



REPUBLIC OF KENYA



Charles v Cheto (Civil Appeal E046 of 2022) [2025] KECA 784 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 784 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E046 OF 2022
SG KAIRU, KI LAIBUTA & GWN MACHARIA, JJA

MAY 9, 2025

BETWEEN

THEPOT PATRICK CHARLES APPELLANT

AND

JOASH SHISIA CHETO RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Malindi (B. O. M. Manani, J.) delivered on 7th March 2022 in E.L.R.C Cause No. E005 of 2021)

JUDGMENT

1. The respondent, Joash Shisia Cheto, filed suit in the Employment and Labour Relations Court at Malindi against the appellant, Theopot Patrick Charles, vide a Memorandum of Claim dated 16th March 2021 seeking to enforce an award of Compensation by the Director of Occupational Safety and Health Services pursuant to the provisions of the *Work Injury Benefits Act*, Cap. 236 (the WIBA).
2. The respondent's case was that, in or about February 2019, the appellant employed the respondent as a gardener at the appellant's residence in Malindi; and that on 7th February 2019, while in the ordinary course of his employment pruning and cutting trees, a branch which he was cutting fell on him and, as a consequence, his left hand was seriously injured.
3. The respondent further averred that, on 5th September 2019, the incident was reported to the Director of Occupational Safety and Health Services (the Director), who filled the necessary statutory forms and, thereafter, assessed compensation payable to the respondent at Kshs. 624,000; that the appellant did not lodge any objection to the Director's decision on the assessment; that, vide a letter dated 26th January 2021, the respondent demanded payment of the sum awarded together with the accrued interest; and that, despite demand and notice to sue, the appellant refused, failed or neglected to pay. He prayed for judgment against the appellant for Kshs. 624,000; interest thereon with effect from 5th September 2019 until payment in full; and costs of the suit and interest thereon.



4. In response, the appellant filed a Written Statement of Defence and Submissions dated 21st May 2021 denying the respondent's allegations as set out in the Memorandum of Claim. His defence was that, sometime in early 2019, he contracted the services of one Mr. Kazungu who was to undertake the task of pruning trees over an agreed period of time and at an agreed price; that Mr. Kazungu was an independent contractor who the appellant had used over the years; that Mr. Kazungu had his own team of employees who he engaged for the purpose of discharging his contractual undertakings; and that the alleged accident did not occur and that, if there was an accident on or about 7th February 2019, any injuries sustained by the respondent, which were denied, were solely caused and/or substantially contributed to by the respondent's negligence.
5. The appellant further averred that the particulars of negligence attributable to the respondent were: failure to wear any protective gear while carrying out his duties; failure to be on the proper lookout to prevent the accident; ignoring clear instructions from Mr. Kazungu not to climb the tree he was cutting; and attempting to hang onto a very small plant that could not carry his weight.
6. According to the appellant, the respondent, who was not known to the appellant, suffered injuries arising from a fall from the tree that he was pruning; that the allegation that the tree or branch fell on him was untrue. The appellant's further defence was that the appellant had never employed or contracted the respondent; that the appellant was surprised to receive the respondent's Memorandum of Claim seeking to enforce the Director's award as a consequence of an accident that injured someone the appellant never employed; that it was absurd to suggest that the respondent was entitled to any compensation by the appellant; and that the appellant received a demand letter dated 19th September 2019, which was replied to by his advocates vide a letter dated 24th September 2019.
7. The suit proceeded to full hearing where the respondent testified as PW1 and adopted his written statement as his evidence in chief. However, his statement was omitted from the record as supplied to us despite being listed in the index of the record.
8. On cross-examination, the respondent stated that he was employed by the appellant despite not having been issued with any letter of appointment or other written evidence of such employment; that he (the respondent) and Kazungu were both in the appellant's employment, but that Kazungu occasionally collected payment on their behalf; and that he was not Kazungu's employee.
9. In his defence, the appellant called two of his employees as witnesses, namely Josephine Nzaro and Cardros Wanje, who testified as RW1 and RW2. The two stated that the respondent had never been employed by the appellant; that Kazungu was the one who was contracted to do the pruning work; and that the respondent was injured while working under Kazungu.
10. Opposing the enforcement of the respondent's award, the appellant stated that he did not make the notification to the Director or take part in the award process; that he only saw the Director's award on 23rd March 2021, yet the award was made on 5th September 2019; and that he did not know whether his lawyer appealed the Director's decision in court.
11. In its judgment dated 7th March 2022, the ELRC (B. O. M. Manani, J.) found that, based on the evidence tendered by the parties, the respondent was engaged by the appellant as a casual employee; that it was not clear when the notice or report of the accident involving him was made to the Director and by whom; that the report was acted on and a medical report completed; that, in his statement prepared under oath, the appellant did not specifically deny knowledge of the fact that the matter had been submitted to the Director for assessment; and that the appellant should have reacted to the issue immediately after a copy of the Director's assessment was sent to his lawyers in January 2021.



12. In addition to the foregoing, the ELRC held that the WIBA was silent on how to enforce the Director's award where an employer elects to ignore the award; that, however, a majority of case law on the issue have determined that the holder of the award can move the court to seek enforcement of the award; that a party who was not made aware of the proceedings before the Director and only learns of them at the adoption stage could only consider filing a Judicial Review motion to quash the award prior to adoption of the award by the court; and that the appellant should have done so in order to ventilate the several procedural issues belatedly raised despite the adoption proceedings having been pending since March 2021. Accordingly, the ELRC adopted the Directors award to the respondent in the sum of Kshs. 624,000; awarded interest on the sum at court rates from the date of judgment until payment in full; and costs of the suit to the respondent.
13. Aggrieved by the learned Judge's decision, the appellant filed the instant appeal vide a Memorandum of Appeal dated 23rd November 2022 on the following grounds:
 - “1. That the learned Judge erred in facts and law by enforcing and adopting a decision where the Respondent was not a party to.
 2. That the learned Judge erred in facts and law in failing to find that the Claimant was not an employee of the Respondent and that the Claimant was never at any [given] time a party to an agreement for service whether oral, written or otherwise between him and the Respondent.
 3. That the learned Judge erred in facts and law in failing to find that once the Respondent was not notified of the proceedings at and by the Director of Occupational Safety and Health (herein after 'the Director') then it was against the Respondent's legitimate right of fair hearing as provided under the Constitution of Kenya.
 4. That the learned Judge erred in facts and law in failing to find that the decision by the Director was unlawful and illegitimate and as such, he is unable to adopt the said decision for it is inconsistent with the Defendant's legitimate right.
 5. That the learned Judge misdirected himself in law and fact by finding that he had no powers to deal with the matter even after making a finding that the Respondent was not party to the proceedings that lead to the Director's decision.
 6. That the learned Judge erred in law and facts in failing to find that the Director's decision is null and void ab initio.
 7. That the learned Judge failed to exercise his discretion properly as a result he reached a perverse finding.
 8. That the learned Judge gave a Judgement against the law and weight of evidence.”
14. Learned Counsel for the appellant, M/s. Muli & Ole Kina, filed written submissions dated 18th September 2023 while learned Counsel for the respondent, M/s. Matata & Mwabonje, filed written submissions dated 31st October 2024, all of which were highlighted orally by the respective counsel when the appeal came for hearing on the Court's virtual platform on 6th November 2024.



15. This Court's mandate on 1st appeal was espoused in *Ng'ati Farmers' Co-Operative Society Ltd. V Ledidi & 15 others* [2009] KLR 331 as follows:

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this 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 witness and should make due allowance in that respect. In particular, this 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

16. This mandate was reiterated in the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 in the following words:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

17. However, we are conscious as cautioned by the predecessor to this Court in *Peters v Sunday Post Ltd* [1958] E.A 424 that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

18. In their submissions, Counsel for the appellant elected to canvass the appeal on two broad issues fashioned thus:

- i. Whether the learned Judge erred in fact and law in failing to appreciate that the Appellant was never informed nor was he part of the proceedings before the Director of Occupational Safety and Health hence against the Appellant's legitimate right of fair hearing thus occasioning a miscarriage of justice. (Ground 1, 3, 4 & 6).
- ii. Whether the learned judge erred by finding that he had no powers to deal with the matter and as a result illegitimately adopting the Decision by Director of Occupational Safety and Health that was procedurally unfair. (Ground 2, 5, 7 & 8).”

19. In our considered view, the instant appeal stands or falls on our finding on two main issues, namely: whether the learned Judge erred by failing to find that the appellant's was not informed of, or was not party to, the proceedings before the Director, thereby violating his right to a fair hearing; and whether the learned Judge erred by adopting the Director's award.



20. With regard to the 1st issue, the learned Judge held that:

- “ 31. From the evidence provided, a notice of report of the accident involving the Claimant was made to the Director
- However, it is not clear from the document when this report was lodged and by whom. The suggestion by the Respondent in his submissions that the report was lodged on 5.9.2019 therefore appears unfounded. Apparently, the report was then acted on and a medical report completed as appears on the flipside of exhibit 3 of the Claimant’s documents.
32. From this, the assessment of compensation was made as appears from Claimant’s exhibit 4. It is however contested whether the Respondent was made aware of this development.
33. Whilst the Respondent asserts in evidence that he learned of the assessment in March 2021, the Claimant suggests that the Respondent was made aware of the award by the Director immediately it was made but declined to honour it.
34. I have considered the evidence on this aspect of the dispute. I note that before the Claim was filed, the Claimant’s Advocates issued a demand to the Respondent for settlement of the dispute. This demand is dated 19th September 2019 and appears as Claimant’s exhibit 5. This demand elicited a response from the Respondent’s Advocates dated 24th September 2019 in which liability was denied. On 26th January 2021, the Claimant’s Advocates again demanded for payment this time round sending out a copy of the Director’s award. The letter was sent by email to the Respondent’s Advocates (see Claimant’s exhibits 6 and 7). It elicited no response. In March 2021, the Claimant filed this claim. On 26th May 2021, the Respondent filed a defense to the Claim after having entered appearance in March 2021.
35. I have looked at the Respondent’s defense and witness statement. Apart from the general denial in the defense, I see nowhere in the Respondent’s statement prepared under oath where he specifically denies knowledge of the fact that this matter had been forwarded to the Director for assessment. In fact, if this was the case, the Respondent would have immediately reacted to the issue once a copy of the Director’s assessment was sent to his lawyers in January 2021. The first time the Respondent denies knowledge of the assessment is during his oral testimony on 25th January 2022.
36. In cross examination, the Respondent confirmed that the details in the DOSHI forms correspond with his actual details. That the residence set out in the form was his and that the telephone number in the form was his. It should be noted that at the trial, these forms were produced as exhibits without objection by the Respondent. Their authenticity was not challenged. The need to verify entries in them was not raised by the defence. On the basis of the foregoing and having regard to the demeanor of the witnesses, who appeared before me on the issue, I am inclined to believe the Claimant’s position that the Respondent was made aware of the award earlier than he now suggests.”



21. Faulting the learned Judge for his decision, counsel for the appellant submitted that the provisions of Article 47 of *the Constitution* (the right to fair administrative action), Article 50(1) of *the Constitution* (the right to have a dispute decided in a fair and public hearing before a court or other independent and impartial tribunal or body), and section 4 of the Fair Administrative Actions Act (Administrative action to be taken expeditiously, efficiently, lawfully etc.) were not adhered to in the entire administrative process against the appellant.
22. The appellant contended that he did not notify the Director of any accident since it never happened and, if it did as alleged by the respondent, the same never happened to a person in his employment and, therefore, he had no obligation whatsoever to notify the Director; that the notice suggests that it was given by the appellant as the respondent's employer, but that there is no evidence suggesting that the same was made by him, or that he signed the form of notification; that, in his Memorandum of Claim, the respondent suggests that the notice was filled by the Director, and that he is aware of who notified the Director; that the hearing neither took place, nor was the appellant notified of the same by the Director or the respondent despite the two having the appellant's contacts as evidenced by the notice in their possession; that the Director went ahead and made an award on the same day on 5th September 2019 by assessing the compensation due at Kshs. 624,000, which award was not brought to the appellant's attention to enable him respond thereto; and that the respondent's Advocates subsequently wrote a demand letter to the appellant dated 19th September 2019, which letter did not make any mention of the award despite the respondent having been in possession thereof.
23. The appellant further submitted that he only came to know of the award when the respondent filed the claim in Court to enforce it and served him (the appellant) with the court documents on 23rd March 2021, more than a year after the award was made, and after the 60 days' period allowed for appeal under section 51 of the WIBA had lapsed; that the only explanation for his action is that the respondent knew that he had no claim against the appellant, and thus resorted to sharp practices.
24. In conclusion, the appellant submitted that every person is entitled to a fair hearing, which is not only a rule of natural justice, but also a Constitutional right which, under Article 25(c), it cannot be limited or denied.
25. To buttress his submissions, counsel cited the cases of *Zahira Habibullah Sheikh & Another v State of Gujarat & Others* AIR 2006 SC 1367 for the proposition that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned, and that failure to accord fair hearing either to the accused or to the prosecution violates even minimum standards of due process of law; and *Union Insurance Co. of Kenya Ltd. v Ramzan Abdul Dhanji* [1997] KECA 186 (KLR) for the proposition that the right to be heard is a basic concept of natural justice and ought not to be taken lightly; and that the law is that parties must be given a reasonable opportunity of being heard and that, once that opportunity is given but is not utilised, then the only point on which the party not utilising the opportunity can be heard is to explain why he did not utilise it.
26. Counsel argued that the fact that the appellant was not notified of the proceedings makes the entire proceeding, including the award, null and void ab initio; that the allegation by the respondent that the appellant was aware of and party to the proceedings leading to the contested award are mere allegations which the respondent has been unable to prove by evidence; that the appellant has no duty to prove to the court that he knew of the award; and that it is trite law, as stipulated in section 107 of the *Evidence Act*, that he who alleges must prove. They urged us to allow the appeal as prayed.
27. On their part, learned counsel for the respondent opposed the appeal and submitted: that, in his defence, the appellant only raised two defences. The first defence was the claim that the respondent was



in the employment of an independent contractor and, secondly, that the accident was caused and/or substantially contributed to by the respondent's own negligence; that the alleged lack of notification to attend the director's hearing was not raised in the appellant's pleadings; and that the defence in this regard only cropped up as a single sentence in the appellants written submissions.

28. Counsel further submitted that it is trite law that submissions are not pleadings; and that, in fact, in the appellant's final submissions at the trial court, he framed only three issues for determination as follows:

- “1. Whether the Claimant is an employee of the respondent?
2. Whether the Claimant is entitled to the remedies sought?
3. Costs of the suit.”

29. According to counsel, the trial court acknowledged that the appellant had not raised the defence of lack of a fair hearing, and further observed that the first time the appellant denied knowledge of the assessment of the award by the Director was during his oral testimony on 25th January 2022. In counsel's view, the appellant cannot raise the defence of infringement of his right to fair hearing for the first time in this appeal.

30. Counsel cited the case of *Hellen Wangari Wangechi v Carumera Muthoni Gathua* [2015] eKLR for the proposition that it is trite law that parties are bound by their pleadings; and that each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Counsel argued that it was clear that the appellant's defence that he was not granted a fair hearing by the Director is an afterthought and should be disregarded. They urged us to dismiss the appeal.

31. We take to mind the respondent's argument is that the issue as to whether the appellant was given notice of the proceedings before the Director was not raised in the appellant's pleadings; and that, therefore, the issue ought not to be entertained in this appeal.

32. In *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR, this Court explained the circumstances under which a court can make a determination on an unpleaded issue as follows:

“Parties are indeed bound by their own pleadings Of course, if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in *Odd Jobs v Mubia* [1970] EA 476, ‘a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for [its] decision.’”

33. In *Herman P. Steyn v Charles Thys* [1997] KECA 395 (KLR), this Court, holding in reference to the particular circumstances of that case that the trial court's determination of an unpleaded issue was proper, observed that:

“ It is true that the finding was an obvious and fundamental departure from the pleadings without any amendment of the same. But in our view the appellant himself introduced the unpleaded issue into the evidence, led evidence thereon, cross examined the plaintiff vigorously in relation thereto and acquiesced into the unpleaded issue being canvassed and left [it] to the court for a decision. In addition, the defendant also called witnesses in support of his assertion Written submissions followed in which the advocates for both the parties dealt with this issue in detail.



In these circumstances, the determination of that issue became an issue at the trial with neither party objecting and both parties fully participating in it Having acquiesced in the departure and participated as set out above, the appellant cannot now be allowed to complain that the trial judge was in error in view of the state of the pleadings.”

34. In his Statement of Defence, the appellant merely denied the respondent’s claim that the matter was reported to the Director, and that, thereafter, the Director assessed the compensation due to the respondent at Kshs. 624,000. The allegation that he was not given notice of the proceedings before the Director and did not participate in the same was also not raised in the appellant’s Statement of Defence dated 25th May 2021. The issue came up for the first time when the appellant gave his oral testimony at the hearing on 25th January 2022 and stated that he did not participate in the process leading to the impugned award.
35. A cursory look at the appellant’s pleadings shows that his defence was primarily that the respondent was not his employee, and that the injuries sustained by him were solely caused by and/or substantially contributed to by his negligence. To our mind, the issue was not fully canvassed by the parties at the hearing or dealt with in detail in the submissions in order for it to appear that it had been left to the court for its determination. Accordingly, the issue ought not to have been considered for determination by the ELRC. In any event, the second limb of the issue that the appellant’s lack of notice of, or participation in, the proceedings before the Director amounted to violation of the appellant’s right to a fair hearing is raised for the first time in submissions in the instant appeal.
36. In *Stallion Insurance Company Limited v Ignazzio Messina & C S. p. A.* [2007] KECA 305 (KLR), this Court held that:

“We are of the further view that the appellant’s case as put and argued before the superior court was specific. The intention to alter it at this appellate stage would be grossly prejudicial to the respondent and it ought not to be allowed. The persuasive speech of Sir Raymond Evershed M.R. in *United Dominion Trust Case (Supra)* may illustrate the point: -

‘... As a matter of principle the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below

.... It is not in accordance with the public interest that a party who has fought a case in a county court and been defeated should then raise in this court a new point and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay the costs not only below, but in this court.’

The same approach appears to obtain in India where, in a case where the new issue of law was raised for the first time on appeal eighteen months after the lower court’s decision, the court stated: -

‘Unless upon very strong grounds, and under very special circumstances, we should hesitate to permit a party at such a stage of his suit, as the present suit now is, to set up a case which was not set up for him in the Court of first instance or of primary appeal, where his professional representative must have been perfectly well aware whether such a case as this alleged special custom could be legitimately set up, and abstained from any attempt to set it up. To yield to such an application



as the present, would be to make an evil precedent, and to hold out a premium to perjury and interminable litigation.” [Emphasis added]

37. In *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] KECA 692 (KLR), M’Inoti, J.A also observed that:

“... the Courts [have] developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In *Openda v. Ahn*, (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant’s case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea.

... ..

In *Securicor (Kenya) Ltd v. EA Drapers Ltd & Another* (supra) the Court, after reviewing a line of decided cases, reiterated that although it has discretion to admit a new point at appeal:

‘Certainly, the cases show that the discretion must be exercised sparingly. The evidence must all be on record and the new point must not raise disputes of fact. The new point must not be at variance to the facts or case decided in the court below.’”

38. The challenge on the respondent’s award on the ground that the appellant was not served with the notice of the Reference to the Director and that, therefore, he could not participate in the assessment, cannot be entertained in the instant appeal, the same having been raised for the first time before us. We find nothing on the record to suggest that the two- pronged ground was raised in the appellant’s defence in the ELRC.
39. Likewise, the appellant’s submission that he was denied a fair hearing is, in our considered view, an afterthought that comes too late in the day. It is indisputable that this line of defence was neither pleaded before the ELRC nor substantially ventilated at the trial by both parties to justify consideration by this Court. Simply put, it is at variance with the facts and the case determined in the court below in that it was neither pleaded nor canvassed before the trial court. To hold otherwise would be tantamount to a licence to allow the appellant to raise a new plea in a new frontier of litigation not contemplated or canvassed in the proceedings before the ELRC whose decision to uphold the Director’s award is now challenged on appeal before us. Consequently, that ground of appeal fails.
40. Turning to the 2nd issue as to whether the learned Judge was at fault in upholding the Director’s award, we take the liberty to set out his finding and holding in extenso as rendered in the following words:

“ 16. The Respondent denies responsibility to pay this amount principally on the ground that the Claimant was not his employee. Under the arrangement set out under the WIBA, I doubt that it is open to the Respondent to raise this objection at this stage of the dispute.



.....

37. ... the challenge in this matter is not so much what has so far been discussed. Rather, it is whether the Respondent can at this stage of the dispute seek to challenge the award in the manner that he has done. Put differently, the question is whether the court has jurisdiction to open up and examine the Director's award at this stage.

.....

40. The process for compensation is triggered by a report of the occurrence of the accident or affliction of the employee by the occupational disease to the Director under sections 21 and 22 of the WIBA. The Director conducts an inquiry pursuant to the powers donated to him/her under section 23 of the WIBA before determining the relief to award.

41. Once the award is made, the employer is obligated under section 26 (4) of the Act to settle the award within ninety (90) days of the claim. However, where the employer is dissatisfied with the award, he/she may within sixty (60) days of the award, lodge with the Director an objection against it. The Director will then determine the objection within fourteen (14) days in terms of section 52 of the Act.

42. Under section 52 (2) of the Act, an objector who is still unhappy with the Director's decision can approach the ELRC by way of an appeal against the decision. This must be done within thirty (30) days of the Director's response to the objection.

43. The law does not tell us what should happen should the employer elect to ignore the Director's award

44. Quite a bit of litigation has centered on this area of law. And as many decisions have been rendered expressing different standpoints on the various questions aforesaid

....

51. 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.
52. I agree with these general principles. However, in their submissions, the Respondent’s Advocates raise a number of challenges posed by the current architecture of the WIBA. For instance, how should a party who was not made aware of the proceedings before the Director and who only learns of them at the adoption stage move to re-open the assessment if the time for appeal has lapsed. These are just some of the weaknesses in this legislation.
53. In my view, such party must consider filing a Judicial Review motion to quash the award. However, this must be done prior to adoption of the award by the court. The Respondent ought to have done this in order to ventilate the several procedural issues he now raises. Unfortunately, this was not done. And this is despite the adoption proceedings having been pending since March 2021. Nothing stopped the Respondent from seeking to stay this cause as he pursues a Judicial Review motion to challenge the award now that the right of appeal under Section 52 of the WIBA had been spent.
54. 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”
41. Faulting the learned Judge’s decision, learned Counsel for the appellant went to great lengths to submit on, among other things, the intent of section 3A of the *Civil Procedure Act* as read with section 3, which vest in the courts inherent power to make any orders as may be necessary for the ends of justice, or to prevent abuse of the court process. Counsel went on to dwell on the edict stipulated in Article 159 of *the Constitution*, which calls on courts to administer justice without undue regard to technicalities of procedure. Citing the provisions of Articles 20(3) and 259 of *the Constitution* as well as judicial authorities from our local and comparable jurisdictions, counsel took us through arguments on the newly-raised issue as to whether the appellant was accorded a fair hearing. He concludes with an appeal that we “develop the law” to seal the perceived lacuna in the law relating to the fate of independent contractors and his right to a fair hearing.
42. In rebuttal to the appellant’s submissions on the 2nd issue, learned Counsel for the respondent submitted that, even if the appellant’s defence had been raised at the opportune time, the lawful avenue for the appellant was for him to file a Judicial Review motion to quash the award, which he failed to do.
43. Having carefully considered the impugned judgment, the rival submissions and the law, we hasten to point out that, upon notification of an occupational accident as prescribed by the WIBA and a claim for compensation therefor, the Director is mandated to undertake such inquiry as may be necessary to determine any claim or liability (section 23 of the Act), and may also require the injured employee to submit to medical examination (section 25). The Director may then award compensation in accordance with Part V of the WIBA (sections 28 to 37).
44. 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, and as provided for under sections 86 and 89 (formerly sections 87 and 90) of the *Employment Act* (Cap. 226). Section 86 reads:

86. Complaint and jurisdiction in cases of dispute between employers and employees
1. Subject to the provisions of this Act whenever—
 - a. an employer or employee neglects or refuses to fulfill a contract of service; or
 - b. any question, difference or dispute arises as to the rights or liabilities of either party; or
 - c. touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Employment and Labour Relations Court.
 2. No court other than the Employment and Labour Relations Court shall determine any complaint or suit referred to in subsection (1).
 3. This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

45. Section 89 provides for limitation of actions under the Act and reads:

89. Limitations

Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

41. In *Richard Akama Nyambane v ICG Maltauro Spa* [2020] KEELRC 847 (KLR), Mbaru, J. held that:

“As held in the cited case of *Ruth Wambui Mwangi & another versus Alfarah Wholesalers Limited* [2017] eKLR, upon Directorate of Occupational Safety and Health Services (DOSHS) making the work injury assessment under Occupational Safety and Health Act, 2007 on the award by the Director under WIBA, there is no enforcement mechanism and this being the court with mandate to address employment and labour relations claims and for connected purposes, the practice has been to file such claims under the provisions of section 89 of the Act as the *Work Injury Benefits Act*, 2007 read with the *Occupational Safety and Health Act*, 2007 do not outline the enforcement mechanism and procedures save to address work place injury assessment and award by the Director.

The application of section 87 of the Act, thus put into perspective, all claims premised under the *Employment Act*, 2007 are subject to the provisions of section 90 thereof. Section 87 and 90 thus read together, the cause of action herein and the orders sought seeking to enforce the DOSH award, such must be subject to the mandatory provisions of section 90. All claims must be lodged with the court within 3 years from the date the cause of action arose.”



47. The manner in which the Director’s decision may be challenged is set out in sections 51 and 52 of the WIBA, which provide:

51. Objections and appeals against decisions of the Director

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.

51. Director’s reply

1. The Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.
2. An objector may, within thirty days of the Director’s reply being received by him, appeal to the Industrial Court against such decision.

48. In *Samson Chweya Mwendabole v Protective Custody Limited* [2021] KEELRC 1809 (KLR), Makau, J. pointed out that the ELRC’s inherent jurisdiction to adopt the Director’s decision is distinct from the appellate jurisdiction under section 52(2) of the WIBA. According to the learned Judge:

“... There is a lacuna in law with respect to procedure for enforcement of the awards made by the Director under WIBA. However, this court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to Article 162(2) (a) of *the Constitution* and section 12 of the Employment and Labour Relations Court Act, I hold that it has the inherent jurisdiction to adopt as judgement the Director’s award for purposes of execution. This jurisdiction should not be confused with appellate jurisdiction which is expressly donated under section 52 (2) of the WIBA in respect of the Directors reply to objection made under section 51(1) of the WIBA.”

49. 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 misperceived 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.
53. Having considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed. Consequently, the judgment and decree of the ELRC B. O. M. Manani, J.) delivered on 7th March 2022 is hereby upheld.
54. The costs of the appeal shall be borne by the appellant.
Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

