



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT KISUMU**

**MISCELLANEOUS APPLICATION NO. E053 OF 2025**

BECKY NYANCHAMA ONYANCHA (suing as a  
dependant and legal representative of  
FREDRICK OTIENO  
(Deceased).....**APPLICANT**

ADUMBO

**VERSUS**

GOGNI RAJOPE CONSTRUCTION LIMITED.....**1<sup>ST</sup>**

**RESPONDENT**

CEABUD ENGINEERING SERVICES LIMITED.....**2<sup>ND</sup>**

**RESPONDENT**

**RULING**

1. The Applicant moved the Court by a Notice of Motion dated 28<sup>th</sup> July 2025 seeking the adoption of an award issued by

the Director of Occupational Safety and Health Services on 12<sup>th</sup> October 2023 in respect of compensation arising from the death of the deceased while in the Respondents' employment.

2. On 25<sup>th</sup> September 2025, when the matter came up for directions on the manner of disposal of the application, the Respondents indicated that they had filed a Preliminary Objection.
3. On 29<sup>th</sup> September 2025, counsel for the Applicant proposed that the Preliminary Objection be treated as a response to the application. Counsel for the Respondents opposed the proposal. Consequently, the Court directed that the Preliminary Objection dated 22<sup>nd</sup> September 2025 be heard first by way of written submissions.
4. In their Preliminary Objection, the Respondents contended that the Court lacked jurisdiction to entertain the application asserting that; the claim was time-barred, it offended section 90 of the Employment Act, and was caught by the doctrine of laches. They argued that there exists no legal provision

empowering the Court to enter judgment, adopt, or enforce awards made by the Director of DOSH. According to them, the application did not amount to an appeal or reference as contemplated under section 52(2) of the Work Injury Benefits Act (WIBA). They further maintained that the application was out of time under section 4(1) of the Limitation of Actions Act, which prescribes a six-year limitation period for actions founded on contract or to enforce awards. They additionally argued that the matter offended section 90 of the Employment Act, which bars employment-related claims after three years from accrual of the cause of action, and that the delay in filing the suit was unreasonable and inequitable.

5. The Applicant opposed the Preliminary Objection through grounds of opposition dated 29<sup>th</sup> September 2025. She argued that the Court had jurisdiction to entertain and determine matters arising under WIBA pursuant to Article 162(2) of the Constitution and section 12(3)(v) and (viii) of the Employment and Labour Relations Court Act. She contended that the claim was not governed by section 90 of the Employment Act but by WIBA, which does not prescribe a

limitation period for the adoption or enforcement of an award by the Director.

6. The Applicant further asserted that the determination and apportionment of dependants' shares having been made less than six years ago, section 4(1) of the Limitation of Actions Act did not apply, highlighting that the Director only referred the matter to court in December 2024. She maintained that she could not be faulted under the doctrine of laches as she had diligently pursued the matter before the Director.

#### Respondents' Submissions

7. On jurisdiction, the Respondents reiterated that the Court lacked authority to adopt or enforce assessments or awards issued by DOSH. They emphasised that the application was neither an appeal nor a reference under section 52(2) of WIBA, and further asserted that neither WIBA, the Employment Act, nor the Employment and Labour Relations Court Act empowers the Court to adopt DOSH awards. They relied on **David Ochieng Ogola v Bob Morgan Services Ltd (Misc. Case No. E124 of 2024) KEELRC 435 (KLR)**, where the Court held that the Employment and Labour

Relations Court has no jurisdiction to adopt DOSH assessments or awards.

8. On limitation under the Employment Act, the Respondents contended that the application was time-barred under section 90. They noted that the accident occurred on 7<sup>th</sup> March 2017 and the award was issued on 21<sup>st</sup> August 2017, more than eight years before the suit was filed. They further averred that the Applicant could not simultaneously rely on section 87 of the Employment Act and claim that the matter fell under WIBA. They cited the decision in the case of **Richard Akama Nyambane v ICG Maltauro SPA (Cause No. 4 of 2020) KEELRC 847 (KLR)** where the Court held:

*“The application of section 87 of the Act, thus put into perspective all claims premised under the Employment Act, 2007 are subject to the provisions of section 90 thereof. Section 87 and 90 thus read together, the cause of action herein and the orders sought seeking to enforce the DOSH award, such must be subject to the mandatory provisions of section 90. All claims must be lodged with*

*the court within 3 years from the date the cause of action arose.”*

9. The Respondents also relied on the case of **Andrew Mwenda Peter v Patrick Maina Stanley Gitau (Misc. App. No. E021 of 2024) [2025] KEELRC 55 (KLR)** to argue that time begins to run from the date the DOSH award is issued. They further submitted that the letter dated 10<sup>th</sup> December 2024, from the director of DOSH referring the matter to court did not constitute a formal award, neither could it revive or extend the limitation period. They thus submitted that the application was caught up by limitation under section 90 and could not be salvaged citing the decision in the case of **Beatrice Kahai Adagala v Postal Corporation of Kenya [2015] KECA 257 (KLR)**, which underscored that claims under section 90 of the Employment Act were in mandatory terms with no room for extension of the limitation period.

10. In the alternative, they submitted that even if the Employment Act did not apply, the suit was still time-barred

under section 4(1)(c) of the Limitation of Actions Act since more than six years had elapsed since the Director issued the award on 21<sup>st</sup> August 2017 through DOSH/WIBA Form 4. They asserted that DOSH/WIBA 6, which apportions compensation, does not constitute a fresh award capable of resetting the limitation period, but was merely an administrative follow-up on the award. Furthermore, they submitted that no award was made on 10<sup>th</sup> December 2024 as alleged by the Applicant.

11. On laches, the Respondents submitted that the Applicant was guilty of unreasonable delay of over eight years and that entertaining the suit would prejudice them and undermine the principles of equity, which aids the vigilant and not the indolent. Moreover, it would normalize the culture of filing WIBA claims without regard to the principle of limitation of time. They therefore urged the court to dismiss or strike out the suit with costs.

#### Applicant's Submissions

12. The Applicant maintained that she was never an employee of the Respondents and that her application

merely sought enforcement of compensation assessed by the Director following the death of the deceased. She averred that the claim arose under WIBA, not the Employment Act, and pointed out that the Respondents had completed and submitted a DOSH-1 form in 2017, which formed the basis of the Director's assessment. Additionally, the Applicant disputed the Respondents' assertion that the claim was time-barred by drawing attention to their letter dated 28<sup>th</sup> September 2023 querying the computations which demonstrated an acknowledgement of a debt.

13. On jurisdiction, the Applicant maintained that the Court was clothed with the requisite jurisdiction to entertain the application. She relied on the case of **Charles v Cheto (Civil Appeal E046 of 2022) [2025] KECA 784 (KLR)** which in referencing **Samson Chweya Mwendabole v Protective Custody Limited [2021] KEELRC 1809 (KLR)**, pointed out that the ELRC's inherent jurisdiction to adopt the Director's decision was distinct from the appellate jurisdiction under section 52(2) of the WIBA, by stating:

*“There is a lacuna in law with respect to procedure for enforcement of the awards made by the director under WIBA. However, this court being endowed with unlimited original and appellate jurisdiction in disputes related to employment and labour relations pursuant to Article 162(2)(a) of the Constitution and section 12 of the Employment and Labour Relations Act, I hold that it has the inherent jurisdiction to adopt as judgment the Director's award for purposes of execution. This jurisdiction should not be confused with appellate jurisdiction which is expressly donated under section 52(2) of the WIBA in respect of the Directors reply to objection made under section 51 (1) of the WIBA.”*

14. On accrual of the cause of action, she submitted that it arose upon the Director's assessment and apportionment conveyed in the letter dated 25<sup>th</sup> July 2024 and the Respondents' subsequent failure to honour the demanded payment. She asserted that under sections 34 and 53 of WIBA, dependants could only enforce compensation after the Director had completed assessment in accordance with the

Third Schedule. In respect of the suit being time barred under section 90 of the Employment Act, the Applicant submitted that the section was inapplicable as she was not an employee but a dependant to the deceased. In view of this she asserted that the authorities cited by the Respondents were distinguishable from the circumstances in this suit as they related to employees.

15. Concerning the suit being time barred under section 4(1) of the Limitation of Actions Act, the Applicant submitted that section 89 of the Employment Act ousted the said provision in claims arising under a contract of service. She maintained that the suit was not time barred having been filed within three years of the Respondents' refusal to honour the Director's demand. With regard to the doctrine of laches, the Applicant submitted that she had been diligent in pursuing payment of the work injury benefits, as evidenced by the engagements between DOSHS, the employer, the Respondents Counsel, and the dependants up to July 2024. Moreover, she asserted that having been actively engaged in the DOSH process, the Respondents could not rely on laches.

To buttress her position, she relied on **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] KECA 27 (KLR)**, where the Court of Appeal held:

*“In our consideration of laches, we observe Article 259 (8) of the Constitution stipulates that if a particular time is not prescribed for performing a required act, the act should be done without unreasonable delay. In line with Article 20 of the Constitution, respect for fundamental rights is a mandatory obligation on the State and all State Organs and the Bill of Rights applies to all and bind all citizens. No citizen can by his act or conduct relieve the State, a State Organ or any person of the solemn obligation to respect the Bill of Rights. It is in this context that no individual can acquiesce to violation or infringement of fundamental rights. Subject to express constitutional provisions, such as the limitations in Article 24 of the Constitution, neither the state nor an individual can arrogate to itself/himself a right or justification to commit a breach of fundamental rights of any citizen and*

*resort to the doctrine of waiver, acquiescence, inordinate delay, estoppel or other similar principle as absolute defence or excuse".*

16. In conclusion, the Applicant urged the Court to dismiss the Preliminary Objection with costs.

#### Disposition

17. The question for determination by this Court is whether the decision of the Director of Occupational Safety and Health in respect of the deceased one Fredrick Otieno Odumbo can be adopted and thereafter paid out. The Court is cognisant of the appeal process under section 52 of the Work Injury Benefits Act. It is clear that this is not an appeal against the decision of the Director. It is an application by the widow of the deceased, who seeks the payment of an amount assessed by the Director of Occupational Safety and Health made in 2017. Under the Work Injury Benefits Act there is no confluence between the estate of the deceased and the work injury. In the assessment of the Director an amount of Kshs. 32,880,000/- was ordered to be paid. It was

against this amount that various correspondence was exchanged between the Respondent's Engineer Hannington R. Juma and the Directorate of Occupational Safety and Health.

18. The objection taken that the pursuit of the amount ordered to be paid by the Director of Occupational Safety and Health is not a matter under section 90 of the Employment Act as it is not a benefit accruing under the Employment Act. It is a claim under a different rubric of law being occupational safety and to boot, involves the widow of the deceased who was an employee of the Respondent. Having determined the strict timelines under the Employment Act do not apply to a demand for compensation or payment for work injury, there is an indication there was a letter dated 28<sup>th</sup> September 2023 by the firm of advocates representing the Respondent being M/s Rachuonyo & Rachuonyo Advocates LLP.

19. A preliminary objection is stated as per the decision in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696** as follows:-

*"So far as I am aware, 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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."*

20. The preliminary objection raised here requires the Court to interrogate the contents of letter dated 28<sup>th</sup> September 2023. It therefore will need the ascertainment of facts, in other words, a fact check and thus cannot lead to a determination of the issue *in limine*. As the preliminary objection is not well taken, the Court dismisses it albeit with no order as to costs. The Respondent is to file within 3 days of this Ruling a certified copy of the letter from M/s

Rachuonyo & Rachuonyo Advocates LLP dated 28<sup>th</sup> September 2023 whose reference is indicated as Ref. RR/CM/CIV/1975/20175 addressed to the Directorate of Occupational Safety and Health Services.

Orders accordingly.

**Dated and delivered at Kisumu this 26<sup>th</sup> day of**

**November 2025**

**Nzioki wa Makau, MCI Arb.  
JUDGE**

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