



REPUBLIC OF KENYA



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Ng'ang'a v Timsales Limited (Employment and Labour Relations Appeal E035 of 2023) [2025] KEELRC 824 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 824 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E035 OF 2023**

AN MWAURE, J

MARCH 14, 2025

BETWEEN

DANIEL NG'ANG'A APPELLANT

AND

TIMSALES LIMITED RESPONDENT

(Being an Appeal from the Ruling and Order of the Honourable Emmanuel S. Soita, Senior Resident Magistrate delivered on 7th November 2021 in Nakuru MCELRC Misc Application No. E163 of 202)

JUDGMENT

1. The Appellant, being dissatisfied by the Ruling and Order of the Honourable Emmanuel S. Soita, Senior Resident Magistrate, filed this appeal vide a Memorandum of Appeal dated 10th November 2021, where 18 grounds were listed but condensed 10 grounds as follows that: -
 1. The learned trial magistrate erred in law and in fact in adopting a revised illegal award of Kshs.274,713.60 dated 29th June 2023 in favour of the Appellant by the Directorate of Occupation Health and Safety as the valid award, whereas the valid award in favour of the Appellant in the one dated 20th July, 2020 for Kshs. 1,070,195 by the Directorate of Occupation Health and Safety.
 2. The learned trial magistrate erred in law and in fact in assisting a clear illegally and monkey games on the part of the Respondent in that the Directorate of Occupation Health and Safety awarded the Appellant a sum of Kshs. 1,070,195.40 on 20th July, 2020, respecting a work relating injury, the Appellant moved the court for enforcement orders vide an application dated 24th August, 2021 while the enforcement application was pending ruling before lower court, the Respondent purported to introduce another award purportedly dated 29th June 2023 for Kshs.274, 713.60 in a complete mischievous and illegal scheme.



3. The learned trial magistrate erred in law and in fact in that the award dated 20th July 2020 by the Directorate of Occupation Health and Safety was certified on 6th June, 2023 by the Director and in those circumstances, the Director could not introduce a new illegal and irregular award dated 29th June, 2023.
 4. The learned trial magistrate erred in law and in fact that within the provisions of sections 51 and 52 of the [Work Injury Benefits Act](#) on appeal can only be lodge before the Director within 60 days after the award has been made.
 5. The learned trial magistrate erred in law in fact in that the Respondent could only have raised a valid objection within 60 days from 20th July 2020.
 6. The learned trial magistrate erred in law and in fact in failing to find that an objection lodged by the Respondent on 27th June 2023 which is three years after the Director's award dated 20th July 2020 was an illegal objection lodged by the Respondent on 27th June 2023 which is three years after the Director's award dated 20th July 2020 was an illegal objection and the purported new award dated 29th June 2023 was an illegality.
 7. The learned trial magistrate erred in law in fact in failing to find that the office of the Director is governed by the Work Injury Benefit Act, the said office cannot be allowed to act outside the law and the Director cannot purport to come up with a new award 3 years later having issued an award dated 20th July 2020.
 8. The learned trial magistrate erred in law in failing to find that upon the director issuing the award dated 20th July 2020, he become functus officio, he cannot entertain an appeal filed outside the 60 days neither does the director have jurisdiction to conduct appellate proceedings outside 60 days from 20th July 2020.
 9. The learned trial magistrate erred in law in fact in failing to find that the subsequent award by the Director dated 29th June 2023 was a complete illegality and unfounded in law.
 10. The learned trial magistrate erred in law in failing to find that whereas his jurisdiction is to issue enforcement orders respecting the director's award under legal notice no. 9243 dated 5th July 2011 and legal notice no. 6024, dated 22nd June 2018, a court of law is the seat of justice and should not stand and allow a clear illegality to happen before its own eyes.
2. The Appellant prays that:
1. The learned trial magistrate ruling dated 7th November, 2023 be reviewed and set aside.
 2. This Honourable Court be pleased to adopt the award dated 20th July, 2020 for Kshs.1,070,195.40 by the Directorate of Occupation Health and Safety in favour of the Appellant against the Respondent as an order of this court.
 3. This Honourable court be pleased to order the Respondent to forthwith pay to the Appellant a sum of Kshs. 1,070, 195.40 as assessed and awarded by the Directorate of Occupation Health and Safety under the Work Injury Benefits in an award dated 20th July 2020.
 4. This Honourable court be pleased to order the Respondent to pay to the Appellant interest on the said sum of Kshs.1,070,195.40 at 14% per annum from 20th July 2020 to date of full payment.



5. The costs of this appeal and the costs of the cause before the lower court are to be borne by the Respondent.
 6. Such further or other relief as this Honourable court may be pleased to grant.
3. The appeal was disposed of by way of written submissions.

Appellant's submissions

4. The Appellant submitted that the trial court erred in adopting the revised award of Kshs.274, 713.60/= dated 29th June 2023 in a ruling delivered on 7th November 2023 superseding the award issued by the Director of Kshs.1,070,195.40/= dated 20th July 2020 in relation to a work related injury. The Appellant submitted that the award dated 20th July, 2020 by the Directorate of Occupational Health and Safety (DOSHS) was certified on 6th June, 2023 by the Director, and in those circumstances, the Director could not introduce a new illegal and irregular award dated 29th June, 2023.
5. The Appellant contended that any party dissatisfied with an award by the Directorate of Occupational Health and Safety can appeal to the Directorate under Section 51 of the [Work Injury Benefits Act](#) (WIBA) and may further pursue a second appeal to this Honourable Court (ELRC) in accordance with Section 52(2) of WIBA.
6. The Appellant submitted that the trial magistrate erred by not recognizing that the Respondent could have filed a valid objection within the statutory 60-day timeline, from 20th July 2020 to 20th September 2020. The Appellant submitted that the award dated 29th June 2023 was illegal and irregular, as no valid appeal was lodged within the required timeframe. The Appellant relied on the case of Hadisha Engineering Company Limited & UAP Insurance Company Limited V Benson Chege Karoki (2015) eKLR where the court held that the application to extend time should have been directed to the Director, with objections submitted by 23rd August 2014 and any court appeal filed by 22nd September 2014. It emphasized the provisions of section 51 of the [Work Injury Benefits Act](#) (WIBA), requiring objections to the Director's decisions within 60 days, a written response from the Director within 14 days, and an appeal to the court within 30 days after the response.
7. In Ruth Wambui Mwangi & Agnes Nyambura Wangai (suing as the legal representatives of the estate of Joseph Wangai Muraya V Alfarah Wholesalers Limited [2017] eKLR the court held that the Respondent had not appealed to the Director against the assessment or raise an objection with court and dismissed the application for lack of merit.
8. The Appellant submitted that the trial court ought to have dismissed the application seeking to substitute and adopt the revised award for the sum of Kshs.274,713.60/= dated 29th June 2023 as the Respondent failed to challenge the assessment within the timeline prescribed under sections 51 and 52 of the WIBA and, therefore, the court lacked jurisdiction to adopt the revised award as the time provided had already lapsed and became functus officio. In Makomboki Tea Factory Limited v Mwaura [2024] KEELRC 2145 (KLR), the court held that the applicant was provided avenues to challenge the Directorate of Occupational Safety and Health (DOSHS) award of damages through objection proceedings and subsequent appeal to the court. However, the applicant claimed it was not served with the assessment by DOSHS, preventing it from filing an objection, and presented a second medical opinion indicating the respondent only suffered 5% permanent incapacity.
9. The Appellant submitted that the learned trial magistrate erred in law and in fact failing to find that the Director, governed by WIBA, cannot act beyond the law and was functus officio after issuing an award on 20th July 2020. The Appellant contended that the Director could not issue a new award



three years later or entertain appeals filed beyond the statutory 60-day period from 20th July 2020, nor could the Director conduct appellate proceedings outside this timeline. The Appellant relied on the case of Telkom Kenya Limited V John Ochanda (suing in his own behalf and on behalf of 996 Former employees of Telkom Kenya Limited [2014] KECA 600 (KLR) the court held as follows on the principle of *functus officio*:

“The Supreme Court in *RAILA ODINGA v IEBC* cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated;

...“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

10. The Appellant submitted that the trial court’s mandate was to enforce the award as it was within his jurisdiction to do so under Legal Notice No. 9243 dated 5th July 2011 and Legal Notice no. 6024 dated 22nd June 2018. The Appellant contended that the learned magistrate enforcing the substituted award abdicating his duty by aiding and sanitizing a clear illegality. The Appellant relied on the Court of Appeal case of *National Bank of Kenya Ltd V Wilson Ndolo Ayah* [2009] KECA 467 (KLR) the court held that the importance of public policy in ensuring the rule of law, particularly in the enforcement of legal standards by courts arguing it must declare acts done in pursuance of illegality as invalid to uphold the law and deter future illegal actions.
11. The Appellant submitted that the trial learned magistrate’s ruling should not be allowed to stand as the application was filed and heard after 3 years, which was an unjust and a bad precedent that could enable employers, in collaboration with the director, to exploit the system unfairly.
12. The Appellant submitted the award dated 29th June 2023 ought to be set aside. The Appellant relied on the case of *Arafa Amin Mohamed (suing as the Legal Representative of the Estate of Omar Khatib Abdulkadir-Deceased) V Dola Feeds (K) Limited* [2022] eKLR the court held that the applicant had established her case and the court made an order for enforcement of the award plus costs and interest.
13. The Appellant urged this Honourable Court to allow the appeal by setting aside the award dated 29th June 2023 and adopt the award of 20th July 2020 with costs.

Respondent’s submissions

14. The Respondent submitted that appeals can be filed as a matter of right. However, an application for leave must first be sought before filing an appeal set out in Order 43 Rule 2 of the Civil Procedure Rules. The Respondent contended that leave was not sought to file the instant appeal. The Respondent relied on the case of *Nyutu Agrovet Ltd V Airtel Network Ltd* [2015] eKLR where the Court of Appeal held that there was no automatic right to appeal as stipulated under Section 75 of the [Civil Procedure Act](#) and Order 43 of the Civil Procedure Rules then the Appellate Court has no jurisdiction to hear and determine an Appeal unless leave of the court from which the order was made is sought and obtained. the court from which the order was made is sought and obtained. The Respondent relied on the other authorities, including *Ita Nguru & Another V Josphat Njue* [2018] eKLR and *Gitau V Kamau* [2022] KEHC 10337 (KLR) in support of that proposition.



15. In *Kakuta Maimai Hamisi V Peris Pesi Tobiko & 2 Others* [2014] KECA 703 (KLR) the Court of Appeal observed that the right to appeal is a fundamental issue of jurisdiction and cannot be dismissed as a procedural technicality under Article 159 (2) (d) of *the Constitution*. The article is not a universal remedy for all procedural and substantive legal shortcomings. The Respondent urged this Honourable court to hold that the appeal is incompetent and therefore should be strike out.
16. The Respondent submitted that being the first appeal the court has a duty to reconsider the evidence, evaluate it and draw its own conclusions citing the cases of *Kenya Ports Authority V Kuston (Kenya) Ltd* [2009] 2 EA 212 and *Barnabas Kipkorir Bundotich* [2018] eKLR in support of that proposition.
17. The Respondent submitted that appeals from DOSH according to WIBA should be handled by *Employment and Labour Relations Court Act* when an aggrieved party is dissatisfied with decisions of the Director as set out in Section 52(2) of WIBA. Section 51 of WIBA provides that any person dissatisfied with a Director's decision under this Act may file a written objection within 60 days, using the prescribed form. The objection must include a concise statement of the relevant circumstances, the relief sought, or the question to be determined. The Respondent contended that the proper way of appealing was for the Appellant to lodge an appeal with the Director with the revised award before approaching the court to appeal the decisions rendered by the Director and trial court.
18. The Respondent submitted that WIBA does not bar DOSH to review the award and allows DOSH to make inquiries and consider evidence before making a decision on compensating an employee which is set out in Section 23 of the WIBA which provides that the Director must conduct necessary inquiries to determine claims or liabilities, which can occur alongside other investigations. Employers and employees are obligated to provide additional details about the accident if requested by the Director, and failure to comply with such requests constitutes an offence.
19. The Respondent submitted that it adduced a medical report that it availed to DOSH in accordance with Section 25 of WIBA. The Respondent submitted that the timeframe for appealing to DOSH had expired when the award was reviewed. The Respondent contended that the medical report led to the timely review of the award on 29th June 2023, just 23 days after the previous award was certified, following consideration of evidence from both parties.
20. The Respondent contended that DOSH saw it fit to review the award based on the medical report that it furnished and there is no provision of the law that bars DOSH in reviewing its award based on the evidence that was presented by the employer and the Director acted within his powers in reviewing the award dated 20th July 2020 and substituting with the award dated 29th June 2023.
21. The Respondent submitted that since the revised award dated 29th June 2023 amounting to Kshs.274,713.60/= has not been objected, challenged and/or set aside, it is therefore valid and was not illegal or irregular and the court is well within its jurisdiction and mandate in adopting it.
22. The Respondent submitted that the learned magistrate did not err in allowing the application to enforce the terms of the revised award dated 29th June 2023. The Respondent urged this Honourable Court to find that the appeal lacks merit and should be dismissed with costs.

Analysis and determination

23. Having considered the records of appeal, the memorandum of appeal, and the submission by both parties, the issue for determination is whether the appeal is merited.
24. In this instant appeal, the Appellant filed for compensation to DOSH after sustaining a work related injury and submitted the necessary form. The Director examined the documents and assessment of the



injury awarding Kshs.1,070,195.40 on 20th July, 2020 and the DOSH/WIBA 4 is provided in court. The Respondent went back to Director of DOSH to have the award revised which was reduced to Kshs.274,713.60/= on 29th June 2023.

The respondent then made an application to the Chief Magistrate's court on 5th July 2023 seeking adoption of the revised award of Kshs.274,713/60 in the place of the award of Kshs.1,070,195/40 which had been assessed way back on 20th July 2020.

25. Sections 51 and 52 of WIBA provides as follows:

“ 51.

- (1) Any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director an objection against such decision.
- (2) The objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.

52.

- (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.”

26. Flowing from the provisions above, the Respondent did not object to the award issued on 20th July 2020 in the prescribed legal process. The court finds it irregular how the Respondent went back to the Director to revise the award by reducing it about three years later without following the normal procedure and complying with the prescribed timelines. The proper way was for the Respondent to appeal against the said award within 60 days to the Director and thereafter to this Honourable Court which has jurisdiction to hear appeals from WIBA and the Respondent had the option which it failed to use.

27. The learned Magistrate did err by adopting a revised award assuming he knew it was a revised award. Even if he did not know however the Respondent was not honest in seeking a revision of the award way out of the prescribed legal timelines against the WIBA Act and then approaching the court to adopt the same.

28. The court finds several persuasive authorities to support this holding that the Respondent used a back door to have the Director's award revised contrary to Sections 51 and 52 of WIBA.

In the case of Hadisha Engineering Company Limited & UAP Insurance -Vs- Benson Chege Karoki (Supra) the court emphasized the provisions of Section 51 of [Work Injury Benefits Act](#) requiring



objections of Director's decision within 60 days and a written response from the Director within 14 days and an appeal to the court within 30 days after the response.

29. The court finds the appeal herein is therefore merited and the award of Kshs.1,070,195/40 to the appellant is upheld and the latter one of Kshs.274,713/60 is set aside.

30. The costs of this application are awarded to the appellant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF MARCH, 2025.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

