



Republic & 2 others v Director, Directorate of Occupational Safety & Health Services & 2 others (Judicial Review E001 of 2024) [2024] KEHC 15484 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
JUDICIAL REVIEW E001 OF 2024
JK SERGON, J
DECEMBER 5, 2024**

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: THE LAW REFORM ACT, 2012 READ
WITH ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, 2015

IN THE MATTER OF: THE WORK INJURY BENEFITS ACT, 2007

AND

**IN THE MATTER OF: THE FLAWED DECISION &
IRREGULAR REVIEW OF COMPENSATION TO DEPENDENTS**

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

BETWEEN

REPUBLIC EXPARTE

AND

**CC (SUING ON HER OWN BEHALF AND AS MOTHER AND NEXT FRIEND
OF MINORS RCN, IKN AND MKN) 1ST APPLICANT**

MONICA CHEPKEMOI LANGAT 2ND APPLICANT

AND

**THE DIRECTOR, DIRECTORATE OF OCCUPATIONAL SAFETY & HEALTH
SERVICES 1ST RESPONDENT**



MARA CONSERVANCY LIMITED 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. Pursuant to leave granted on 25th June, 2024 in Misc. Application No. E007 of 2024, to institute judicial review proceedings, the Applicants herein filed a substantive motion for judicial review. Therefore the application coming up for determination is a notice of motion dated 8th July, 2024 seeking the following orders;
 - (i) That an Order of Certiorari to bring to this Honourable Court for the purpose of being quashed the proceedings and decision of the 1st Respondent made vide Revised Form Dosh/Wiba 6 dated 19th April, 2024.
 - (ii) That an Order of Mandamus be directed to the 1st and 2nd Respondent to compel the enforcement of the payment of the compensation as per Form Dosh/Wiba 6 dated 17th April, 2023.
 - (iii) That an Order of Prohibition restraining the 1st Respondent, its servants, agents and employees from executing and/ or implementing the decision made vide Revised Form Dosh/Wiba 6 dated 19th April, 2024.
 - (iv) The costs of this application.
2. The application is based on grounds on the face of it and the supporting affidavit of Chepkemoi Cheruiyot the 1st Applicant herein. The notice of motion is supported by verifying affidavit and statutory statement.
3. She avers that the Applicants lost their husband, father and mother respectively, the late Robert Kipkorir Ngeno, through a tragic road traffic accident on 15th March, 2023 while in the course of duty for the 2nd Respondent. She avers that she was married to the deceased under the African Marriage and Divorce Act and was blessed with 3 issues (all minors).
4. She avers that she obtained all necessary documentation and lodged with the 1st Respondent a claim for compensation under the Work Injury Benefits Act of 2007 and that the 1st Respondent having conducted its investigations made its own assessment and on 19th April, 2023 made demand for payment of work injury benefits to the 2nd Respondent vide Form Dosh/Wiba 4 and that the aforesaid demand attached Form Dosh/Wiba 6 which listed 5 beneficiaries/ dependents and the respective amounts that each would be paid. She further avers that as at 19th April, 2023 when the above referred documents were released by the 1st Respondent to the 2nd Respondent, it had already discharged its mandate and made its decision as to dependency. She avers that the Form Dosh/Wiba 6 that was attached to the demand instructed the 2nd Respondent to release cheques to the adult dependents but for the minors, the cheques were to be drawn in the name of the Public Trustee.
5. She avers that on 17th April, 2024 one year after unknown to the Applicants, the 1st Respondent unlawfully forwarded a second form Dosh/Wiba 6 labelled 'Revised' to the 2nd Respondent that introduced 3 new dependents. She further avers that the revision reduced the entitlements for each dependent in the first form Dosh/Wiba 6 from Kshs. 1,659,933 to Kshs. 958,553 and that the Revised Form Dosh/Wiba 6 dated 19th April, 2024 indicated that the revision was occasioned by further discussions held with the County Occupational Safety and Health Officer and proof of documents.



- The revised form Dosh/Wiba 6 changed the mode of payment of the compensation for minors as it instructed the 2nd Respondent to " ... for the minors to be written in the name of their mothers as agreed by both parties. Should be a banker's cheque". She avers that there was no agreement to change the mode of payment from the Public Trustee to Banker's Cheque as claimed.
6. She avers that the 1st Respondent arrogated and abused its powers by allowing the said 'revision' without having the requisite procedures and documents submitted by the purported additional dependents.
 7. She avers that the Applicants have never been invited or summoned by the 1st Respondent over the revised form Dosh/Wiba/6 despite being affected by the outcome of the revision and as such, the 1st Respondent failed to observe the provisions of the law and rules of natural justice and acted in contravention of Section 4 of the *Fair Administrative Action Act*, 2015.
 8. She avers the consideration of the objection and subsequent award by the 1st Respondent is illegal, irregular and unprocedural, the objection having been made and considered out of the statutory timelines and no statement having been sent to the Applicants.
 9. She avers that consideration of the objection and subsequent revision of form Dosh/Wiba/6 is unfair, unreasonable an abuse of discretion, violated the legitimate expectations of the Applicants and was an affront to *the Constitution* of Kenya, 2010 and the *Work Injury Benefits Act*, 2007.
 10. The 2nd Respondent filed a replying affidavit in response to the application which was sworn by Aruasa David the administrator of Mara Conservancy Limited in whose purview matters relating to this case lie and hence competent to swear the affidavit.
 11. He avers that the late Robert Kipkorir Ngeno was a permanent employee of Mara Conservancy appointed on 18th March 2013 as an Assistant Mechanic and annexed a copy of his appointment letter dated 18/03/2013 and that he passed on through a tragic road traffic accident on 15th March, 2023 while coming back to work. The reporting of the accident was done to Lolgorian Police Station under OB Number 30/15/3/2023. The death certificate of the late Robert Kipkorir Ngeno was sent to them by the family to aid in payment of benefits to them.
 12. He avers that the 2nd Respondent sent a Notice ML/Dosh Form 1, of an occupational accident involving their employee one Robert Kipkorir Ngeno who had suffered fatal injuries on 15/03/2024 and submitted a list of dependants vide a Certificate of Dependency, Dosh/Wiba/6, duly signed by the Sub-County Commissioner Trans Mara South, the deceased's Sub-County of birth.
 13. He avers that the pension distribution to the next of kin was done as per the late Robert Kipkorir Ngeno's nominated beneficiaries on 24th March 2022.
 14. He avers that Dosh Form 1, was filled by the 2nd Respondent and a certification of dependency of the late was written, stamped and signed by the Area Chief one Richard. K. Sigei confirming and acknowledging the dependents of the late Robert Kipkorir Ngeno on 3rd April, 2023 and that Dosh / Wiba/6 was signed by the Deputy County Commissioner Trans-Mara South.
 15. He avers that the 2nd Respondent intended to follow the decision of the Deputy County Commissioner but were intruded by a letter from Muturi Njoroge & Co Advocates on 17th May, 2023 stating that Lilian Njeri Maina was to be part of the WIBA beneficiaries as a widow of the late Robert Kipkorir Ngeno, he attached a copy of the said letter.
 16. He avers that the 2nd Respondent then wrote an email to Director of Occupational Safety and Health Services (Dosh) Narok County to inform them of the claim from Muturi Njoroge & Co Advocates on 10th January 2024. He avers that upon receipt of these new developments of new dependants, the



- 1st Respondent proceeded to review the decision on distribution of compensable amount to include the newly discovered dependants.
17. He avers that the Directorate of Occupational Safety and Health revised the Dosh/Wiba/6 on 19th April, 2023 including Lilian Njeri Maina and the two minors which led to a succession dispute.
 18. He avers that the 2nd Respondent merely concurred with communication dated 17th April, 2024 from the 1st Respondent and confined payments to the dependants listed vide a letter dated 21st June, 2024. The 2nd Respondent therefore denies having tainted any legal procedure and denies having acted contrary to the provisions of *the constitution*, Fair Administrative Action Act, 2015 or *Work Injury Benefits Act*, 2007.
 19. The Applicant filed a supplementary affidavit in response to the replying affidavit filed by the 2nd Respondent. She avers that she was in a monogamous marriage as proven by the certificate of marriage and therefore the allegation that the deceased had another wife are malicious and unfounded.
 20. She reiterated that the 1st Respondent's action of forwarding a second form Dosh/Wiba 6 labelled 'Revised' to the 2nd Respondent, introducing 3 new dependants was unlawful and misplaced and that she was never summoned by the 1st Respondent over the revised form despite being affected by the outcome of the revision.
 21. The 1st and 3rd Respondents did not file any responses to the application dated 8th July, 2024.
 22. This Court directed the parties to file their written submissions.
 23. The Applicant complied with the directions of this court, the applicant submitted that article 23 (3) (f) of *the Constitution* of Kenya, 2010 provides that in any proceedings brought under article 22, a court may grant appropriate relief, including judicial review. The Applicant submitted that the scope of judicial review was set out in the case of *Municipal Council of Mombasa v Republic & another* [2002] eKLR where the court stated as follows; "The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."
 24. The Applicant reiterated that there was illegal and unprocedural impropriety on the part of the 1st and 2nd Respondents thereby warranting this court to issue judicial review orders to wit certiorari, mandamus and prohibition. The Applicant proceeded to set out, the acts of impropriety on the part of the 1st and 2nd Respondent as follows;
 - (i) The 1st Respondent allowing the 2nd Respondent to lodge an objection outside the 60 days prescribed by law.
 - (ii) The 1st Respondent unlawfully made a revision of its earlier decision and forwarded a second form Dosh/Wiba 6 labelled as Revised to the 2nd Respondent introducing 3 new dependants and changing the mode of payment of the compensation of the minors from the Public Trustee to Banker's Cheque.
 - (iii) The 1st Respondent did not send a copy of the statement of its decision to uphold the objection to the Applicants having been a person affected by the decision as required by law.



- (iv) The 1st Respondent did not grant the Applicant an opportunity to be heard when making the purported revisions. The Applicant reiterated that they had levelled allegations based on the decision making process and not the merits of the 1st Respondent's decision, which was made without compliance to the rules of natural justice as well as the provisions of the relevant statutes. The Applicant was adamant that she had proven her case as against the Respondents and was therefore deserving of the reliefs sought.
25. At the time of writing the ruling the Respondents had not uploaded submissions in the Case Tracking System.
26. This Court having considered the application, responses and submissions by the parties finds that the sole issue for determination is whether this court can issue an order of certiorari, mandamus or prohibition arising from the proceedings and decision of the 1st Respondent made vide Revised Form Dosh/Wiba 6 dated 19th April, 2024. This court has considered the facts giving rise to the application for judicial review, the applicant filed a claim for compensation under the *Work Injury Benefits Act* of 2007 in respect to the estate of the deceased, however, the applicant is aggrieved by decision making process of the Director of Occupational Safety and Health Services and the decision by the Director of Occupational Safety and Health Services which resulted in a revised form Dosh/Wiba 6 introducing 3 new dependants and changing the mode of payment of the compensation of the minors from the Public Trustee to Banker's Cheque.
27. The Chief Justice issued practice directions in Kenya Gazette No. 5476 issued on the 28th April, 2023 titled as 'Practice Directions Relating To Pending Court Claims Regarding Compensation For Work Related Injuries And Diseases Instituted Prior To The Supreme Court Decision In Law Society of Kenya v Attorney General And Another, Petition No. 4 Of 2019; (2019) eKLR'.
28. The said practice directions stated that in all claims filed after the Supreme Court decision, all appeals emanating from the decision of the Director of Occupational Safety and Health Services shall lie before the Employment and Labour Relations Court.
29. This court, having considered the import of the practice directions, is of the view that it lacks the jurisdiction to entertain the instant application for judicial review since jurisdiction lies elsewhere.
30. In light of the foregoing the notice of motion dated 8th July, 2024 is incompetently before this Court. The same is hereby ordered struck out.
31. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 5TH DAY OF DECEMBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Langat

Kiletyen for 2nd Respondent

Miss Njiha holding brief for Tuya for applicant

