



REPUBLIC OF KENYA



**Maluti & another v Musyoka t/a Aquaryna Water Bottlers & 2 others (Miscellaneous Application E016 of 2025 & Judicial Review Application E005 of 2025 (Consolidated)) [2025] KEELRC 3061 (KLR) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3061 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION E016 OF 2025 & JUDICIAL  
REVIEW APPLICATION E005 OF 2025 (CONSOLIDATED)**

**SC RUTTO, J**

**OCTOBER 31, 2025**

**BETWEEN**

**GABRIEL MUENDO MALUTI ..... APPLICANT**

**AND**

**SALOME MUENI MUSYOKA T/A AQUARYNA WATER  
BOTTLERS ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**JUDICIAL REVIEW APPLICATION E005 OF 2025**

**BETWEEN**

**SALOME MUENI MUSYOKA ..... APPLICANT**

**AND**

**DIRECTOR OF OCCUPATIONAL SAFETY AND HEALTH SERVICES ATHI  
RIVER COUNTY & ANOTHER & ANOTHER ..... RESPONDENT**

**RULING**

1. The Applicant, Gabriel Muendo Maluti, is the Interested Party in ELRC JR Application No. E005 of 2025, whereas Salome Mueni Musyoka is the Applicant in the same matter and the Respondent in ELRC Misc. Application No. E016 of 2025. Given that both matters emanate from the same set of facts, they were consolidated on 30<sup>th</sup> May 2025.



2. For ease of reference and clarity in this Ruling, Gabriel Muendo Maluti will be referred to as the Applicant, while Salome Mueni Musyoka will be referred to as the Respondent.
3. By way of a Notice of Motion dated 3<sup>rd</sup> April 2025, the Applicant seeks the following orders:-
  - a. That this Honourable Court be pleased to make a declaration that the Respondent pay the Applicant the amount of Kshs. 1,548,384.00 being the compensation award by the Director of Occupational Safety and Health Services to the Applicant.
  - b. That the compensation of Kshs. 1,548,384.00 by the Director of Occupational Safety and Health Services to the claimant be adopted as the judgment of this court with interest as from 8<sup>th</sup> November 2024.
  - c. That the costs of the Application be paid by the Respondent.
4. The Motion is anchored on the grounds set out therein and supported by the Affidavit of Gabriel Muendo Maluti, the Applicant. It is averred by the Applicant that his late son, Muthama Muendo, was employed by the Respondent at her business premises in Athi River.
5. The Applicant avers that on 1<sup>st</sup> June 2022, he received a call informing him that his son had passed away while cleaning a water tank at a client's premises in the Kyumbi area of Machakos, having succumbed in the course of performing his duties.
6. He further states that he attended the post-mortem examination, which revealed that the cause of death was carbon monoxide poisoning sustained while cleaning the underground tank of the Respondent's customer.
7. The Applicant adds that he reported the incident to the Director of Occupational Health and Safety (Director) in Athi River and requested computation of the compensation benefits due to his late son's estate.
8. He avers that the Director assessed the compensation payable to the estate of his late son at Kshs. 1,548,384.00 and duly served the Respondent with the assessment. However, more than ninety days have since lapsed without payment.
9. According to the Applicant, the Respondent has not lodged any objection to the Director's assessment within the statutory period.
10. The Applicant contends that the Respondent's non-responsiveness has necessitated the filing of the present application.
11. In response to the Application dated 3<sup>rd</sup> April 2025, the Respondent filed a Replying Affidavit sworn on 24<sup>th</sup> July 2025, wherein she avers that there is no causal link between the death of the Applicant's son and her role as an employer. She maintains that the circumstances leading to his death arose from an unfortunate accident unrelated to his employment duties.
12. The Respondent further states that, as the proprietor of Aquaryna Water Bottlers, she engaged the Applicant's son as a casual labourer whose primary responsibilities were office errands and messenger duties, not tank cleaning.
13. She avers that on 1<sup>st</sup> July 2022, she assigned the deceased routine office duties at the company premises. However, with her knowledge, he requested to accompany the water bowser on an errand that did not involve cleaning any tank.



14. The Respondent contends that the cleaning of water tanks was exclusively assigned to two of her employees, namely, Bonface Musyoka Zakayo and Sedrick Atego.
15. She further avers that at the customer's premises, the deceased, together with the said employees, took it upon themselves to enter the tank for cleaning, a task for which the deceased had not been assigned or instructed by her or any authorized company representative.
16. The Respondent further avers that, based on police statements given by both Sedrick Atego and Bonface Musyoka Zakayo, the group independently decided to operate a generator inside the confined tank, which resulted in fatal carbon monoxide exposure.
17. She adds that the post-mortem report dated 7<sup>th</sup> July 2022 confirmed that the Applicant's son died from carbon monoxide poisoning caused by actions undertaken by himself and his colleagues, without any authorization or instruction from her.
18. The Respondent is categorical that neither she nor the management of Aquaryna Water Bottlers gave any directive or approval for the deceased to enter the tank or to use a generator in such a dangerous manner.
19. She further avers that police investigations conducted after the incident classified the death as accidental and made no adverse findings or recommendations against her in her capacity as employer.
20. The Respondent further states that she duly reported the incident to the relevant authorities and extended an ex-gratia contribution to assist with funeral arrangements. She asserts that this gesture was purely humanitarian and did not amount to an admission of liability or commitment to compensation.
21. She contends that despite the absence of any legal or factual nexus linking her to the fatal incident, the Director, proceeded on or about 8<sup>th</sup> November 2024 to compute compensation allegedly payable by her to the deceased's estate, without granting her a fair hearing or an opportunity to be heard on issues of liability or causation.
22. The Respondent asserts that the Director's actions were ultra vires, as compensation under the law presupposes the existence of a causal employment link or negligence, neither of which, she argues, has been established by the available evidence.
23. She therefore contends that the Applicant's prayer for adoption of the Director's computation as a judgment of the Court is misconceived, as the assessment was unilateral and made without her participation or representation.
24. The Respondent further filed an Ex Parte Chamber Summons Application dated 15<sup>th</sup> May 2025, through which she seeks the following orders:
  1. Spent.
  2. Leave be granted to the Applicant to institute judicial review proceedings seeking for an order of CERTIORARI quashing the Respondent's decision made on or about 8<sup>th</sup> November 2024 tabulating the compensation to be paid by the Applicant to the estate of the late Muendo Muthama;
  3. Leave granted do operate as STAY of proceedings in Machakos Misc Elrc Application E016 Of 2024 And Mavoko Cr Case 3/2024r Vs Salome Musyoka.
  4. That costs of this Application be in the cause.



25. The grounds underpinning the Application largely mirror the averments contained in the Respondent's Replying Affidavit, sworn on 24<sup>th</sup> July 2025.
26. The Applicant opposed the Respondent's Chamber Summons by way of a Replying Affidavit sworn on 16<sup>th</sup> July 2025.
27. The Applicant avers that, on the advice of his advocate on record, the Application and its Supporting Affidavit are incurably defective, incompetent, bad in law, and constitute an abuse of the court process.
28. He further states that, based on the same legal advice, an order of certiorari can only be sought within six months from the date the impugned decision was made, and that such time cannot be extended.
29. He contends that the Respondent now seeks leave to apply for an order of certiorari to quash the Director's decision made on 8<sup>th</sup> November 2024, well beyond the six-month statutory limit.
30. The Applicant further avers that the Respondent has admitted that his late son was her employee, engaged as a casual labourer, and that he died while in the course of employment.
31. He maintains that, although the Respondent claims that the deceased volunteered to clean the client's tank, one of the employees who accompanied him stated that it was the Respondent who instructed the deceased to join them in carrying out the task.
32. The Applicant argues that it is disingenuous for the Respondent to shift blame to a deceased person by alleging that his son acted on his own volition, when other witnesses confirm that he was assigned the duty by the Respondent.
33. He asserts that the Respondent directed her employees to undertake a hazardous task for which they were neither trained nor properly equipped, resulting in his son's death and the hospitalization of another employee, Bonface Zakayo.
34. He contends that the Respondent's failure to face prosecution over the death of his son does not absolve her of tortious liability for negligence.
35. The Applicant further avers that the Respondent failed to report the fatal accident and neglected to follow the legal procedure under the [Work Injury Benefits Act](#), and therefore cannot now claim to have been treated unfairly.
36. He adds that criminal proceedings relating to the incident are still ongoing, and the court handling that matter will determine whether the Respondent bears criminal liability for failing to report the accident.
37. The Applicant maintains that his son died while performing lawful duties assigned by the Respondent, irrespective of where the task was carried out.
38. The Director, who was named as the Respondent in the judicial review application, did not file any response to the Respondent's Application dated 15<sup>th</sup> May 2025.

### **Submissions**

39. The Application was canvassed by way of written submissions. The court has paid due consideration to the submissions by both parties.

### **Analysis and Determination**

40. Upon careful consideration of the Applicant's Notice of Motion dated 3<sup>rd</sup> April 2025, the Respondent's Replying Affidavit, the Respondent's Ex Parte Chamber Summons dated 15<sup>th</sup>



May 2025, and the Applicant's Replying Affidavit, the Court identifies the following issues for determination:

- a. Whether the Respondent should be granted leave to institute judicial review proceedings for an order of certiorari to quash the decision of the Director, WIBA made on 8<sup>th</sup> November 2024, awarding compensation to the Applicant;
- b. Subject to the finding in (a) above, whether proceedings in Machakos ELRC Misc. Application No. E016 of 2024 should be stayed;
- c. Subject to the finding in (a) above, whether the award made on 8<sup>th</sup> November 2024 by the Director should be adopted by the Court.

Leave to institute Judicial review proceedings for an order of certiorari

41. Through the Ex parte Chamber Summons dated 15<sup>th</sup> May 2025, the Respondent seeks leave to institute judicial review proceedings for an order of certiorari to quash the decision of the Director, WIBA, made on 8<sup>th</sup> November 2024, awarding compensation to the Applicant.
42. The applicable legal framework on timelines for seeking an order of certiorari is set out under Section 9(3) of the *Law Reform Act*, which provides as follows:

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law...”

43. Similarly, Order 53 Rule 2 of the Civil Procedure Rules, 2010 stipulates that:

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act...”

44. From the foregoing, it is evident that Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules, 2010 set a strict statutory limit of six months within which an application for an order of certiorari must be brought.
45. It is worth noting that the provisions are couched in mandatory terms, expressly prohibiting the grant of leave where the application is made outside the prescribed period.
46. The central issue, therefore, is whether the Director's decision awarding compensation under WIBA qualifies as a decision envisaged within the scope of Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules, 2010.
47. In *Republic v Kenya National Highways Authority & 2 others ex parte Amica Business Solutions Limited* [2016] eKLR, the Court of Appeal held as follows:

“In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties...”



48. And further, in Republic v County Council of Kwale & another; Kondo & 57 others (Ex parte) [1998] KEHC 2 (KLR), the Court held as follows:-

“It is my view nonetheless that certiorari lies not only to courts but to other persons and bodies having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially. The Commissioner of Lands in my view is such a person and his actions are amenable to the grant of orders of certiorari.”

49. Guided by the foregoing precedents, the Court is of the considered view that the Work Injury Benefits Act vests the Director with quasi-judicial authority for the initial determination of claims under that Act. Accordingly, the decision made by the Director on 8<sup>th</sup> November 2024 in the present case constituted a formal quasi-judicial determination amenable to judicial review by way of an order of certiorari.

50. In light of the foregoing, and applying the provisions of Section 9(3) of the Law Reform Act as well as Order 53 Rule 2 of the Civil Procedure Rules, 2010, and considering that the decision sought to be quashed was rendered on 8<sup>th</sup> November 2024, it is evident that the Respondent’s Application, filed on 21<sup>st</sup> May 2025, was lodged outside the prescribed six-month period and is therefore time-barred and unsustainable.

51. Having determined that the Respondent’s Application is time-barred, the second issue identified for determination consequently falls by the wayside.

#### **Adoption of the award by the Director**

52. On this issue, the Court notes that it is undisputed that the Director issued an award in favour of the Applicant on 8<sup>th</sup> November 2024. The record does not reflect any challenge to that award through the procedures prescribed under the Work Injury Benefits Act. Equally, there is no indication that the Respondent has taken any steps to satisfy the said award.

53. Accordingly, this Court finds that the Applicant is rightfully entitled to the award of Kshs. 1,548,384.00 as assessed by the Director on 8<sup>th</sup> November 2024.

54. The Court further awards interest on the said sum at court rates from the date of this Ruling until payment in full.

55. The Respondent shall also bear the costs of the two Applications.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF OCTOBER 2025.**

.....

**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Applicant Mr. Kioko

For the Respondent Ms. Magogo instructed by Mr. Malenya

Court Assistant Millicent

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.

