

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**MACHAKOS**  
**MISC. APPLICATION NO. E021 OF 2025**

**IRVING INDUSTRIES LIMITED.....APPLICANT**

**VERSUS**

**CASMIL KYEVA KIUNGUA LIMITED.....**  
**RESPONDENT**

**DIRECTORATE OF OCCUPATIONAL SAFETY**

**AND HEALTH SERVICES.....INTERESTED**  
**PARTY**

**RULING**

1. What is before this Court for determination is a Notice of Motion dated 16<sup>th</sup> May 2025 through which the Applicant seeks the following orders:

1. *Spent.*
2. *That this Honourable Court be and is hereby pleased to grant leave of extension of time for the Applicant to lodge an appeal against the decision of the Director of Occupational Safety and Health Services out of time.*
3. *Spent.*

- 4. That the Honourable Court be pleased to stay the execution and/or adoption of the demand by the Directorate of Occupational Safety and Health Services dated 6<sup>th</sup> February, 2025 pending the hearing and determination of the intended Appeal.*
- 5. That this Honourable Court be and is hereby pleased to direct the Director of Occupational Safety and Health Services to produce before this Honourable Court a copy of the Reply to the Objection lodged by the Applicant and the decision by the Director thereof.*
- 6. That the costs of this application be provided for.*

2. The Application is founded on the grounds set out on its face and is supported by the Affidavit of **Tevin Kiama Wachanga**, who has described himself as the Advocate on record for the Applicant.

3. The grounds in support of the Motion are that the Respondent sustained an injury on 21<sup>st</sup> August 2024, following which the Applicant completed the DOSH Form 1 and duly reported the incident to the Directorate of Occupational Safety and Health Services (Director). The attending doctor at Kitengela Sub-County Hospital assessed the Respondent's degree of permanent disability at 0%.

4. Mr. Wachanga avers that the Respondent, being dissatisfied with this assessment objected to the same through a letter dated 15<sup>th</sup> October 2024. Mr Wachanga contends that the Respondent's Objection was not in the prescribed format as required under Section 51(1) and (2) of the Work Injury Benefits Act (WIBA).
5. He further contends that the Director unlawfully and/or irregularly allowed the Respondent's Objection, after which he (Respondent) sought an independent medical assessment from his own doctor, who determined a 40% degree of permanent incapacity. Mr. Wachanga further contends that the Applicant was never served with a copy of this medical report.
6. Mr. Wachanga avers that thereafter, the Applicant received a demand for payment dated 11<sup>th</sup> November 2024 from the Sub-County Occupational Safety and Health Office, requiring payment of Kshs. 537,600/=.
7. The Applicant, being dissatisfied with the Director's handling of the matter and the failure to adhere to the procedures set out under the WIBA, sought clarification as to why an Objection not made in the prescribed form had been

accepted. The Applicant subsequently lodged its own Objection in the prescribed form.

8. Mr. Wachanga avers that to date, the Director has not responded to the Applicant's Objection as required under the WIBA.

9. He further states that on 8<sup>th</sup> May 2025, the Applicant received another demand for payment through WIBA Form 4 from the Director, accompanied by an evaluation clinic report dated 23<sup>rd</sup> January 2025, which assessed the Respondent's permanent incapacity at 60%.

10. Mr. Wachanga avers that the said report was accompanied by a demand from the Nairobi Occupational Health and Safety Office dated 6<sup>th</sup> February 2025, seeking payment of Kshs. 820,938/=. That it was consequent to this that the Applicant filed the present Application out of an abundance of caution.

11. Mr. Wachanga maintains that the delay in filing the appeal was not attributable to the Proposed Appellant, as the circumstances were beyond its control.

12. In response to the Application, the Respondent, **Casmil Kyeva Kiungua**, filed a Replying Affidavit sworn on 29<sup>th</sup> May 2025, wherein he contends that the doctor at Kitengela Sub-County Hospital assessed his disability at 0% because the doctor was acting on behalf of the Applicant.

13. Mr. Kyevea deposes that through his letter dated 15<sup>th</sup> October 2024, he objected to the initial medical assessment and sought permission to obtain a second medical opinion, explaining that his hand had lost sensation following nerve and tendon damage, rendering him unable to work.

14. Mr. Kyevea further avers that by a letter dated 22<sup>nd</sup> October 2024, the Applicant granted him permission to seek further or alternative medical attention from any facility of his choice, at his own expense.

15. On 31<sup>st</sup> October 2024, he attended Plaza Specialist Hospital, where he underwent examination and assessment, and a medical report was prepared, placing his permanent disability at 40%.

16. He adds that the said assessment was duly served upon the Applicant, and the Director subsequently assessed his injuries at Kshs. 552,138/=, not Kshs. 537,600/= as alleged by the Applicant.

17. The Applicant, being dissatisfied with that assessment, lodged an Objection dated 5<sup>th</sup> December 2024 and requested that the Respondent be subjected to another medical examination and that a fresh report be issued. The Applicant also urged the Director to consider the appropriate percentage of permanent

incapacity, the medical and related expenses it had incurred in treating the Respondent, and any payments made to him during his recovery.

18. Mr. Kyeva further avers that the Director responded to the said Objection through a letter dated 6<sup>th</sup> January 2025, referring him to the Work Injury Evaluation Clinic for a further evaluation in accordance with WIBA, in order to reconcile the conflicting assessments. He asserts that the Applicant was duly served with this response and therefore it is untrue that the Director failed to reply to the Objection as alleged.

19. He adds that pursuant to the Director's directive, he underwent another medical assessment at the Work Injury Evaluation Clinic, which prepared a report dated 23<sup>rd</sup> January 2025 assessing his permanent incapacity at 60%. Mr. Kyeva asserts that this report was also served upon the Applicant.

20. Mr. Kyeva states that, based on the 60% assessment, the Director awarded him compensation in the sum of Kshs. 820,938/=.

21. He thereafter issued a demand for payment dated 6<sup>th</sup> February 2025, which the Applicant failed to honour.

22.Mr. Kyeveva contends that all procedures were duly followed in accordance with the provisions of the WIBA, and that the Applicant's failure to pay has caused him undue hardship. He maintains that there is no arguable appeal with reasonable prospects of success.

23.He further asserts that the Applicant has not provided any sufficient justification for failing to lodge the appeal after receiving the award dated 6<sup>th</sup> February 2025 and the accompanying report dated 13<sup>th</sup> May 2025, and therefore objects to the leave sought, adding that further delay will only prolong his suffering.

24.In rejoinder to the Respondent's Replying Affidavit, **Tevin Kiama Wachanga** filed a Further Affidavit sworn on 5<sup>th</sup> June 2025, wherein he avers that the second medical report was tainted with malice, prompting the Applicant to lodge an Objection which, however, was never addressed by the Director.

25.He further contends that the third and final medical report, together with the resultant award issued by the Director, was never served upon the Applicant. In his view, had proper service been effected, the Applicant would have had the opportunity to file an appeal promptly and within time.

26. Mr. Wachanga maintains that the intended appeal is a necessary step for the Applicant to challenge the Respondent's conduct and to address the Objection lodged with the office of the Director. He further asserts that the determination of the substantive dispute hinges on the outcome of the proposed appeal, which is essential to bring out the issues in dispute.

27. The Director who was sued as the Interested Party did not file a response to the Application.

#### **Submissions**

28. The Application was canvassed through written submissions. The Court has duly considered the parties' respective submissions.

#### **Analysis and Determination**

29. Upon considering the Application, the Respondent's Replying Affidavit, the Applicant's Further Affidavit and the rival submissions, the Court has distilled the following issues for determination:

- i. Whether this Court has jurisdiction to extend the time for filing an appeal against an award made by the Director under the Work Injury Benefits Act; and*
- ii. Depending on (i), whether the Applicant has met the requisite conditions for the grant of such extension.*

## Jurisdiction?

30.The Respondent contends that the Work Injury Benefits Act does not contain any provision granting this Court jurisdiction to extend the time for filing an appeal against an award made by the Director.

31.The Respondent's contention fades in light of **Rule 18 of the Employment and Labour Relations Court (Procedure) Rules, 2024**, which expressly provides that this Court may, where circumstances justify, extend the period prescribed for filing an appeal or any document relating to an appeal.

32.Additionally, **Rule 80** of the same Rules stipulates that the Court may extend the time prescribed under the Rules or such time as may be stipulated in an order of the Court.

33.It is therefore evident from the foregoing provisions that this Court is vested with jurisdiction to entertain the present Application and to extend time where appropriate.

34.Consequently, the Court finds that it has the jurisdiction to grant the orders sought by the Applicant.

**Whether the Applicant has met the requisite conditions for the grant of extension of time**

35. It is evident from **Rules 18 and 30 of the Employment and Labour Relations Court (Procedure) Rules (2024)** that the Court exercises discretionary power when determining an application for enlargement of time.

36. The Supreme Court in **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, set out the guiding principles for the exercise of such discretion, as follows:

- a) Extension of time is not a party's right, but an equitable remedy available only to a deserving applicant at the discretion of the Court;*
- b) The applicant bears the burden of laying a satisfactory basis for the grant of the extension;*
- c) Whether or not to extend time is a determination to be made on a case-by-case basis;*
- d) The applicant must provide a reasonable explanation for the delay, to the satisfaction of the Court;*
- e) The Court must consider whether the Respondent will suffer prejudice if the extension is granted;*
- f) The application must have been brought without undue delay; and*

*g) In certain cases, such as election matters, public interest may be a relevant consideration.*

37. In the present case, the Applicant seeks extension of time to lodge an appeal against the Director's award. The record shows that the Applicant lodged an Objection dated 5<sup>th</sup> December 2024 before the Director, while the instant Motion was filed on 16<sup>th</sup> May 2025, approximately five months later.

38. Explaining the delay, in its failure to file the Appeal within the prescribed timelines, the Applicant has averred that it is yet to receive a response to its Objection from the Director, adding that it only filed the Application herein out of abundance of caution.

39. The record bears that following the Applicant's Objection, the Sub-County Occupational Safety and Health Officer, one **Seki Leyian**, referred the matter to the Director in Nairobi by a letter dated 6<sup>th</sup> January 2025, after which the Respondent was subjected to a further assessment at the Work Injury Evaluation Clinic.

40. Although it is apparent that the said letter was copied to the Applicant, there is no evidence on record confirming that it was actually served upon the Applicant.

41. What's more, besides the letter dated 6<sup>th</sup> January 2025, there is no express response on record from the Director addressing the Applicant's Objection.

42. Coupled with the foregoing, the Director did not file any response to the present Application to clarify the Applicant's assertion that there is no response to its Objection.

43. Having weighed the explanation advanced by the Applicant for the delay in filing the intended appeal, the Court finds the same plausible and is persuaded to extend the benefit of the doubt to the Applicant.

44. Consequently, the Court finds merit in the Application seeking leave to file an appeal against the Director's award out of time.

45. Before I conclude, it is worth noting that the Applicant has also sought an order for stay of execution pending the hearing and determination of the intended appeal. This relief cannot be granted at this stage, as no appeal has been filed. Consequently, there is no basis upon which an order for stay of execution pending appeal can be issued.

46. In sum, the Application dated 16<sup>th</sup> May 2025 is hereby allowed with the Applicant being granted leave to file an appeal against the Director's award out of time. The appeal shall be filed and served within fourteen (14) days from the date of delivery of this Ruling.

47. The costs of this Application shall abide the outcome of the appeal.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> day of October 2025.**

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

Mr. Kiama for the Applicant

Mr. Kimeu for the Respondent

No appearance for the Interested Party

Millicent Court Assistant

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

**STELLA RUTTO**

**JUDGE**