



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangata v Shyam General Merchants Limited (Cause E086 of 2024)  
[2025] KEELRC 616 (KLR) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 616 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E086 OF 2024  
K OCHARO, J  
JANUARY 16, 2025**

**BETWEEN**

**RAMADHAN CHANDUGU MWANGATA ..... APPLICANT**

**AND**

**SHYAM GENERAL MERCHANTS LIMITED ..... RESPONDENT**

**Jurisdiction of the Employment and Labour Relations Court to issue enforcement orders for the awards by the Director of Occupational Safety and Health Services**

*The application sought among other orders that the court adopts as its judgment the assessment/ award of the Director of Occupational Safety and Health Services. The court noted that the Work Injury Benefits Act hadn't provided for the procedure for enforcement of the Director's award and that was a recipe for the two schools of thought held by judges of the court. There were those who held that the court had the jurisdiction, and those that were of a contrary position. The instant court held that from a purposive reading of rule 69 of the Employment and Labour Relations Court Procedure Rules, 2024, it had the jurisdiction to entertain the instant application and render itself on the same.*

Reported by Kakai Toili

**Jurisdiction** – jurisdiction of the Employment and Labour Relations Court (ELRC) - jurisdiction to issue enforcement orders for the awards by the Director of Occupational Safety and Health Services award - whether the ELRC had the jurisdiction to issue enforcement orders for the awards by the Director of Occupational Safety and Health Services award – Constitution of Kenya, articles 10, 41 and 48; Employment and Labour Relations Court Procedure Rules, 2024, rule 69.

**Labour Law** - Director of Occupational Safety and Health Services (the Director) – decisions/awards by the Director – claim that a party was aggrieved by an award issued by the Director - what was the effect of failure to file an objection or an appeal against an award by the Director within the statutory timelines – Work Injury Benefits Act (cap 236), sections 51 and 52.



## **Brief facts**

The applicant was an employee of the respondent, at its construction site as a concrete worker and had sustained injuries out of a workplace accident. The incident was reported to the Director of Occupational Safety and Health Services (the Director). Subsequently, an assessment of the injuries suffered was done and he was found to have suffered 60% permanent incapacity. Consequently, the Director on November 30, 2023, awarded the applicant, KShs. 804,333.33 as damages for the injuries suffered. Upon the assessment, the respondent was required to effect payment within 90 days after which the Director would transmit the paid sum to the applicant within 30 days.

The applicant stated that if the respondent was aggrieved by the Director's decision/award, it was supposed to lodge an objection with the Director within 60 days of the decision/award. However, the respondent never lodged an objection or appeal within the stated period. Instead, the respondent without the Director's permission subjected the applicant for secondary medical examination after which a report was issued indicating that the applicant suffered 25% permanent incapacity. On the basis of the report, the respondent lodged an objection with the Director. The objection was declined on the grounds *inter alia* that it was lodged outside the statutory period of 60 days.

The applicant stated that despite the Director's assessment and rejection of the objection, the respondent ignored and or refused to pay the awarded sum. The application thus sought among other orders that; the court adopts as judgment of the court, the assessment/ award of the Director.

## **Issues**

- i. Whether the Employment and Labour Relations Court had the jurisdiction to issue enforcement orders for the awards by the Director of Occupational Safety and Health Services.
- ii. What was the effect of failure to file an objection or an appeal against an award by the Director of Occupational Safety and Health Services within the statutory timelines?

## **Relevant provisions of the Law**

### **Work Injury Benefits Act (cap 236)**

#### **Section 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.*

#### **Section 52 - 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.*

## **Held**

1. The replying affidavit had been sworn by a stranger to the proceedings herein. It hadn't been by a director of the respondent company, or an officer of the respondent who could be said to have had within her or his knowledge the matters deposed in the replying affidavit. What was deposed to therein were matters that could be competently deposed to by either the director of respondent company or officer, not the insurer's legal officer.
2. The Work Injury Benefits Act hadn't provided for the procedure for enforcement of the Director's award. Further, there had been a furious debate on as to whether the Employment and Labour Relations Court, had the requisite jurisdiction to issue enforcement orders or orders that were



- facilitative for the enforcement, of the Director’s award, in light of the gap. That had been a recipe for the two schools of thought held by judges of the court. There were those who held that the court had the jurisdiction, and those that were of a contrary position. For there to be a precise decision as regards the court’s jurisdiction on the matters aforementioned, the stipulations of the Work Injury Benefits Act had to be read not in isolation from, relevant constitutional provisions, statutes and legal principles.
3. Equity would not suffer a wrong without a remedy. The court hadn’t left those who deserved the enjoyment of the sums assessed by the Director as compensation for injuries suffered to be without recourse due to the *lacuna* in the provisions of the Work Injury Benefits Act, and more specifically where the person under a duty to settle the award was deliberately and without justification refusing to do so. Such persons could not be left to painfully wait, till end came, for a Legislature which hadn’t deemed it fit to legislate the enforcement mechanism 17 years after the taking effect of the Act, to legislate before pursuing enforcement orders to facilitate enforcement of the Director’s awards or decisions that were in their favour. It was in situations like that, that judge made law or judge craft became imperative for the wider interest of justice.
  4. Among the national values and principles of governance stipulated under article 10 of the Constitution of Kenya, which bound the court whenever it applied or interpreted the law, were; social justice, the rule of law, human rights, and human dignity. If the court were to fold its hands and say that the Work Injury Benefits Act did not provide for an enforcement mechanism, there was nothing it could do, the citizens’ right of access to justice under article 48 of the Constitution shall suffer, and fair labour practices under article 41 of the Constitution, unnecessarily stifled. The employers would deliberately refuse to settle the awards by the Director, as a result, the rule of law and social justice would suffer. Therefore, the court was obligated, to issue facilitative orders to enable enforcement of the Director’s awards in deserving cases.
  5. The Employment and Labour Relations Court Procedure Rules, 2024, came into effect on August 18, 2024. A purposive reading of rule 69, would reveal that the instant court had jurisdiction to entertain an application such as the instant application and render itself on the same.
  6. While the respondent possessed the right to file an objection against the award under section 51 of the Work Injury Benefits Act and a right of appeal to the court under section 52 thereof, apparently it failed to avail itself of those procedures within the statutory period. Absent an objection and/or appeal by the respondent against the award dated May 30, 2023, the court’s jurisdiction to enforce the award in the face of the respondent’s non-settlement of the same, had matured.
  7. The matters raised by the respondent in response to the applicant’s application were largely an attack on the merits of the award and or the process leading to the award. The grounds and material presented by the respondent could be proper material and or grounds in a process that involved merit consideration, like the appeal process contemplated under section 52 of the Work Injury Benefits Act, or a judicial review application to the court. The grounds and or material as presented by the respondent were irrelevant in proceedings like the instant one, where the court’s authority was limited and did not extend to the examination of merits and or consideration of the propriety of the process leading to the award.
  8. The applicant having sufficiently demonstrated; the existence of the award by the Director made on November 30, 2023 in his favour; that the award had not been assailed in any of the ways provided for under the law and; that the respondent had not settled the same to date; was entitled to the orders sought in his notice of motion application.

*Application allowed with costs.*

#### **Orders**

- i. *Interest on the sum awarded shall be at court rates from the date of the award of the Director, till full payment.*
- ii. *The interest shall be simple interest not compounded interest as sought by the applicant.*



## Citations

### Cases

1. Elijah Kisyanga Ndende v Manager Zahkem International Construction Ltd (Miscellaneous Application E040 of 2021; [2022] KEELRC 383 (KLR)) — Explained
2. Joash Shisia Cheto v Thepot Patrick Charles (Cause E005 of 2021; [2022] KEELRC 478 (KLR)) — Explained
3. Peter Mutua Kaloki v China State Construction & Engineering Corporation [ Kenya] & another (Miscellaneous Application E125 of 2021; [2022] KEELRC 960 (KLR)) — Followed
4. Samson Chweya Mwendabole v Protective Custody Limited (? E020 of 2020; [2021] KEELRC 1809 (KLR)) — Explained

### Statutes

1. Constitution of Kenya, 2010 — article 10, 27(1); 41(1); 48; 162 — Interpreted
2. Employment and Labour Relations Act [ Procedure Rules, 2024] (cap 8E, Sub Leg) — rule 69 — Cited
3. Employment And Labour Relations Court Act (cap 8E) — section 12 — Interpreted
4. Work Injury Benefits Act (cap 236) — section 10(1); 19(2); 21; 51; 52 — Interpreted
5. Labour Relations Act

### Advocates

None mentioned

## RULING

### Background

1. Through his notice of motion application dated August 19, 2024, the applicant seeks the following orders: -
  - a. Spent.
  - b. That the honourable court be pleased to adopt as judgment of the court, the assessment/ award of the Directorate of Occupational Safety and Health Officer-Mombasa made on November 30, 2023.
  - c. A decree do issue for;
    - i. The sum of KShs. 804, 333.33, being the Director’s award/assessment made on 30<sup>th</sup> November,2023; and;
    - ii. Interest thereon compounded annually at court rates from the date of the award until payment in full.
  - d) That costs of this application be awarded to the applicant.
2. The notice of motion is premised on the grounds set out on its face and the supporting affidavit of the applicant, sworn on August 19, 2024.
3. The respondent resisted the application through a replying affidavit sworn on September 28, 2024 by Mary Odera, the Legal Officer of Intra Africa Assurance Company Limited, the Respondent’s Insurer.
4. The applicant’s application is expressed to be brought under sections 10[1], 19[2], and 51 of the *Work Injury Benefits Act*, articles 27[1] & [2], 41[1] and 162 of the *Constitution* of Kenya, 2010, and section 12 of the *Employment and Labour Relations Court Act*.



## The Application.

5. The applicant asserted that at all material times, he was an employee of the respondent, at its construction site [Amani Apartment] as a concrete worker. In the course of his employment he sustained injuries out of a work place accident.
6. The incident was reported to the Director of Occupational Safety and Health Services [the Director]. Subsequently, an assessment of the injuries suffered was done. He was found to have suffered 60% permanent incapacity. Consequently, the Director on November 30, 2023, he was awarded the applicant, KShs. 804,333.33 as damages for the injuries suffered.
7. Upon the assessment, the respondent was required to effect payment of the stated amount within ninety [90] days after which the Director would transmit the paid sum to the applicant within thirty [30] days.
8. The claimant further stated that if the respondent was aggrieved by the Director's decision/award, it was supposed to lodge an objection with the Director, within sixty [60] days of the decision/award. The respondent never lodged an objection or appeal, within the stated period or at all.
9. Instead, the respondent without the director's permission subjected the applicant for secondary medical examination after which Dr. Adegü William Jacob, on 17<sup>th</sup> May, 2024 issued a report indicating that the applicant suffered 25% permanent incapacity.
10. On the basis of the said report, the respondent lodged an objection which was received by the Director's Mombasa Office on July 19, 2024. Under cover of a letter of the even date, the Office forwarded the objection together with the secondary medical report to the Head Office, Nairobi for action. Through a letter dated July 31, 2024, the objection was declined on the grounds inter alia that the same was lodged outside the statutory period of sixty [60] days.
11. He further stated that despite the Director's assessment and rejection of the objection, the Respondent ignored and or refused to pay the awarded sum, thereby occasioning the applicant who is incapacitated to an extent that he cannot work, destitute. The continued neglect to settle the award by the respondent is an infringement on his constitutional rights under article 27, and article 41[ right against unfair labour practices], of the Constitution.

## The Response

12. The respondent through the affidavit forestated, asserted that the instant application is incurably defective and incompetent to warrant issuance of the orders sought as this court doesn't have jurisdiction to entertain the matter as held in the case of Peter Mutua Kaloki v China State Construction & Engineering Corporation [Kenya] & another [ 2022] eKLR.
13. It was further argued that the instant matter is bad in law and an abuse of the court process following the fact that the application is a disguised form of forum shopping as the applicant filed and later withdrew Mombasa CMC ELRC Misc. Application No. E 010 Of 2024 on 16<sup>th</sup> September, 2024.
14. Contrary to the tenets on natural justice, the respondent was not notified of the award dated 30<sup>th</sup> November 2023. Further, time for purposes of lodging the objection or appeal contemplated in under the above-mentioned Act, starts running from the time the Director's award is received by the employer.
15. The respondent, upon discovery of the existence of the irregular award made, promptly filed an objection on the July 10, 2024 contesting the award of the Director. The objection was declined



without the respondent being accorded an opportunity to be heard on why it filed the objection out of time.

16. The Director's award was made in a vacuum and is not supported by any treatment notes contrary to the principles of equity and the Director's failure to incorporate the Medical Report dated May 17, 2024 was contrary to the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.
17. The applicant didn't notify the respondent of the occurrence of the accident within the timelines provided under section 21 of the *Work Injury Benefits Act*.

### **The Rejoinder**

18. Through the supplementary affidavit sworn on September 30, 2024, the applicant asserted that prior to lodging the objection which was declined by the Director, the respondent had referred him to its Doctor, Ndegwa William Jacob on May 17, 2024, indicative that it was aware of the Director's assessment.
19. The court should note that the respondent has conveniently failed to state when the discovery of the 'irregular award' was made. Further, the Director's decision rejecting the respondent's objection was not appealed against within the thirty days contemplated in the Act or at all.
20. The factual issues surrounding the award as raised by the respondent cannot be considered in this forum. They could only be, if this court had been invited by the respondent to exercise its appellate jurisdiction.
21. The issue of the court's jurisdiction in matters like the instant one is now settled. Rule 69 of the *Employment and Labour Relations Act [Procedure Rules, 2024]* read together with section 12 of the *Employment and Labour Relations Court Act*, and article 162 of the *Constitution*, are instructive that the court possesses the requisite jurisdiction.

### **Analysis and Determination**

22. I have carefully considered the notice of motion application; the grounds thereof and affidavit in support; the replying affidavit; and the further affidavit, and distil a single issue for determination, thus; whether this court should award the orders sought by the applicant
23. From the onset it is important to point out that the replying affidavit herein filed and expressed to be in opposition to the applicant's application in my view, has been sworn by a stranger to the proceedings herein. It hasn't been by a Director of the respondent Company, or an Officer of the respondent who can be said to have had within her or his knowledge the matters deposed in the replying affidavit. A careful consideration of the manner in which the replying affidavit has been couched, and the contents thereof, leads only to one easy conclusion, what is deposed to therein are matters that could be competently deposed to by either the Director of respondent Company or Officer, not the Insurer's Legal Officer.
24. Further, it is imperative to pronounce myself on the jurisdictional issue that keeps on springing up in matter like the instant. Undoubtedly, the *Work Injury Benefits Act* hasn't provided for the procedure for enforcement of the Director's award. Further, there has been a furious debate on as to whether the Employment and Labour Relations Court, has the requisite jurisdiction to issue enforcement orders or orders that are facilitative for the enforcement, of the Director's award, in light of the gap. This has been a recipe for the two schools of thought held by Judges of the court. There are those who hold that the court has the Jurisdiction, and those that are of a contrary position as exemplified by the decision



of *Peter Mutua Kaloki v China State Construction & Engineering Corporation [ Kenya ] & another* [2022], cited by the deponent of the Replying affidavit.

25. Elsewhere, I have respectively declined to be persuaded by the unbinding authority mentioned above. Time and again, I have held that for there to be a precise decision as regards the court's jurisdiction on the matters aforementioned, the stipulations of the *Work Injury Benefits Act*, have to be read not in isolation from, relevant Constitutional provisions, Statutes and legal principles.
26. Equity will not suffer a wrong without a remedy. This court hasn't left those who deserve the enjoyment of the sums assessed by the Director as compensation for injuries suffered to be without recourse due to the lacuna in the provisions of the Act, and more specifically where the person under a duty to settle the award is deliberately and without justification refusing to. Such persons cannot be left to painfully wait, till end comes, for a Legislature which hasn't deemed it fit to legislate the enforcement mechanism 17 years after the taking effect of the Act, to legislate before pursuing enforcement orders to facilitate enforcement of the Director's awards or decisions that are in their favour. It is in situations like this that Judge made law or Judge craft becomes imperative for the wider interest of justice.
27. Among the national values and principles of governance stipulated under article 10 of the *Constitution* of Kenya, 2010, that bind this court whenever it applies or interprets the law, are social justice, the rule of law, human rights, and human dignity. If this court were to fold its hands and say "Behold WIBA does not provide for an enforcement mechanism, there is nothing I can do", the citizens' right of access to justice under Article 48 shall suffer, and fair labour practices under Article 41, unnecessarily stifled. The employers will deliberately refuse to settle the awards by the Director, as a result, the rule of law and social justice will suffer.
28. Therefore, the court is obligated, to issue facilitative orders to enable enforcement of the Director's awards in deserving cases.
29. This court hasn't lost sight of the fact that the *Employment and Labour Relations Court Procedure Rules, 2024*, came into effect on August 18, 2024. A purposive reading of rule 69, will reveal that this court has jurisdiction to entertain an application such as the instant application and render itself on the same.
30. This court's hereinabove, gets inspiration in various Judicial precedents. In *Elijah Kisyinga Ndende – Vs- The Manager Zabkem Internation Construction Ltd* [2022] eKLR, the court held: -

“The *Work Injury Benefits Act* is silent on the procedure to be followed in enforcing the Director's decision made on assessment of compensation payable to an employee for work injuries. In this court's view, however, the legislature never intended that an employee whose employer fails and/or refuses to pay the amount of compensation assessed by the Director of Occupational Safety and Health Services under WIBA would be without civil remedy, and particularly so where the employer never objected to the Director's decision on assessment of compensation payable.”
31. Similarly, in *Samson Chweya Mwandabole –Vs- Protective Custody Limited* [2021] eKLR, the court held as follows: -

“...However, this court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to article 162(2) of the *Constitution* and section 12 of the *Employment and Labour Relations Court Act*, the court has inherent jurisdiction to adopt as a judgment 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 director's reply to an objection made under section 51(1) of WIBA. It would appear that the former jurisdiction, which I now invoke, can be exercised by the court where there is no challenge mounted against the Director's award by any party by way of objection or appeal under sections 51(1) and 52(2) of the WIBA respectively."

32. In *Joash Shisia Cheto v Thepot Patrick Charles* [2022] eKLR, after analyzing various decisions on the issue of enforcement of DOSH awards, the court stated: -

"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."

33. While the respondent possessed the right to file an objection against the award under section 51 of the *Work Injury Benefits Act* and a right of appeal to this court under section 52 thereof, apparently it failed to avail itself of these procedures within the statutory period. Section 51 and 52 provide that: -

"(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.

52. 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.”

34. Absent an objection and/or appeal by the respondent against the award dated May 30, 2023, this court’s jurisdiction to enforce the said award in the face of the respondent’s non-settlement of the same, has matured.
35. I have carefully considered the matters raised by the respondent in response to the applicant’s application. Largely, they are in the attack on the merits of the award and or the process leading to the award. In my view, the grounds and material presented by the respondent could be proper material and or grounds in a process that involves merit consideration, like the appeal process contemplated under section 52 of the Act, or a judicial review application to this court. The grounds and or material as presented by the respondent are irrelevant in the proceedings like the instant one, where the court’s authority is limited and does not extend to the examination of merits and or consideration of the propriety of the process leading to the award.
36. The above-stated position by this court draws inspiration from the decision in Joash Shisia Cheto v Thepot Patrick Charles [2022] eKLR, where the court aptly stated;
- “..... [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.”
37. The applicant having sufficiently demonstrated; the existence of the award by the Director made on November 30, 2023 in his favour; that the award has not been assailed in any of the ways provided for under the law and; that the respondent has not settled the same to date, I return that he is entitled to the orders sought in his notice of motion application.
38. In the upshot, I allow the notice of motion application dated August 19, 2024, with costs.
39. Interest on the sum awarded shall be at court rates from the date of the award of the Director, till full payment. The interest shall be simple interest not compounded interest as sought by the applicant.
40. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 16<sup>TH</sup> DAY OF JANUARY 2025.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

..... for the Applicant.

..... for the Respondent.

