



**Masai & another (Suing as Administrators of the Estate of the Late Muinde Mwendwa) v China Communication Construction Company Limited & 2 others (Appeal E003 of 2023) [2024] KEELRC 2685 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2685 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
APPEAL E003 OF 2023  
M MBARŪ, J  
OCTOBER 31, 2024**

**BETWEEN**

**PURITY NDUMI MASAI ..... 1<sup>ST</sup> APPELLANT  
STEPHEN MWANDWA MWENDENI ..... 2<sup>ND</sup> APPELLANT  
SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE MUINDE  
MWENDWA**

**AND**

**CHINA COMMUNICATION CONSTRUCTION COMPANY LIMITED .... 1<sup>ST</sup>  
RESPONDENT  
DIRECTOR OCCUPATIONAL SAFETY AND HEALTH SERVICES .... 2<sup>ND</sup>  
RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The appellants filed this appeal challenging the decision of the 2<sup>nd</sup> respondent in assessing work injury compensation of the Estate of the late Muinde Mwendwa.
2. In response, the 1<sup>st</sup> respondent filed a Notice of Preliminary Objections dated 14 May 2024 on the grounds;
  1. The Employment and Labour Relations Court lacks the appellate and original jurisdiction to hear and determine the appeal because no objection or a reply was lodged in terms of Section 51(1) and 52(1) of the *Work Injury Benefits Act*.
  2. The appeal is incompetent and fatally defective for being filed out of time.



3. Parties attended and agreed to address the objections by written submissions.
4. The 1<sup>st</sup> respondent submitted that the court lacks jurisdiction to hear this appeal. The appellants filed the appeal before exhaustion of procedure and objection under Section 51(1) of the *Work Injury Benefits Act* (WIBA). The right to appeal a decision of the Director is provided under Section 52(1) of WIBA and should be lodged against a reply of the Director under Section 52(1) of the Act. The objection should be lodged within 60 days whereupon the Director should reply within 14 days.
5. In this appeal, the Director's original decision was on 26 May 2022. The appellants were required to lodge objections within 60 days, and failure to do so meant that they consented to the decision and were precluded from appealing against it since the right of appeal cannot precede an objection under Section 51(1) of WIBA.
6. Under the law, the doctrine of avoidance and exhaustion of available remedies required the appellants to exhaust the procedure of objecting to the Director's decision before filing this appeal. In the case of *Attorney General v Law Society of Kenya & another* [2017] eKLR the court held that where there is a clear procedure for the redress of any particular grievance prescribed by *the constitution* or statute, that procedure should be exhausted before approaching the court.
7. In the case of *Douglas Shikoli Nasiali v Citam Schools Woodley* [2021] eKLR the court struck out an appeal for failing to follow the procedure outlined under Section 51 of WIBA because the appellant had bypassed the procedure of lodging objections and proceeded to file an appeal. In the case of *Haji v C.G. (MSA) Limited Misc. Application E006 of 2024*, the court held that the appellant could not move the court on appeal without objection to the compensation as assessed.
8. The 1<sup>st</sup> respondent submitted that the appeal was filed out of time and hence incompetent. Under section 52(2) of WIBA, an appeal against the decision of the Director should be filed within 30 days. In this case, the appellants filed the appeal on 20 March 2023 outside the mandatory 30 days from 26 May 2022. In the case of *African Service Maintenance Limited v Comarco Supply Base (EPZ) Limited & another Civil Appeal 160 of 2019* the court struck out the Notice of Appeal and held it was incompetent as it was filed out of time. There was no application seeking to extend the time to file the appeal.
9. In the case of *Esther Anyango Ochieng v Transmara Sugar Company* [2020] eKLR the Court of Appeal struck out the appeal for being incompetent because the notice of appeal was filed and served out of time without leave. In this case, the appeal is filed without jurisdiction and out of time and should be dismissed with costs.
10. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that this is an employment and labour dispute in which Sections 51 and 52 of WIBA have set out how a dispute should proceed. Under Section 51 of WIBA, the appellant must object to the Director within 60 days. The Director is required to reply to the objections within 14 days. Section 52 provides for the right to appeal the decision of the Director against the reply to the objection made under Section 52(1) of WIBA.
11. The decision of the Director was made on 26 May 2022 and no objections were filed within the statutory time. The appellants have failed to disclose to the court that the award has since been paid. There is no grievance upon which the appeal is based.
12. Under the doctrine of avoidance and exhaustion of available remedies, this court's jurisdiction is limited to hearing appeals. In the case of *Kenya Plantation & Agricultural Workers Union v Mununga Leaf Base* [2013] eKLR the court held that the resolution of labour disputes is a process with the court in most cases where other pre-court mechanisms have failed.



13. Article 159 of *the constitution* allows for the use of alternative dispute resolution mechanisms, including the Director assessing and awarding compensation under Section 51 of WIBA, as held in Douglas Shikoli Nasiali v Citam Schools Woodley [2021] eKLR. The court's jurisdiction only comes into effect under Section 52 of WIBA, as held in Attorney General v Law Society of Kenya & another [2017] eKLR.
14. In the case of Joash Shisia Cheto v Thepot Patrick Charles [2022] eKLR, the court held that once the Director makes an award, parties cannot approach the court to re-open the matter except by way of an appeal. For these reasons, this court lacks jurisdiction to hear this appeal after the appellants have failed to exhaust the available mechanisms.
15. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the award of the Director was issued under Section 30 of WIBA as read together with the First Schedule which sets out the compensation percentages to apply upon a fatality. The appellants are seeking to apply the Third schedule which is incomplete and would be a disservice to the victims of work-based injuries and accidents. The attempt to calculate the percentage of the 4 dependants, the wife, child and parents to the deceased is 27.5% not taking into account that the WIBA under Section 6 recognizes the varying degree of dependence between the dependants. To take 27.5% which as per the WIBA relates to an instance where the deceased was survived by 4 children would be against the law. The calculations by the Director include the widow and child at 100% dependence on the deceased while the parents had a lower dependency at 20%. This ensures justice to the Estate of the deceased employee.
16. In this case, the appeal is incompetent and should be dismissed with costs.
17. The appellants submitted that under Article 162(2) (a) of *the constitution*, everyone has the right to file an employment and labour relations claim before this court. Section 52(2) of WIBA creates the right of appeal to the court for an objector from the decision of the Director as held in Douglas Shikoli Nasiali v Citam Schools Woodley [2021] eKLR. The right of appeal accrues after an objection of a decision has been made to the Director. The Act is however silent on the procedure to be followed if the Director fails to reply to a party's objections as was the case with the appellants.
18. The appellants, in a bid to secure their constitutional rights, filed this appeal relying on the court's inherent jurisdiction under Section 12 of the *Employment and Labour Relations Court Act*. In the case of *Sheikh v Inspector General of Kenya Police & another Misc. Application E821 of 2022* the court held that the purpose of Section 23 which calls for the initial resolution of dispute via the Director can be deemed an alternative dispute resolution mechanism. But where one is aggrieved by the decision of the Director, the answer lies in Section 52 of WIBA. In Gazette Notice No. 5476 of 28 April 2023 the Chief Justice following Supreme Court Petition 4 of 2019 – Law Society of Kenya v Attorney General & another issued Practice directions on the filing and handling of claims for compensation for work-related injuries.
19. The appellants submitted that the doctrine of laches is not applicable. Section 52 of WIBA provides timelines within which the objection and appeal process is to take place. 14 days for the Director to respond to an objection and 30 days to file an appeal. There are no guidelines or procedures within the Act. The inordinate delay was addressed in the case of Moses Mwangi Kimani v Shammi Kanjirappaarambi Thomas & 2 others [2014] eKLR that there is no precise measure of what amounts to inordinate delay and excessive as compared to normality is based on the circumstances of each case.
20. Section 6 of WIBA defines dependants as the widower of an employee; a parent and a child who has not attained the age of 18. Section 34 of the Act provides that the amount of compensation in case of a death is to be calculated as per the Third Schedule and paid to dependants. The maximum degree of



benefits is 100%. In this case, the deceased employee was survived by a widow, his son, his mother and his father. The Third Schedule provides for compensation calculated at 27.5% of the employee wages. The Objections should be dismissed to allow the appellants to be heard on the appeal.

### **Determination**

21. Any questions of law, once raised should be addressed first. This would assist the court in determining and delving into the facts of the appeal.
22. The 1<sup>st</sup> respondent has raised questions about this court's jurisdiction to hear the appeal before the appellant's exhaustion of the objection procedures under Section 51(1) of WIBA to secure the right to appeal under Section 52(1) of the Act.
23. The 1<sup>st</sup> respondent also raised the issue that this appeal was filed out of time and without leave.
24. Indeed, the appellants opted to file this appeal on 20 February 2023. There are five (5) grounds of appeal that the Directed erred in computing the compensation by under-assessing it by relying on the First Schedule to the WIBA hence adopting an erroneous calculation. That the award of Ksh.1, 612,800 to the Estate of the deceased employee should be reviewed.
25. To support the appeal, the appellants filed the Record of Appeal.
26. The impugned award of compensation by the Director was on 26 May 2022.
27. There are no objections to the award. The Record of Appeal filed by the appellants has no such record.
28. Under Sections 16 and 23 of the WIBA, the Director should receive all work-related injuries for an inquiry, assessment and award of compensation submitted to the employer to pay the injured employee. Through notice dated 26 May 2022, the Director issued notice to the 2<sup>nd</sup> respondent to pay the Estate of the deceased employee and the dependants Ksh.1, 612,800.
29. A party who is aggrieved with the assessment and award of compensation by the Director is allowed under Section 51(1) to object within 60 days;
  - (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.
30. Based on the submitted objection(s), the Director is required to respond in writing within 14 days under Section 52(1) of WIBA;
  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.
31. The Director must give reasons in answer to the objections(s), varying or upholding the decision subject of objection.
32. This in essence is to allow an aggrieved party to agree and revert back to the original assessment or proceed with an appeal within 30 days from the issued decision and in accordance with Section 52(2) of the WIBA.
  2. An objector may, within thirty days of the Director's reply being received by him, appeal to the Industrial Court against such a decision.



33. These procedures are not alien. They have been applied for decades now. Under the provisions of Section 17 of the *Employment and Labour Relations Court Act* read together with Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, a party is allowed 30 days to file an appeal. Where there is no appeal filed within the statutory period, by application of Section 79G and Sections 3 and 12 of the *Employment and Labour Relations Court Act*, and Rule 16 of the Court Rules, a party is allowed to move the court under a miscellaneous application seeking for more time to file an appeal out of time. Cogent reasons must be given to allow the court to exercise its discretion and allocate more time to file appeals out of time.
34. In this case, without the appellants exercising the provisions of Section 51 and 52(1) of WIBA, to file an appeal as herein done is premature.
35. This position is reiterated by the Supreme Court in the case of *Law Society of Kenya v Attorney General and COTU Petition No.4 of 2019*;

We reiterate the above holding and in the present context, therefore, we further find that Section 16 cannot be read in isolation to create the impression that it curtails the right to immediately access the courts, because by looking at the intention of Section 16, the purpose it fulfils is apparent. That purpose is revealed in Section 23 which calls for initial resolution of dispute via the Director and this can be deemed as an alternative dispute resolution mechanism. But what if one is still aggrieved by the decision of the Director? The answer to that question lies in Section 52 of the Act which allows aggrieved parties to seek redress in a court process. In the circumstances, access to justice cannot be said to have been denied.

36. About pending claims, the Court held that;

In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act, litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA, not being unconstitutional and an even more progressive statute, as we have shown above we opine that it is best that all matters are finalized under Section 52 aforesaid. [Underline added].

37. Therefore, the Supreme Court in addressing the provisions of Section 52(2) of the WIBA held that;

Furthermore, this Court should consider *the Constitution* 2010's provisions to help deduce whether or not the impugned provisions, when read alongside the purpose of WIBA would assist in bringing clarity and justice to the issues in contest. In doing so, a plain reading of Section 16 of the Act would reveal that its intention is not to limit access to courts but to create a statutory mechanism where any claim by an employee under the Act is subjected, initially, to a process of dispute resolution starting with an investigation and award by the Director aforesaid and thereafter, under Section 52 an appeal mechanism to the then Industrial Court [Employment and Labour Relations Court].

38. Without any objections to the award of the Director, to proceed and file this appeal is to circumvent the provisions under Sections 51 and 52(1) of the WIBA. There are no reasons, for reviewing or approval of the award by the Director subject to an appeal. Such invalidates the appeal.



39. Further, from the date of the assessment and award on 26 May 2022, no objections or appeals were filed within the allowed statutory period. No efforts were made to address the lapse in time to justify the direct filing of an appeal, as herein done. This is incurable and renders the appeal a fatal blow.
40. The office of the Attorney General representing the 2nd and 3rd respondents submitted that the Estate of the Deceased employee has since been paid the award and compensation. The appellants have not fully disclosed these facts. It would aid justice in bringing such facts out as they seek to prosecute the appeal. This places the appellant in bad standing and should meet the costs due to the respondents.
41. Accordingly, the 1st respondent's objections are meritorious. The court's jurisdiction was invoked prematurely, and the appeal was filed out of time. The appeal was dismissed. The 1st respondent is to be paid full costs, while the second and 3rd respondents get 25% of due costs.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 31ST DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

