



**Mutie & another (Suing as Administrators of the Estate of Richard Muya Mutunga) v SBI International Holdings AG Kenya; Mutunga (Interested Party) (Employment and Labour Relations Miscellaneous E032 of 2025) [2025] KEELRC 3076 (KLR) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEELRC 3076 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**EMPLOYMENT AND LABOUR RELATIONS MISCELLANEOUS E032 OF 2025**  
**AN MWAURE, J**  
**OCTOBER 31, 2025**

**BETWEEN**

**JENNIFER NDUKU MUTIE ..... 1<sup>ST</sup> APPLICANT**

**ABRAHAM ANYEGAH NYAKONDO ..... 2<sup>ND</sup> APPLICANT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF RICHARD MUYA  
MUTUNGA**

**AND**

**SBI INTERNATIONAL HOLDINGS AG KENYA ..... RESPONDENT**

**AND**

**JASCIDAH WAVINYA MUTUNGA ..... INTERESTED PARTY**

**RULING**

1. Before this Honourable Court are two preliminary objections for determination. The interested party filed a preliminary objection dated 24<sup>th</sup> June 2025 on the following grounds that:
  1. The instant suit is res subjudice Nyandarua High Court HCJRMISC/E001/2025 Jascidah Wavinya Mutunga vs Director of Occupational Safety and Health Services, which are judicial review proceedings challenging the legitimacy of the Director of Occupational Safety and Health Services' assessment and award
  2. The instant suit is res judicata of Nakuru ELRC Misc App No. E012 Jennifer Nduku Mutie & Abraham Anyegah Nyakondo vs SBI International Holdings and Another
2. On the other hand, the interested party also filed a preliminary objection dated 4<sup>th</sup> July 2025 and came up with 15 points which this Honourable Court condensed as follows:



- a. The matter is res judicata, as it was already determined in Nyahururu MCELRC No. E004 of 2024 and Nakuru ELRC Misc No. E012/2025
  - b. This Honourable Court (ELRC) lacks jurisdiction to enforce awards issued by the Director of Occupational Safety and Health Services (DOSHS).
  - c. No legal provision in *the Constitution*, *Work Injury Benefits Act*, *Employment Act*, or ELRC Act grants this court enforcement powers over DOSHS awards.
3. Parties herein canvassed the P.O. by way of written submissions.

DIVISION - Applicant's submissions

PARA 4.

The Applicant submitted that the doctrine of res judicata does not apply to the present matter, contrary to the assertions made by both the Respondent and the Interested Party. The Applicant explains that it previously lodged a similar application before the Chief Magistrate's Court under Nyahururu CMELRCMISC E004 of 2024. In that instance, the Respondent challenged the application by filing a Notice of Preliminary Objection. The court upheld the objection, determining that the Magistrate's Court lacked the jurisdiction to adopt an award issued by the Director of Occupational Safety and Health Services under the *Work Injury Benefits Act*. Nonetheless, the Applicant argues that this ruling did not bar it from seeking enforcement before a court properly vested with jurisdiction to adopt and enforce such awards.

PARA 5.

The Applicant relied on Section 7 of the *Civil Procedure Act* provides that res judicata bars a court from hearing a suit or issue that has already been directly and substantially addressed in a previous case involving the same parties or those claiming under them, provided the earlier case was heard and finally decided by a competent court. This applies even if the earlier case was filed after the current one. The rule includes not only matters actually raised but also those that ought to have been raised as part of the defence or claim. Reliefs not expressly granted are considered denied, and when parties litigate in good faith over shared rights, all interested individuals are bound by the outcome.

PARA 6.

In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] KECA 477 (KLR) The Court of Appeal held that for the doctrine of res judicata to apply, several elements must be met collectively not separately. Specifically, the issue in question must have been directly and substantially in issue in a previous suit; that earlier suit must have involved the same parties or their legal representatives; the parties must have litigated under the same title; the issue must have been heard and conclusively determined; and the court that decided the earlier matter must have been competent to hear the subsequent suit or the one in which the issue is now raised.

PARA 7.

The Applicant submitted that the doctrine of res judicata does not apply to the current application, as the previous suit filed in the Nyahururu Magistrate's Court was dismissed for lack of jurisdiction, a key element required for res judicata to apply as affirmed in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others* [1996] KECA 102 (KLR). Since the Magistrate's Court lacked authority to adopt and enforce the award, there was no obligation to appeal or review its decision, and the Applicant appropriately filed the present application before a competent court. Additionally, the Nakuru ELRC HC Misc E012 of 2020 case was withdrawn before any judgment or ruling was issued, meaning the issue of enforcement was never heard or finally determined. Under Order 25 Rule 1 of the Civil Procedure Rules, such withdrawal does not bar



subsequent proceedings. Therefore, the doctrine of res judicata cannot be invoked where the matter was not conclusively adjudicated.

PARA 8.

The Applicant contends that this Honourable court has jurisdiction to adopt and enforce an award issued by the Director of Occupational Safety and Health Services. Initially, the applicant sought enforcement before the lower court in Nyahururu CMELRCMISC E004 of 2024, which declined jurisdiction, prompting the current application. The Applicant relied on the cases of Muturi v National Police Service & 3 Others [2023] KEELRC and Kalimoni v Powerful Construction Limited [2023] KEELRC 2991 (KLR) demonstrate that this court, while sitting in Nairobi, has previously adopted similar awards as judgments. The Applicant argued that the Respondent has not provided any valid reason why the same jurisdiction should not apply here. Furthermore, Gazette Notice No. 9517 (vol. CXXvII-No. 154, pages 4406–4410), published on 18<sup>th</sup> July 2025, outlines practice directions that explicitly support the adoption and enforcement of such awards by this court.

PARA 9.

The Applicant submitted that the application dated 31<sup>st</sup> May 2025 seeks the adoption and enforcement of an award issued by the Director of Occupational Safety and Health Services (DOSHS), which remains unchallenged and is not stayed by any court. The earlier appeal in Nakuru ELRC Appeal No. E081 of 2024 was withdrawn on 17<sup>th</sup> February 2025, and although a judicial review in Nyandarua HCJR Misc/E0001/2025 Jascidah Wavinya Mutunga v Director of Occupational Safety and Health Services is pending, it only contests the applicant’s capacity as the deceased’s wife, not the validity or quantum of the award. The award includes undisputed compensation for two minors who urgently require school fees and basic necessities. Gazette Notice No. 9517 (18 July 2025), particularly Paragraphs 7(g) and 7(h), outlines that such applications are valid once the objection and appeal periods lapse and the employer fails to settle the award conditions that have all been met.

PARA 10.

The Applicant also submitted that the doctrine of sub judice does not apply, as the parties and issues in the judicial review differ from those in the current application. The Applicant relied on the Supreme Court’s case in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] KESC 54 (KLR), which emphasized that for sub judice to apply, the suits must involve the same parties, subject matter, and be pending before courts of competent jurisdiction. Accordingly, the current application is a proper enforcement proceeding and is not barred by law or any pending litigation.

PARA 11.

The Applicant urged this Honourable Court to dismiss both preliminary objections as they lack merit she also prays for costs.

### **Respondent’s submissions**

12. The Respondent contends that the present application before this Honourable Court is barred by the doctrine of res judicata under Section 7 of the *Civil Procedure Act*, as the Applicant previously sought enforcement of the same DOSH award in Nyahururu MCELRC No. E004 of 2024, which was heard and determined on 15<sup>th</sup> July 2024 without any appeal or review being filed.
13. The Respondent relied on the cases of Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (supra) and John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] KECA 472 (KLR), the Respondent emphasizes the need for finality in litigation and avoidance of multiple suits on the same issue.



14. In Nakuru ELRC MISC/EB012/2028, The Respondent submitted that the Applicant withdrew a similar suit at the judgment stage, arguing that the current filing of this application amounts to an abuse of court process. Furthermore, the Respondent asserts that the Employment and Labour Relations Court lacks jurisdiction to enforce DOSH awards under the *Work Injury Benefits Act*, relying on Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 other [2012] eKLR and Re Karisa Chengo & 2 others [2017] eKLR, which affirm that courts can only exercise jurisdiction as conferred by law.
15. The Respondent submitted that the application is premature due to pending appeals and review requests, including Nakuru ELRC Appeal No. E081 of 2024. In Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR, the court cautioned against parallel proceedings that risk conflicting outcomes. Finally, the Respondent cited the case of Owners of the Motor vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1, the Respondent argues that the court must decline to proceed where jurisdiction is lacking, rendering the application frivolous, vexatious, and an abuse of court process and thus urged this Honourable Court to dismiss the preliminary objection as prayed.
16. The interested party did not file their written submissions.

### **Analysis and determination**

17. The court considered the two preliminary objections and the rival submissions by the counsels.  
The issue for determination is whether the two preliminary objections are merited or not.
18. One famous case of Mukisa Biscuit Manufacturers Limited v West End Distributors Limited (1969) E.A 696 the court stated on preliminary objection as follows:  

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”
19. In Independent Electoral & Boundaries Commission v Jane Chepkiner & 2 Others [2015] eKLR where the Supreme Court stated that: -  

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”



20. In *Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR stated that:

“...a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

21. In this instant case, the Respondent and interested parties in their Preliminary objection stated that this matter is *res judicata* as it was already litigated and determined in Nyahururu MCELRC No. E004 of 2024 and the same time there was matter filed in Nakuru ELRC Appeal No. E081 of 2024, which was withdrawn on 17<sup>th</sup> February 2025. There is a Judicial Review in Nyandarua High Court JR Misc No. E0001 of 2025 *Jascidah Wavinya Mutunga v Director of Occupational Safety and Health Services* which is pending, it only contests the applicant’s capacity as the deceased’s wife, not the validity or quantum of the award.

22. In *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 Others* [2021] KESC 39 (KLR) the Supreme Court held as follows:

“For *res-judicata* to be invoked in a civil matter the following elements had to be demonstrated:

- a. there was a former judgment or order which was final;
- b. the judgment or order was on merit;
- c. the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d. there had to be between the first and the second action identical parties, subject matter and cause of action.

The doctrine of *res judicata* was based on the principle of finality which was a matter of public policy. The principle of finality was one of the pillars upon which the judicial system was founded and the doctrine of *res judicata* prevented a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensured that litigation came to an end, and the verdict duly translated into fruit for one party, and liability for another party, conclusively.”

23. Coming by the Principles set out in determining if *res judicata* applies, the court notes that the suit should have been decided with finality by a court with competent jurisdiction.

The matter in Nyahururu CMELRC MISC 004/2024 was by a preliminary objection filed by the Respondent and it raised the issue that the said subordinate court had no jurisdiction to adopt the DOSH award. The court upheld the preliminary objection and held indeed the Magistrate’s court did not have jurisdiction to adopt the DOSH awards.

24. The court finds the case was not concluded on its merits and is inclined to rule that the Applicant was within her right to seek enforcement of the award in the right court with the requisite jurisdiction.

25. The other matter raised is whether the Employment and Labour Relations Court has jurisdiction to adopt DOSH awards. The court is persuaded by a number of precedents on this issue. In the case of *Elijah Kisyanga Ndende & Manager Zakhem International Construction LTD* (2022) eKLR the



court stated “The Work Injury Benefits Act is silent on the procedure to be followed in enforcing the Director’s decision made on assessment of compensation payable to an employee for work injuries.”

In my view, the legislature never intended that an employee whose employer fails and or refuses to pay the amount of compensation assessed of by the Director of Occupational Safety and Health Services under WIBA would be without any remedy and particularly where the employer never objected to the Director’s decision on assessment of compensation payable to the employee.

Similarly, in the case of Chweya Mwandabole -vS- Protective Custody Ltd (2021) eKLR the court held:- “However this court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to article 162(2) of the Constitution and Section 12 of Employment and Labour Relations Act the court has inherent jurisdiction to adopt as judgment the Director’s award for purposes of execution.”

26. The record shows there was appeal 081/2024 which was withdrawn by the Interested Party on 17<sup>th</sup> February 2025.

27. The case HCJ RMISC 001/2025 is a Judicial Review challenging the capacity of the Applicant as the wife of the deceased.

The court does not find any application challenging the award of the Director of the adoption of the award and especially in relation to the minors.

28. The court has not had the benefits of the judgments and applications referred in the Preliminary Objection and has relied on the submissions of the respective parties and the pleadings.

29. The court having critically considered the submissions by the parties on the Preliminary objections finds the same are not proved and are not merited.

The Preliminary objections by the Respondents and the Interested Parties are not proved and are therefore dismissed.

30. The court orders the application dated 31<sup>st</sup> May 2025 to proceed for determination.

31. The court orders costs to be in the cause.

Orders accordingly.

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



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

ANNA NGIBUINI MWAURE

JUDGE

ELRC MSC APPLC. NO. E032 OF 2025 RULING PAGE 18 OF 18

