it is a reasonable request and is based on a genuine mistake of counsel drafting the pleadings, and further is consistent with the law, section 52(2) of WIBA.

11. The application dated 10th November 2025 is allowed as prayed.

12. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27th DAY OF FEBRUARY, 2026.

J. W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant/Applicant – Nyanjiru

2nd Respondent: Kipkirui