

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

**ELRC CAUSE NO E772 OF 2025**

**MARY NZISA MUTUNGA & HARRISON MWENDWA MUTUNGA**  
**(Administrators of the estate of Charles Mutunga Makuthi,**  
**Deceased).....**  
**.....CLAIMANTS**

**VERSUS**

**PEARL PACKAGING**  
**LIMITED.....RESPONDENT**

**RULING**

**Background**

1. The Claimants have approached this court through a Notice of Motion application dated 12<sup>th</sup> August 2025 seeking the following orders:-
  - a) That the Respondent be compelled to report the fatal work related accident which involved the late Charles Mutunga Makuthi to the Director of Occupational Safety and Health Services within 24 hours of the court order.
  - b) That the Director of Occupational Safety and Health Services be directed to process the Claimants' application for compensation under *the Work Injury Benefits Act, 2007* upon receipt of the accident report from the Respondent.
  - c) That the Respondent be ordered to provide all necessary documents including the deceased's employment records

- and earnings to facilitate the assessment of compensation to the dependants of the deceased.
- d) That the court makes provision for costs of the application.
2. The application is anchored on the grounds that are set out on the face of it and the supporting affidavit of one Mary Nzisa Mutunga, the affiant. The affiant contends that the deceased was an employee of the Respondent and that he died on 13<sup>th</sup> November 2024 following an accident at the workplace. She further avers that the Respondent did not report the accident to the Director of Occupational Safety and Health Services in accordance with the provisions of *the Work Injury Benefits Act, 2007*.
  3. The affiant avers that the Respondent's failure to report the accident has deprived the administrators of the deceased's estate the right to pursue compensation. She contends that because of the failure to report the accident, the Director of Occupational Safety and Health Services cannot assess the compensation that is due to the deceased's dependants.
  4. The affiant asserts that upon the demise of Charles Mutunga Makuthi, the Respondent informed the family of the deceased that it had reported the accident to the Director of Occupational Safety and Health Services. However, she avers that when the family followed up the matter with the Director of Occupational Safety and Health Services, they learned that no such report had been lodged.

5. The affiant contends that the family has attempted to lodge a report of the accident to the Director of Occupational Safety and Health Services through its online platform. However, she says that these attempts have not been fruitful.
6. The affiant avers that the Director of Occupational Safety and Health Services has informed them that the Respondent must first fill the DOSHI 1 form. As such, she contends that they fear that the process will be unduly delayed and subsequently time barred.
7. The Claimants aver that they served the application on the Respondent but it (the Respondent) has not responded to it. They have placed on the court file a certificate and affidavit of service dated 2<sup>nd</sup> September 2025 and 7<sup>th</sup> October 2025 respectively to speak to the fact of service.
8. Based on the aforesaid affidavits, the court was convinced that the Respondent had been made aware of the application but had nevertheless not responded to it. As such, it (the court) allowed the Claimants to prosecute the motion in the absence of the Respondent.

### **Analysis**

9. The instant application, though undefended, is afflicted by a number of legal pitfalls which the court is obligated to speak to. An analysis of the pitfalls will determine the fate of the motion.

10. The first challenge relates to the manner in which the Claimants have moved the court for the orders which they seek. The record shows that they opted to invoke the court's jurisdiction by filing a Notice of Motion application. The application is neither filed in a substantive suit nor is it presented as a Miscellaneous Application. It is presented as a bare Notice of Motion. Yet, it seeks substantive remedies.
11. A perusal of the *Employment and Labour Relations Court (Procedure) Rules, 2024* shows that there are only three procedures through which a litigant can approach the court in the first instance. He can do so either through a Statement of Claim or a Petition or a Judicial Review Application. Although not expressly provided for in the aforesaid rules, the other methods which the courts have accepted for purposes of invoking their jurisdiction in the first instance are Miscellaneous Applications and Originating Summons.
12. Notice of Motion and Chamber Summons applications are not recognized mechanisms for invoking the court's jurisdiction in the first instance. They are usually used to move the court for interlocutory reliefs in a pending suit. Indeed rule 45 (1) of the *Employment and Labour Relations Court (Procedure) Rules, 2024* acknowledges that a Notice of Motion application is intended for interlocutory reliefs by providing as follows:-

*“An interlocutory application shall be made by notice of motion and may be heard in open court or as the court may direct.”*

13. In ***Abdulkarim v Mulla & 3 others (Miscellaneous Application E31 of 2024) [2024] KEHC 13987 (KLR) (12 November 2024) (Ruling)***, the court, quoting with approval the decision in the case of ***Proto Energy Limited v Hashi Energy Limited (2019) eKLR***, observed on the subject as follows:-

*“Order 3 Rule (i) (ii) provides that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a plaint, petition or an originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a Notice of Motion renders the entire suit defective.”*

14. In ***Kalyonge v Karanja [2022] KEHC 16174 (KLR)***, the Claimant instituted proceedings for dissolution of a partnership and injunction through a Notice of Motion application. In declaring the proceedings as incompetent, the trial court stated as follows:-

*“In view of the foregoing, the suit before the court is not competent. The applicant came by way of notice of*

*motion which is not prescribed by any law or rule as an originating process.”*

15. The instant proceedings were presented through a bare Notice of Motion application which is not a recognized method of commencing proceedings before court. As such, they are incompetent for this reason.
16. Also noteworthy is that the Claimants are seeking, inter alia, an order to compel the Director of Occupational Safety and Health Services to institute the process of assessing the compensation that is due to the dependents of the deceased. Yet, they have not joined the Director of Occupational Safety and Health Services as a party to the action.
17. It is impermissible for a court to issue orders against a non-party to a suit. To do otherwise will be tantamount to depriving such non-party the right to be heard (see par 146 of ***Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others [2018] KEHC 7513 (KLR)***). For this reason, it will be improper for the court to issue the orders sought against the Director of Occupational Safety and Health Services even when it is apparent that the said Director is not a party to these proceedings.
18. The court has further scrutinized the provisions under which the Claimants have moved it for the orders sought and it is apparent that none of them grant it (the court) the power to compel either the employer to report the suit accident or the

Director of Occupational Safety and Health Services to process compensation for the benefit of deceased's dependants particularly in an action commenced through a Notice of Motion. As such, it is doubtful that the court has jurisdiction to entertain the motion.

19. Section 21 of *the Work Injury Benefits Act* stipulates the procedure for reporting a workplace accident. An employee and or his representative is required to report the accident to the employer in the first instance.
20. Once the employer has been notified of the accident or has become aware of it through some other means, he is required to make a report thereof to the Director of Occupational Safety and Health Services. The employer should make the report within seven days of receipt of the report of the accident from the employee (see section 22 of the Act).
21. However, the fact that an employer has failed to notify the Director of Occupational Safety and Health Services of a workplace accident is not a bar to an employee lodging the report directly with the Director of Occupational Safety and Health Services. Section 22(5) of *the Work Injury Benefits Act* entitles an employee (or his dependants) to make a report of an accident directly to the Director of Occupational Safety and Health Services.
22. Importantly, failure by an employee to report a workplace accident to the employer for onward reporting to the

Director of Occupational Safety and Health Services does not necessarily defeat a claim for compensation in respect thereof. Under section 26 of *the Work Injury Benefits Act*, the Director of Occupational Safety and Health Services is required to consider a claim for compensation on account of a workplace injury as long as it is lodged by either the employee or the employee's representative within twelve (12) months of the accident or death of the employee. The employee or representative of the employee who makes a late claim should simultaneously lodge a late report of the accident to the employer in terms of section 27 of the Act to avoid the time bar which is imposed by the section.

23. The Director of Occupational Safety and Health Services is only precluded from considering a claim that is lodged outside twelve (12) months where there is no evidence that the accident that gave rise to the claim was reported as required under the Act (see section 26(2) of the Act). As such and in my view, the Director of Occupational Safety and Health Services is duty bound to process all workplace injury claims that are lodged with him ( whether initially reported to him or not) as long as they are lodged within twelve months of the occurrence of the accident or death.
24. A Claimant can only seek to compel the Director of Occupational Safety and Health Services to process a claim if there is evidence that the Claimant had lodged the claim in accordance with section 26 of the Act but the Director of

Occupational Health Services has refused to act on it for no valid reason. In such case, the Claimant is entitled to contend that the Director of Occupational Safety and Health Services has unreasonably failed to discharge his statutory mandate. As such, he may move the court through a Judicial Review motion to seek an appropriate prerogative order against the Director of Occupational Safety and Health Services.

25. In the instant case, the evidence on record shows that the deceased died on 13<sup>th</sup> November 2024 following an alleged workplace accident. The Claimants contend that the Respondent has failed to report the suit accident to the Director of Occupational Safety and Health Services for purposes of processing. However, they have not presented evidence of having reported the accident either to the employer or the Director of Occupational Safety and Health Services in terms of the provisions of *the Work Injury Benefits Act*.
26. As the accident occurred on 13<sup>th</sup> November 2024, the Claimants have the opportunity to make a formal report thereof to the Respondent and the Director of Occupational Safety and Health Services simultaneously with lodging a claim for compensation with the Director of Occupational Safety and Health Services before midnight on 12<sup>th</sup> November 2025 in accordance with the provisions of *the Work Injury Benefits Act*. The court cannot do this for them.

**Determination**

- 27. For the reasons set out in the ruling, the application dated 12<sup>th</sup> August 2025 is not only defective but premature.
- 28. As such, it is dismissed.
- 29. There is no order as to costs.

**Dated, signed and delivered on the 6<sup>th</sup> day of November, 2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimants

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M MANANI**