

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT MACHAKOS

APPEAL NUMBER E009 OF 2025

KITONGA GARDEN RESORT1ST APPELLANT

DAVID KITONGA.....2ND APPELLANT

-VERSUS-

DIRECTOR OF OCCUPATIONAL SAFETY AND
HEALTH SERVICES.....1ST RESPONDENT

ABEDNEGO MULANDI MUTISYA.....2ND RESPONDENT

*(Being an appeal against the decision of the Director of Occupational Safety and Health
Services, Machakos & Makueni Counties, delivered on 5th February 2025)*

CORAM

Before Lady Justice Jemimah Keli

C/A Otieno

JUDGMENT

1. The Appellants herein, being dissatisfied with the decision of the Director of Occupational Safety and Health Services, Machakos & Makueni Counties, delivered on 5th February 2025, in the dispute between the parties before the said Director, filed a memorandum of appeal dated 27th February 2025 seeking the following orders:

- a) The decision of the Director of Occupational Safety and Health Machakos County awarding the 2nd Respondent the sum of Kenya Shillings Six Hundred and Fifteen Thousand Four Hundred and Twenty-One Only (Kshs.1,615,421/-) as compensation for work injuries be and is hereby set aside and/or vacated.
- b) The Respondents to pay the costs of this appeal.

GROUND OF THE APPEAL

2. The 1st Respondent erred in law and in fact by making a finding that the 2nd Respondent sustained work injuries while allegedly working for the Appellants/Applicants and that such constituted an occupational accident.
3. The 1st Respondent erred in law and in fact by erroneously awarding the 2nd Respondent a sum of Kenya Shillings One Million Six Hundred and Fifteen Thousand Four Hundred and Twenty-One Only (Kshs. 1,615,421/-) as compensation for alleged work injuries in total disregard of the objection raised by the 1st Applicant that the 2nd Respondent was/has never been an employee of the Appellants.
4. The 1st Respondent erred in law and in fact by erroneously awarding the 2nd Respondent a sum of Kenya Shillings One Million Six Hundred and Fifteen Thousand Four Hundred and Twenty-One Only (Kshs. 1,615,421/-) as compensation for work injuries sustained whereas there was no employment relationship between the Appellants and the 2nd Respondent.

5. The 1st Respondent erred in law and in fact by erroneously awarding the 2nd Respondent a sum of Kenya Shillings One Million Six Hundred and Fifteen Thousand Four Hundred and Twenty-One Only (Kshs. 1,615,421/-) as compensation for work injuries on the assumption that since the 2nd Appellant covered the medical bills of the 2nd Respondent, he was definitely the employer of the 2nd Respondent.

BACKGROUND TO THE APPEAL

6. The claim for compensation before the Director was lodged by the 2nd Respondent against the 1st and 2nd Appellants and was commenced by way of a “Notice by Employer of an Occupational Accident/Disease of an Employee” form *ML/DOSH FORM 1* dated 4th September 2024. The 2nd Respondent claimed that he suffered a work injury, namely fractures to his left tibia and fibula as a result of a fall from a ring beam which was under construction on the first floor at the Appellant’s premises at Mbiuni, Mwala, on 18th November 2022. (see page 3 and 12 of the Appellants’ ROA dated 4th November 2025).
7. Form *ML/DOSH FORM 1* was accompanied by witness statements of the 2nd Respondent, Patrick Muoki Mutisya, Alex Ndolo, Paul Onsesse Nyangaresi, all filed before the Director (pages 4-7 of ROA).
8. Following investigations carried out by the Director and preparation of an investigation report, reference *ML/DOSH/ACC.INVEST/13/2024* dated 11th December 2024 (pages 8-10 of ROA was the report), the Director of Occupational Safety and Health Services delivered his Decision and issued form *DOSHS/WIBA 4* “Demand for Payment of Work Injury Benefit”,

dated 1st October 2024, designating the 2nd Respondent's permanent disablement at 40% and awarding compensation of Kshs. 1,615,421.00 calculated as follows:

Kshs. 22,487 (Monthly Total Earning) x 96 months x 40% Disablement

Plus

Kshs. 22,487 (Monthly Total Earning) x 608 (No. of days off duty) at 40% temporary disablement

Plus

Medical Expenses – 226,050.00 (page 11 of ROA).

9. Being dissatisfied with the award issued by the Director, the Appellants lodged an Objection dated 14th December 2024 vide form DOSH/WIBA 12 “Form of Objection to the Decision of the Director of Occupational Safety and Health Services” praying that the award be set aside and citing their reasons for objecting as:

‘Abednego Mulandi Mutisya was/has never been an employee of Kitonga Garden Resort.’

(objection at page 13-14 of ROA).

10. The 1st Respondent vide a letter dated 5th February 2025 confirmed that the objection was made within the statutory timelines, but dismissed the Appellants’ Objection on the premise that during the hearing and determination of the claim, the 2nd Respondent was indicated as and established to be an employee of DAVID KITONGA, not KITONGA GARDEN RESORT. Further employees, servants and agents of DAVID KITONGA are the ones who paid the medical fees for the Appellant on the material date (pages 15-18 of ROA is the decision).

DETERMINATION

11. The appeal was canvassed by way of written submissions. The parties complied.

Issues for determination

12. In their submissions dated 5th February 2026, the Appellants identified a single issue for determination, namely:-

- i. Whether the 2nd Respondent was an employee of the Appellants.

13. The 2nd Respondent identified the following issues for determination in their submissions dated 3rd March 2026:

- i. Wh
ether the 2nd Appellant had employed the 2nd Respondent at the time of the accident.
- ii. Wh
ether the 1st Respondent considered the objection by the 1st Appellant.
- iii. Wh
ether the 2nd Respondent should be paid the Director's award of Ksh. 1,615,421/-.

14. The court discerned from the grounds of appeal the issue for determination to be as framed by the appellant thus –

Whether the 1st respondent erred in finding the 2nd appellant liable for compensation of the injury to the 2nd respondent

15. The grounds of appeal were-

- a. The 1st Respondent erred in law and in fact by making a finding that the 2nd Respondent sustained work injuries while allegedly working for the Appellants/Applicants and that such constituted an occupational accident.

- b. The 1st Respondent erred in law and in fact by erroneously awarding the 2nd Respondent a sum of Kenya Shillings One Million Six Hundred and Fifteen Thousand Four Hundred and Twenty-One Only (Kshs. 1,615,421/-) as compensation for alleged work injuries in total disregard of the objection raised by the 1st Applicant that the 2nd Respondent was/has never been an employee of the Appellants.

- c. The 1st Respondent erred in law and in fact by erroneously awarding the 2nd Respondent a sum of Kenya Shillings One Million Six Hundred and Fifteen Thousand Four Hundred and Twenty-One Only (Kshs. 1,615,421/-) as compensation for work injuries sustained whereas there was no employment relationship between the Appellants and the 2nd Respondent.

- d. The 1st Respondent erred in law and in fact by erroneously awarding the 2nd Respondent a sum of Kenya Shillings One Million Six Hundred and Fifteen Thousand Four Hundred and Twenty-One Only (Kshs. 1,615,421/-) as compensation for work injuries on the assumption that since the 2nd Appellant covered the medical bills of the 2nd Respondent, he was definitely the employer of the 2nd Respondent.

The appellant's submissions

16. Whether the 2nd Respondent herein Abednego Mulandi Mutisya was an employee of the Appellants? Under Section 5 (1) of the Work Injury Benefits Act, 2007, an employee is defined as a person who has been employed for wages or salary under a contract of service. Most critically, Section 5 (3) a of the Work Injury Benefits Act, 2007 stipulates that person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business shall not be regarded as an employee. The Appellants herein and more so the 2nd Appellant who was and still is a co-director of the 1st Appellant as per the CR-12 at page 18 of the Appellants' Record of Appeal dated 4th November, 2025, have never employed the 2nd Appellant herein Abednego Mulandi Mutisya either formally or casually. The 2nd Appellant's magnanimous acts of financially coming through for injured stranger at their premises by settling medical bills cannot be used to impute an employer-employee relationship. Be it as it may, even in the worst-case scenario, the 2nd Appellant was a Director of 1st Appellant herein Kitonga Garden Resort which owned the facility where the 2nd Respondent was allegedly injured. As such, the 1st Respondent cannot purport to pierce the corporate veil and direct the 2nd Respondent to pay the compensation sum. Handwritten documents with no clear proof the 2nd Respondent was receiving monies for either of the Appellants accompanied by fake statements cannot be used to establishing an employment relationship. We urge this court to find there was no contractual relationship between the Appellants and the 2nd Respondent.

(ii) Whether the 1st Respondent had jurisdiction to award Kenya Shillings One Million Six Hundred and Fifteen Thousand Four Hundred and Twenty-One (Kshs. 1,615,421/=) as compensation for work injuries on the assumption that since the Appellants covered the medical bills of the 2nd Respondent, they were definitely the employers of the 2nd

Respondent. That having established there was no employer-employee relationship between the 2nd Respondent and the 2nd Appellant, it goes without say the 1st Respondent ought not to have invoked the provisions of Section 23 of the Work Injury Benefits Act, 2007, as there was employment relationship between the 2nd Appellant and the 2nd Respondent. In light of the same, we urge this court to find the 1st Respondent herein the Directorate of Occupational Health and Safety Services award of Kenya Shillings One Million Six Hundred and Fifteen Thousand Four Hundred and Twenty-One (Kshs. 1,615,421/=) to the 2nd Respondent herein Abednego Mutisya Mulandi was irregular and unlawful for want of jurisdiction and proceed to set the same aside.

17. Whether a compensation award of Kenya Shillings One Million Six Hundred and Fifteen Thousand Four Hundred and Twenty-One (Kshs. 1,615,421/=) was arbitral and unfair? The 1st Respondent never involved the Appellants while conducting inquiries as to the alleged injuries sustained by the 2nd Respondent and as such we find the Appellants' right to fair hearing was breached as they never got a chance to present critical documentations as to who is the owner of the construction site and as to whether they had employed the 2nd Respondent and if so who is the employer. Article 25 of the Constitution of Kenya, 2010 states that right to fair hearing cannot be limited. The 1st Respondent hurriedly made an award and the Appellants more so the 2nd Appellant came to learn of the same when they were being forced to settle a frivolous award against a stranger they have never employed. Shockingly, the 2nd Appellant later came to learn his acts of helping the 2nd Respondent seek medical attention was taken to mean he had employed him when in real sense he was not the employer or has never even employed him. In manner meant to deny the Appellants an opportunity to present their case, the 1st Appellant dismissed the Appellant's objection to

the said award which was not only unfair but too high given the injuries sustained by the 2nd Respondent.

The respondent's submissions

18. Whether the 2nd Appellant had employed the 2nd Respondent at the time of the accident? The 2nd Appellant was indeed the employer of the 2nd Respondent at the time when the work injury occurred. This as stated above has been supported by his colleagues (record of appeal page 4-7). This is also supported by the investigation report by DOSHS the 1st Respondent (page 8-11 of the record of appeal) other evidence such as the attendance sheet for work can also be found in the 2nd Respondent's replying affidavit dated 9th September 2025 that is on record. Additionally at this point court is also aware that the 2nd Appellant paid for Ksh. 5000/- to take the 2nd Respondent to hospital when the accident occurred and Ksh. 80,000/- as the balance of the 2nd Respondent's medical bill. All these details are in the DOSHS investigation report and are also captured in the 2nd Respondent's replying affidavit dated 9th September 2025 that is on record. It is actually quite surprising that now the 2nd appellant says that he was not the employer.

19. Whether the 1st Respondent considered the objection by the 1st Appellant? The 1st Respondent indeed considered the 1st Appellant's objection. In its decision pursuant to the objection DOSHS is very clear that it identified the 2nd Appellant as the employer and not the 1st Appellant. It also demanded that the 2nd Appellant pay the 2nd Respondent Ksh. 1,615,421/-.

20. Whether the 2nd Appellant should pay the Director's award of Ksh. 1,615,421/-? The 2nd appellant should pay the award as granted by the director at DOSH. The award stems from a lawful calculation 3 by DOSHS on the amount payable. The DOSHS 4 was also effectively served upon the 2nd appellant hence the current appeal. It is only just and fair that the 2nd Respondent is fully compensated for his work injury.

Decision

21. The objection before the 1st respondent was as follows- 'Abednego Mulandi Mutisya was/has never being(sic) an employee of Kitonga Garden Resort'. The objector was Antony Mutua who indicated he was the CEO of Kitonga Garden Resort. (page 13-14 of ROA) The Director in decision on the objection stated as follows-

'1. THAT the "FORM OF OBJECTION TO THE DECISION OF THE DIRECTOR™ DOSH/WIBA 12 is Lodged by yourself,

2. THAT the name of the employer as indicated in the "OBJECTION TO DECISION OF THE DIRECTOR FORM" [DOSHS/WIBA 12] is M/s KITONGA GARDEN RESORT and whose employee is MR. ABEDNEGO MULANDI MUTISYA.

3. THAT the objection is pursuant to a decision rendered vide Ref: ML/VIBA/MKS-MKN/969/2024 on 01/10/2024 for compensation due to Mr. Abednego Mulandi Mutisya who suffered an occupational accident on 18/11/2022 while working as a General Worker to Mr. David Kitonga during the construction of M/s Lydia Memorial Hospital.

4. THAT there is no compensation claim for Mr. Abednego Mulandi Mutisya in our Machakos County D.O.S.H.S. Office whose employer is M/s KITONGA GARDEN RESORT that has been entered in the Claims Database whose reference is ML/WIBA/MKS-MKN/969/2024.

5. THAT Compensational Claim that exist has been issued is to Mr. David Kitonga who was employer to Mr. Abednego Mulandi Mutisya during the time of Occupational Accident on 18/11/2022.

6. THAT nowhere in the Compensation document has it been suggested even remotely that Mr. Abednego Mulandi Mutisya was an employee of or had contractual relationship with M/s Kitonga Garden Resort.

7. THAT Mr. David Kitonga has never discounted that Mr. Abednego Mulandi Mutisya wasn't his employee at the time of the occupational accident.

8. THAT the relations, servants and/or agents or otherwise of Mr. David Kitonga paid for the ambulance fee and medical bills that accrued at Machakos Level 5 Hospital owed to Mr. Abednego Mulandi Mutisya following the Occupational accident on 18/11/2022.

9. THAT this objection at the time it was submitted to County Occupational Safety and Health Officer - Machakos County had been LODGED WITHIN the statutory timeline.

DECISION:

THAT the relief sought is DECLINED under the provisions of Sections 4.26. 37 & 53 Work Injury Benefits Act, Issue No. 13 of 2007.

THAT the employer to Mr. Abednego Mulandi Mutisya is Mr. David Kitonga and not M/s Kitonga Garden Resort.

THAT "Demand for Payment" [DOSHAVIBA 4] issued to Mr. David Kitonga on 01/10/2024 as such SUBSISTS and compensation to Mr. Abednego Mulandi Mutisya Ksh. 1,615,421.00 should have been SETTLED on OR before 01/01/2025

Paul K. Bett.

Secretary Occupational Safety And Health Services.” (pages 15-16 of ROA)

22. The court, on perusal of the objection which was before the 1st respondent established that the objection was only lodged by Kitonga Garden Resort (1st Appellant) through its CEO, Antony Mutua. There was no objection by David Kitonga (2nd appellant). The demand for payment was addressed to David Kitonga (page 11) and not to the objector (1st appellant) . There was no demand to the 1st appellant. The claim for compensation was lodged against David Kitonga only, and he was described as the employer/occupier. (page 3 of ROA).

23. The basis of the appeal was that the 1st respondent erred in finding the 2nd appellant was the employer. In the claim the 2nd appellant is addressed as employer/occupier. The 1st respondent mandate is as per the provisions of WIBA. There are key words defined under the Act which I find relevant in the appeal. The 2nd respondent was involved in an accident leading to the compensation. The accident and injuries were not in dispute. The word ‘accident’ is defined under WIBA as follows- “accident” means an accident arising out of

and in the course and scope of an employee's employment and resulting in personal injury;" Indeed the accident resulted in personal injury of the 2nd respondent. It was not in dispute the accident occurred at the work place. The meaning of Employer under WIBA is as defined under section 4 to wit- 'In this Act, "employer" means any person who employs an employee and includes—(a)the legal personal representative of a deceased employer;(b) any person controlling the business of an employer; and(c)the Government.' Conversely, an employee is as defined in section 5 of WIBA- '1)In this Act, "employee" means a person who has been employed for wages or a salary under a contract of service and includes an apprentice or indentured learner.(2)Subsection (1) applies irrespective of whether the contract is expressed or implied, is oral or in writing, and whether the remuneration is calculated by time or by work done and whether by the day, week, month or any longer period and whether the payment is in cash or recognised legal tender.'

24. A Claim was lodged against the 2nd appellant, identified as the employer. The 2nd appellant denies being the employer. The 2nd respondent recorded a statement and stated the 2nd appellant was the employer and was supported by 3 other workers at the same site who witnessed the accident (pages 4-7 of ROA). The 1st respondent investigated the accident where it interviewed the site manager and the CEO of the 1st Appellant and established that the 2nd respondent was working at the construction site of David Kitonga (2nd appellant) when he was injured and that the site manager, Alex Munyao, was acting on behalf of David Kitonga (2nd Appellant) .The report further stated that Alex Munyao, the construction manager, transferred Kshs. 80,000 for payment of the medical bill incurred by the 2nd respondent to another worker, Patrcik Muoki, who transferred to the same hospital. (Pages 8-10 of ROA was the investigation report) The 1st respondent stated that Alex Munyao

confirmed the 2nd respondent was an employee of the owner of the construction site, one David Kitonga. The employment of the 2nd respondent was corroborated by other witnesses who recorded statements. The court finds the assertion of employment was corroborated by 3 others workers at site. The investigation report established that the 2nd appellant was the employer. I find no basis to interfere with the decision by the 1st respondent that the 2nd appellant was the employer and owner of the site where the 2nd respondent was working when the accident leading to the injury occurred.

25. The court from the evidence disclosed in the record of appeal found that there was only one objector to the DOSH award, namely, Kitonga Garden Resort. That the said objector was not served with any demand as relates to the assessment by the 1st respondent. The evidence before the court pointed with certainty at DAVID Kitonga as the owner of the site where the 2nd respondent was injured, and that the said David Kitonga, on being issued with the demand for payment, never made any objection to the award as required under section 51 of the WIBA.
26. The process followed by the 1st respondent was as per section 256 WIBA –'26. A claim for compensation in accordance with this Act shall be lodged by or on behalf of the claimant in the prescribed manner within twelve months after the date of the accident or, in the case of death, within twelve months after the date of death.(2)If a claim for compensation is not lodged in accordance with subsection (1), the claim for compensation may not be considered under this Act, except where the accident concerned has been reported in accordance with section 21. (3)If an employer fails to report an accident or to provide information requested by the Director as specified in the request, the Director may—

(a)conduct an investigation and recover the cost of the investigation from the employer as a debt due from the employer; or(b)levy a penalty on the employer.(4)An employer or insurer against whom a claim for compensation is lodged by the Director under this section, shall settle the claim within ninety days of the lodging of the claim.’ The court confirmed documentation for the claim, investigation, and demand for payment.

27. The objection to award is as provided for under section 51 to wit-‘(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 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.’’ The objector was the 1st appellant who stated it was not the employer of the 2nd respondent. The basis of the allegation was not disclosed as no claim for payment had been lodged against it by the 1st respondent. The objector was thus a stranger to the claim and had no locus to make the objection. The employer at all material times in the claim and demand was David Kitonga, and the said person never raised objection to the award. The court’s jurisdiction on appeal is stated in section 52 of WIBA thus- ‘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 court then concluded that the 2nd appellant, having not objected, had no locus to file the appeal. The court has no jurisdiction on the appeal by the 2nd appellant, who, on receipt of the demand, did not raise an objection. The objector was the 1st appellant. The court upheld the decision by the 1st respondent that there was no demand against the 1st appellant.

28. Consequently, I find the grounds of appeal raised on behalf of the appellants jointly improper as the objection was only by the 1st appellant, who the court found was a stranger to the claim for compensation. The 2nd appellant, having not filed any objection, is now bound by the award. The appeal is without basis as there was no objection to the award by the employer /owner/occupier of the workplace of injury, who was stated in the claim and demand for compensation as the 2nd appellant. The appeal is incompetent for non-compliance with section 51 of the WIBA by the 2nd appellant, and without merit for the reason that the 2nd Appellant has been proved as the employer on a balance of probabilities. The appeal is dismissed with costs to the respondents.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF MAY, 2026.

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellants – Mbulu

1st Respondent – Kuria h/b Mumo

2nd Respondent -Makau