

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

MISCELLANEOUS NO. E079 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

BENSON CHRIS OWIRO ONGUSO.....

APPLICANT

VERSUS

DPL FESTIVE LIMITED.....

RESPONDENT

RULING

Before the court for determination is the applicant's Notice of Motion dated 30th September 2025 seeking Orders that:-

- 1. Judgment be entered in favour of the Applicant in the sum of Kshs.536,121.60 together with interest from 25th April 2017 when the award was made until payment in full.*
- 2. Costs of this application be provided for.*

The Notice of Motion is expressed under Section 87 of the Employment Act, Section 12 of the Employment and Labour Relations Court Act, Section 1A, 1B and 3A of the Civil Procedure Act and Rule 24 of the Employment and

Labour Relations Court (Procedure) Rules 2024 and is based on the grounds set out on its face and the Supporting Affidavit of Benson Chris Owino Onguso sworn on an undisclosed date and had no authentication page and thus not capable of being relied upon.

The applicant stated that the suffered injury in the course of his employment by the respondent and lodged WIBA Form 4 for assessment of compensation by the Director of Occupational Safety and Health Services (herein after “DOSHS”) and was informed vide WIBA Form 4 that his injuries had been assessed at Kshs.536,121.00 and requested the respondent to settle the same but the amount remained unpaid owing to the respondent’s refusal, neglect or failure.

That this court has jurisdiction to grant the Orders sought and their were in furtherance of the overriding objectives of the court and interest of justice.

Respondent’s case

By Grounds of Opposition dated 10th October 2025 the respondent averred that the court lacked jurisdiction to hear and determine the application as it was time-barred

by dint of Section 89 of the Employment Act and the application ought to be dismissed.

Similarly, by a Replying Affidavit sworn by Duncan Otieno Njoga on 10th October 2025, the affiant deponed that the application was misconceived, fatally defective and an abuse of court process and was time barred as the award was issued 7 years ago and was not enforced within 3 years in accord with the provisions of Section 89 of the Employment Act and the 7 years delay was inordinate, unexplained and inexcusable and was stale.

The affiant further deposed that the court had no jurisdiction to entertain a statute barred action.

That the applicant had not met the threshold for the grant of the Orders sought.

Counsels opted not file submissions.

Analysis and determination

This is a straight forward application for adoption of the award by the DOSHS as a judgment of the court for purposes of enforcement.

The only issue for determination is whether the applicant's application herein meets the threshold for grant of the Orders sought.

The operative statutory framework are the provisions of Section 86 of the Employment Act which provide:

(1) Subject to the provisions of this Act whenever—

(a) an employer or employee neglects or refuses to fulfil a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Employment and Labour Relations Court.

(2) No court other than the Employment and Labour Relations Court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

This provision confer upon the Employment and Labour Relations Court jurisdiction to adopt awards by the DOSHS for purposes of enforcement.

The foregoing was affirmed by the Court of Appeal in **Thepot Patrick Charles V Joash Shisia Cheto** [2025] KECA 784 (KLR) where the court addressed the question of adoption of awards made by the DOSHS and affirmed the position that the Employment and Labour Relations Court (ELRC) had jurisdiction to adopt the awards and enter judgment in favour of the applicant as held in **Samson Chweya Mwendabole V Protective Custody Ltd** [2021] KEELRC 1809 (KLR) and **Sino V China Civil engineering Construction Corporation (K) Ltd** [2025] KEELRC 1792 (KLR) among others.

In **Thepot Partick Charles V Joash Shisia Cheto** (supra), the Court of Appeal held:

“The foregoing sentiments of the Court of Appeal Settles the law that the Employment and Labour Relations Court is the only court with jurisdiction to adopt the awards by the DOSHS for purposes of enforcement”.

As to whether the applicant’s Notice of Motion is time barred by dint of the provisions of Section 89 of the Employment Act, as alleged by the respondent, it is clear that the application is not a suit for the disentanglement and appreciation of the evidence. It is an application filed for purposes of enforcement of an existing decision which the respondent has not contested. It is exclusively an enforcement action and in the court’s view, it is not statute barred as neither the Employment Act nor the Work Injury Benefit Act (WIBA) expressly provide for the duration within which DOSHS awards must be filed for adoption and entry of judgment.

In the court’s view nothing turns on the issue of limitation of time and jurisdiction of the court.

The more significant issue on which this case turns is whether the applicant’s application meets the threshold for grant of the Orders sought.

First, the applicant's Supporting Affidavit has neither a deponent or date nor the advocate who commissioned it and is thus not a Supporting Affidavit.

Under Rule 69 of the Employment and Labour Relations Court (Procedure) Rules, 2024;

(1) Where parties have entered into a conciliation, negotiation or mediation agreement, or, are bound by an arbitral award or a lawful decision reached in Alternative Justice Systems, a party may file the award, decision or agreement for adoption and enforcement as an order of the Court.

(2) An application under subrule (1) shall be by way of a Miscellaneous Application instituted through a notice of motion supported by an affidavit exhibiting the award, decision or agreement together with all relevant documents.

This rule is couched in mandatory tone and prescribes not only the manner of approaching the court, but more significantly, the documents to be attached to the Notice of Motion, Supporting Affidavit, the award, decision or agreement and all relevant documents.

Regrettably, the applicant's Notice of Motion, whose granting as prayed ought to have been a matter of course fails on two grounds

(i) The Supporting Affidavit by Benson Chris Owiro Onguso sworn on 30th September 2025 was not signed by Mr. Benson Chris Owiro Onguso, the deponent, which would appear to suggest that he did not appear before the Commissioner for oaths. The affidavit is invalid and ineffectual.

In sum, the Notice of Motion had no Supporting Affidavit as by law required.

(ii) Other than DOSHS/WIBA 4 dated 25th April 2017 informing the respondent that the applicant's compensation was assessed at Kshs.536,121.60, no other document was attached.

It is unclear to the court as to when the alleged accident occurred, nature or type of injury suffered, treatment, admissions, if any, and other relevant facts.

Notably, the DOSH/WIBA 1 which contains the applicant's details as confirmed by the employer, input by the medical practitioner including degree of permanent incapacity, (if any), and authentication by the Labour Officer was not attached.

In sum, the claim lacked a history and context, the DOSH/WIBA 4 Form is patently insufficient for purposes of adoption of an award by the DOSHS.

In the upshot, the applicant's Notice of Motion dated 30th September 2025 is incomplete and it is struck out with no Orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 27TH DAY OF NOVEMBER 2025.**

**DR. JACOB GAKERI
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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI
JUDGE